

Christian Erk

Health, Rights and Dignity
Philosophical Reflections on an
Alleged Human Right



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Meinen lieben Eltern,
ohne die ich nicht wäre, was ich bin,
in tiefer Dankbarkeit.

“In toto corde tuo honora patrem tuum et gemitus matris tuae ne obliviscaris.
Memento quoniam, nisi per illos, natus non fuisses; et quid retribues illis, quomodo et illi tibi?”
(Jesus Sirach/Ecclesiasticus 7, 27f (28f))



Meiner geliebten Frau Nadja,
ohne deren Geduld und Unterstützung
diese Arbeit nicht möglich gewesen wäre.

“Gratia enim verecundiae illius super aurum.”
(Jesus Sirach/Ecclesiasticus 7, 19 (21))



Abstract

Christian Erk

“Health, Rights and Dignity: Philosophical Reflections on an Alleged Human Right”

Health is perhaps the most fundamental condition of human life. As such, it has been recognised as a human right by a variety of international and national documents since the World Health Organization (WHO) was established in 1946. These days, no one seems to doubt the stipulation that “health is a fundamental human right” (CESCR, General Comment No. 14). Yet, it is far from clear which normative background actually justifies this right: the philosophical underpinnings of the human right to health “remain largely a matter of guesswork” (Toebe, 1999b: 32). In order to remedy this unfortunate and intellectually dangerous insufficiency, this doctoral thesis aims at clarifying the idea of a ‘human right to health’ by reflecting on its philosophical underpinnings.

In doing so it shall offer an enquiry into the philosophical coherence of the concept which has come to be called the ‘human right to health’ and find an answer to the question whether health can be considered a human right from a philosophical perspective if one assumes that human rights are grounded in the inherent dignity of the human person. While offering a philosophical argument, this thesis shall not be philosophical-historical or doxographical in nature; it shall thus neither present and trace back the history as well as the development of the concept of the human right to health as it is used today nor outline or compare the prevalent opinions and arguments in this field. Rather, the purpose of this thesis is to analyse the concept of the human right to health systematically, to find out if such a right can exist, and if so, establish what it could entail from a philosophical perspective.

The answer to the research question of this thesis shall be developed by analysing the concepts underlying the idea of the human right to health as a right grounded in dignity, i.e. health, (human) rights and dignity. Once it is understood what the concepts contained in the proposition ‘health is a

human right grounded in dignity' signify, the answer to the question about the proposition's philosophical tenability should be rather self-evident.

The following discussion and argument shall show that health cannot be conceived of as a human right if we take human rights to be the rights of all human beings of all times which "derive from the inherent dignity of the human person" (ICESCR, Preamble). The catalogue of human rights has to consequently be adapted and reduced to what can be reasonably covered by the concept of a human right. It shall, however, also be argued that health – although not a human right in a strict sense – can still be thought of as a moral, passive negative claim-right either grounded in the human right to life or in a moral duty to health – even though such a moral right would be rather limited in scope.

Acknowledgements



Writing this doctoral thesis has been an important part of my pilgrimage through life – a journey of intellectual maturation, which has not only taught me crucial (although sometimes disillusioning) lessons about science, but also (and more importantly) forced me to reflect on and challenge the basic principles of my thinking. Now that the last sentence of this thesis has been written and my doctoral journey has ended, I do not want to leave unmentioned those, to whom this thesis and I are much obliged and whose support has made this journey possible in the first place. For, although writing a doctoral thesis can be lonely, one certainly cannot and does not do it alone.

Despite the fact that this thesis has been written in English, I am taking the liberty of expressing my gratitude in German, even though this might be considered uncustomary. I have chosen to do this because matters, which are near to one's heart, are best expressed in one's mother tongue.

Zu Dank bin ich in erster Linie meinen Referenten Professor Dr. Urs Marti und Professor Dr. Georg Kohler verpflichtet, die sich zur Betreuung meines Dissertationsvorhabens an der Universität Zürich bereiterklärt haben. Ohne diese ihre Bereitschaft würde diese Arbeit wohl nur im Reich der Ideen existieren.

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Ich möchte mich vor allem aber auch bei all denjenigen Personen bedanken, die bereit waren, sich Zeit für meine Fragen zu nehmen, ihr Wissen mit mir zu teilen und mir in der ein oder anderen Form mit Rat, Hinweisen, durch kritische Diskussion meiner Ideen oder einfach durch kritische Rück- und Verständnisfragen zur Seite zu stehen. Ein paar Personen namentlich herauszuheben würde bedeuten, anderen Unrecht zu tun. Durch ihre Anregungen und Anmerkungen hat die vorliegende Arbeit viel an Qualität gewonnen; sie steht somit nicht nur mit einem Fuß auf ihren gedanklichen Schultern, sondern auch in ihrer Schuld. Allenfalls vorhandene Schwächen liegen vollkommen in meiner Verantwortung.

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Christian Erk
September 2010

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I THE HUMAN RIGHT TO HEALTH: A PERVASIVE BUT OPAQUE IDEA

“Was jedermann für ausgemacht hält,
verdient oft am meisten untersucht zu werden.”

Georg Christoph Lichtenberg (1742–1799)

1 Human Rights: A Practice with Little Theory

Human rights¹ did not just happen nor did they have to be invented; they had to be discovered – a process which is ongoing.² Since their discovery, the idea of human rights has had an impressive trajectory, and these days the idea of rights and especially human rights is pervasive. As Tasioulas notes, the discourse of human rights has even acquired “in recent times [...] the status of an ethical lingua franca” (Tasioulas, 2007: 75; also cf. Knowles, 2001: 253). In addition, Thomasma states that “there are few mechanisms available other than human rights to function as a global ethical foundation” (Thomasma, 2008: 13). Manfred Nowak, the United Nations’ (UN) Special Rapporteur on torture, even holds that human rights constitute the only contemporary value system, which can claim universal

¹ As Cranston (1983: 1) mentions “‘Human rights’ is a fairly new name for what were formerly called ‘the rights of man’. It was Eleanor Roosevelt in the 1940s who promoted the use of the expression human rights when she discovered, through her work in the United Nations, that the rights of men were not understood in some parts of the world to include the rights of women. The rights of man at an earlier date had itself replaced the original term ‘natural rights’.”

² For an overview of the history of human rights in western political philosophy as well as in East-West and North-South relations cf. Vincent, 1986: 19ff, 61ff, 76ff; also cf. Cranston, 1983. In contrast to the common belief that individual rights did not exist before the seventeenth century and came into being with Hobbes, Locke and Paine, Mäkinen (2006a: 168) states that “recent scholarly research has shown that if we wish to find the beginning of the concept of individual rights we have to turn to the Middle Ages”. Tierney (cf. 1989: 625 as well as 1997: 58ff) adds that patterns of language which take ‘ius naturale’ not only as natural law or cosmic harmony, but also a faculty, ability, power or claim of individual humans qua humans can be traced back to the 12th century.

validity (Nowak, 2002: 13). The idea of human rights has become ‘in vogue’ and the “dominant morality of our time, [...] a truly global morality” (Perry, 2007: 4) – some, like Weissbrodt (1988: 1) even call it “the world’s first universal ideology”. The worldwide acceptance of the idea of human rights is also reflected by the fact that all of the almost 200 states in the world have acknowledged the existence of human rights – either in their constitutions and/or by means of ratification of one or more of the relevant treaties, declarations or covenants of international law. Today, hardly any state would dare – at least not publically – to question the very idea of human rights. Consequently, there is scarcely any statement with regard to social and political life that is not affirmed using the term ‘rights’: “these days it is usually not long before a problem is expressed as a human rights issue” (Clapham, 2007: 1). To cut a long story short, we live in an age of rights:

“A new idea has triumphed on the world stage: human rights. It unites left and right, the pulpit and the state, the minister and the rebel, the developed world and the liberals of Hampstead and Manhattan. Human rights started their life as the principle of liberation from oppression and domination, the rallying cry of the homeless and the dispossessed, the political program of revolutionaries and dissidents. But their appeal is not confined to the wretched of the earth. Alternative lifestyles, greedy consumers of goods and culture, the pleasure-seekers and playboys of the Western world, the owner of Harrods, a former managing director of Guinness plc, as well as a former king of Greece, have all glossed their claims in the language of human rights.”
(Douzinas, 2000: 445)³

Far from being a modern idea, the concept of human rights has been constantly evolving throughout the history of mankind. One could even say that – despite different ways of addressing it throughout history – the question of man and his rights is as old as mankind itself. The complex intellectual history of the idea of human rights has its roots in Christian

³ Also cf. *Fayed v United Kingdom* (1994) 294 Eur Court HR (ser A) 23; *Saunders v United Kingdom* (1996) VI Eur Court HR 2044; *The Former King of Greece v Greece* (2000) 33 EHRR 516.

religion (Old Testament: Genesis 20, 1-5; New Testament: Matthew 20, 12; Acts 10, 34; Galatians 2, 6; Romans 2, 11), ancient legal codes of conduct (Hammurabi, Draco, Solon) as well as ancient Western (Plato, Aristotle, Thucydides, Cicero, Seneca, Epictetus) and ancient Asian (Confucius, Kautilya, Asoka) thinking and philosophy (cf. Ishay, 2007; Punt, 1987). Precursors of our modern human rights can also be found on the American continent where Inca and Aztec codes of conduct and justice as well as an Iroquois Constitution (cf. Johansen, 1995) existed well before the ‘Universal Declaration of Human Rights’ (UDHR) was issued by the United Nations (UN) in 1948. Despite these widespread roots, we owe it to modernity and particularly the 20th century that human rights have been explicitly formulated as well as catalogued and that it has codified “die geistliche, die ideelle Würde des Menschen in eine Rechtsinstitution innerhalb des Gemeinwesens” (Huber & Tödt, 1978: 123), which obliges the whole international community.

But the mere existence and continuous ratification of international human rights instruments does not allow for the conclusion that there is a universal concept of human rights. Upon closer look, a regrettable lack of theory becomes obvious. Although the idea of universal human rights is being increasingly accepted, explicated and refined in the realm of international law on practical grounds, there is no universally shared theoretical foundation of such rights: “the morality of human rights is not well understood” (Perry, 2007: 4). While it is undoubtedly true that there is something “deeply attractive” (Sen, 2004: 315) about the idea of human rights, attractiveness alone cannot be a sustainable foundation for the ever-growing catalogue of alleged human rights. The craft and art of philosophy is quite similar to the construction of a building in that both require a solid basis; otherwise, they become unstable as work progresses and ultimately collapse. Even if all the walls and ceilings have been erected perfectly, this cannot make up for a weak base. If one looks at the foundation of the concept of human rights one soon has to realise that – as Griffin puts it – the term ‘human right’ has become “seriously debased” (2001a: 306), “nearly criterionless” (2008: 14) and “less determinate and more disputed than most common nouns” (2001a: 307). This might be due to the fact that

“there are few criteria for determining when the term is used correctly and when incorrectly” (Griffin, 2008: 14).

“When during the seventeenth and eighteenth centuries the theological content of the idea was abandoned, nothing was put in its place. The term was left with so few criteria for determining when it is used correctly, and when incorrectly, that we often have only a tenuous, and sometimes plainly inadequate, grasp on what is at issue. Its indeterminateness of sense is not something characteristic of ethical terms in general; it is a problem specifically [...] with the term ‘human right’.” (Griffin, 2008: 2)

The reason for this grievance is the fact that human rights are “the rights of lawyers, not the rights of philosophers” (Nickel, 2007: 7).⁴ Hence, it is not surprising that the major human rights documents signed by the international community during the past fifty years do not address underlying philosophical issues and are not concerned with identifying the normative foundation of human rights. In fact, “there is very little moral philosophy written into the documents that constitute the framework for the United Nations human rights regime” (Puchala, 1995). In consequence of this unfortunate lack the realm of human rights seems to be rather theory-free. That this description is not a cynical phantasm, but indeed a true description of reality, can be gathered from the actual experiences of Jacques Maritain, a French theologian and philosopher who headed the French delegation at the UNESCO meetings in Mexico City during November and December 1947:

“During one of the meetings of the French National Commission of UNESCO at which the Rights of Man were being discussed, someone was astonished that certain proponents of violently opposed ideologies had agreed on the draft of a list of rights. Yes, they replied, we agree on these rights, providing we are not asked why. With the ‘why’, the dispute begins. The subject of the Rights of Man provides us with an eminent example of the situation that I tried to describe in an address to the

⁴ And, even if philosophers attend to the concept of human rights, they “in the manner of magicians, pull rights out of nowhere” (Griffin, 2001a: 306).

second international conference of UNESCO⁵, from which I take the liberty of quoting a few passages. ‘How,’ I asked, ‘is an agreement conceivable among men assembled for the purpose of jointly accomplishing a task dealing with the future of the mind, who come from the four corners of the earth and who belong not only to different cultures and civilizations, but to different spiritual families and opposing schools of thought? Since the aim of the UNESCO is a practical aim, agreement among its members can be spontaneously achieved by virtue not of common speculative notions, but of common practical notions; not on the affirmation of the same conception of the world, man, and knowledge, but on the affirmation of the same set of convictions concerning action.’” (Maritain, 1998: 77)

The Universal Declaration of Human Rights was and is not a declaration about common intellectual and philosophical conceptions and ideas, but a pragmatic achievement. The drafting parties agreed on a common and – given the differing views – necessarily theory-free denominator of practical principles. The philosophical underpinnings were sketched only vaguely by putting down on paper that people are born free and equal in dignity and concluding that they have equal and inalienable rights. Why this is so, why human beings are only born, but not conceived free and equal in dignity, and how dignity is the source of rights, nobody really knows. Men, mutually opposed in their theoretical views, came to a purely practical agreement of what constituted a list of human rights. Maritain’s experience that international human rights documents in some sense bypass philosophical debate by simply and pragmatically establishing a set of positive legal norms is corroborated by Weston who states that “to say that there is widespread acceptance of the principle of human rights on the domestic and international planes is not to say that there is complete agreement about the nature of such rights or their substantive scope – which is to say, their definition. Some of the most basic questions have yet to receive conclusive answers.” (1984: 262) Freeman adds that “there is no adequate theory of human rights, and there is a need for greater theoretical

⁵ This conference took place in Mexico City on November 6th, 1947.

rigor” (1994: 494). One cannot help but call this lack of theory a serious deficit – one, which has not been overcome to date.

It could be replied that the preamble of the Universal Declaration of Human Rights actually mentions the ‘inherent dignity’ and the consequential ‘equal and inalienable rights of all members of the human family’. Given this wording, one would be tempted to conclude that all the signatories have at least some common philosophical conception of the source of human rights. But, does it actually suffice to postulate the natural evidence of the inalienable dignity of man without explicitly grounding it in and giving it a commonly accepted anthropology? As experience and intuition tells us, it does not. This position is substantiated by Konrad Löw’s comparative studies of the understanding and reality of basic rights in the former German Democratic Republic (GDR) and the Federal Republic of Germany. As Löw (1977: 22ff, 127ff, 156ff) convincingly shows, although both sides used terms such as ‘dignity’, ‘equality’ and ‘freedom’, both had a very different understanding of the actual content of these terms. The well-read reader might notice that such differences in understanding are not a thing of the past, but a problem that has outlived the Cold War.

Therefore, as honourable as pragmatism for the sake of the common goal of bettering the life of people and peoples may be⁶, it can only be a short-term solution. Whenever actions have to be suited to the word and concrete

⁶ cf. Maritain (1998: 78): “I am fully convinced that my particular way of justifying the belief in the rights of man and the ideal of freedom, equality, and fraternity is the only one which is solidly based on truth. That does not prevent me from agreeing on these practical tenets with those who are convinced that their way of justifying them, entirely different from mine or even opposed to mine in its theoretical dynamism, is likewise the only one that is based on truth. Assuming they both believe in the democratic charter, a Christian and a rationalist will, nevertheless, give justifications that are incompatible with each other, to which their souls, their minds, and their hearts are committed, and about these justifications they will fight. God forbid that I should say it is not important to know which of the two is right! It is vitally important. There remains, however, an agreement on the practical affirmation of that charter, and they can formulate together common principles of actions.”

human rights instruments have to be implemented, having a clear theoretical foundation of human rights becomes unavoidable. Moreover, as the human rights theorist Freeman notes, “rights without reasons are vulnerable to denial and abuse. The human rights struggle is certainly motivated by passion, but it is also influenced by argument.” (Freeman, 1994: 493) The theoretical foundation of human rights is not something that everyone can have his own opinion about as long as one aims for the same rights. In the end, it is the justification and specification, which determines a specific human right’s actual meaning and content. It is very likely that the almost insurmountable difficulties in bringing the human rights talk and declarations to life are due to their deficiencies and differences in justification and specification.

Furthermore and as the most detrimental consequence, without a sound philosophical foundation of human rights there is no end to the catalogue of human rights. The result being, “an unruly proliferation of incompatible or often just incredible rights claims” (Tasioulas, 2007: 75). Given the fact that such a foundation is missing, all kinds of human rights have mushroomed up “uncontrollably” (Griffin, 2001b: 2) over the last decades: from peace, help in the event of a natural disaster and comprehensive sexual education to euthanasia, globalisation and killing an unborn child based on a woman’s right to choose virtually everything is conceptualised as a human right – the result being an indiscriminate, dubious and quite possibly an irresponsible inflation or hypertrophy of human rights. But: Do we indeed have all these rights? If so, why do we have them? If not, why not? These questions cannot be answered without reference to a theory of human rights, which explicates their foundation.

This thesis takes up the just posed questions and is devoted to scrutinising the philosophical soundness of one right of this long list of human rights which is “characterized by particular vagueness” (Toebe, 1999a: 661), but which is nevertheless asserted by philosophers, political scientists, physicians and economists alike (cf. Clapham & Robinson, 2009): the so-called ‘human right to health’ or – as it is also referred to – the ‘human right to the highest attainable standard of health’.

2 The Human Right to Health

“It is my aspiration that health will finally be seen not as a blessing to be wished for, but as a human right to be fought for.”

Kofi Annan, Former UN Secretary General

“Wer nichts weiß, muss alles glauben.”

Marie v. Ebner-Eschenbach

The idea that there is such a thing as a human right to health, i.e. that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being” (Preamble of the Constitution of the World Health Organization (WHO); also cf. CESCR, General Comment No. 14), has become pervasive. Every country in the world is now party to at least one human rights treaty that addresses health-related rights. Because of this, Navanethem Pillay, UN High Commissioner for Human Rights, seems to state the obvious when he writes that “the right to health is a fundamental part of our human rights” (Pillay, 2008: 2005). This right has, however, not only entered the realm of politics and policies, but is also defended in academic circles: Gostin considers it “perhaps the most important social and economic entitlement” (Gostin, 2001: 29) and Amartya Sen thinks of this right as an “extraordinarily important subject that does not get as much attention as it deserves” (Sen, 2008: 2010).

2.1 The Human Right to Health in International Law

As has been adumbrated, the human right to health has become acknowledged by and firmly embedded in a significant number of international and regional human rights instruments governing the conduct of states, organisations and individuals. These instruments give the individual some sort of health-related human right vis-à-vis the state or international community, which in turn has the responsibility to respect, protect and fulfil it, i.e. not to violate it, to prevent its violation and to create policies, structures and resources that promote and enforce that right (cf. Eide, 1995). The most prominent examples of these instruments are found in:

1. United Nations' Texts on the Right to Health:

- The third paragraph of the preamble of the Constitution of the World Health Organization (1946)
- Article 25.1 of the Universal Declaration of Human Rights (1948)
- Article 5(e) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- Article 12 of the International Covenant on Economics, Social and Cultural Rights (ICESCR) (1966)
- Articles 11.1 (f) and 12 of the UN Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) (1979)
- Article 24 of the UN Convention on the Rights of the Child (1989)
- General Comment 14 of the Committee on Economic, Social and Cultural Rights (CESCR) (2000)

2. Regional Texts on the Right to Health:

- Article 11 of the European Social Charter of 1961 as revised in 1996 (1996)
- Article 16 of the African Charter on Human and People's Rights ('Banjul Charter') (1981)
- Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988)
- Article 11 of the American Declaration of the Rights and Duties of Man (1948)
- Article 39 of the Arab Charter of Human Rights (2008)

3. Other General Texts on Health and Human Rights:

- The Declaration of Alma Ata (1978)

- People's Charter for Health (2000)
- The Leaders Statement on the Right to Health (2005)

There is also a variety of further international documents, which relate to health and human rights and/or touch upon one of its aspects as e.g. bioethics (professional ethics, research and experimentation, bioethics and biotechnology), protection of life and physical integrity, health aspects of the right to an adequate standard of living (right to adequate food, right to adequate housing, right to education), protection of vulnerable populations (women, children, disabled, elderly persons, refugees and displaced persons), protection of the environment and the human rights aspects of public health (infectious diseases, business, trade, intellectual property, occupational health and safety, tobacco control) (cf. Marks, 2006; also cf. Leary, 1994: 32ff and Alfredsson & Tomaševski, 1998: 127ff).

2.2 The Lacking Theoretical Foundation of the Human Right to Health

Despite its prominence and pervasiveness, libraries full of writings on its enforcement as well as the fact that every country in the world is party to one of the above-mentioned instruments, the human right to health as stipulated in the legal codifications mentioned previously is something of a mystery and “characterized by particular vagueness” (Toebe, 1999a: 661). Ten years later but still in the same fashion, Ruger (2009: 119) observes that “one would be hard pressed to find a more controversial or nebulous human right than the ‘right to health’”. This vagueness and nebulosity is twofold in nature: it is a mystery both, with respect to its legal ramifications, as well as its philosophical underpinnings.

As far as the legal ramifications are concerned, it is by no means clear “precisely what individuals are entitled to under the right to health, nor is it clear what the resulting obligations are on the part of states” (Toebe, 1999a: 661f). In spite of the wide range of international human rights instruments asserting a human right to health, it does not seem to be clear what the human right to health actually implies from a legal standpoint.

Although Toebes (1999a: 675ff) tries to remedy this vagueness by exploring the scope and core content of the human right to health as explicated in contemporary legal instruments and rulings, this does not solve the second – philosophical – mystery and problem of the human right to health. Most of the literature simply holds that health is a human right because it has been codified; the underlying assumption is that human rights and, by extension, the human right to health are mere legal and therefore positive rights, i.e. rights which are justified with reference to national constitutions and laws or international treaties and documents.⁷ But as Fagan rightly points out and as will be shown later on, equating human rights with legal rights is “philosophically naïve” (Fagan, 2006). I would even dare to say that it would not only be naïve, but also negligent to deal with the human right to health from solely a legal and not also as well as primarily from a philosophical perspective. For, everything can be codified and enacted as a legal right; any parliament could agree upon a law that forbids any movement other than two steps forward followed by one step back. However, adding the word ‘human’ to ‘right’ seems to give the latter a kind of importance that goes beyond the law; it adds moral importance: “human rights are a form of moral rights” (Cranston, 1973: 21; also cf. Nickel, 2007: 46 as well as Orend, 2002: 67) – and as such they have to be validated with reference to a moral theory and not a mere act of legislation. As long as such a foundation is missing, the first mystery and problem – the vagueness of the legal human right to health – cannot be satisfactorily solved. In the end, it is the philosophical justification and specification, which determines a specific human right’s meaning, as well as its legal content. Unfortunately, the philosophical underpinnings of the

⁷ Examples of this position are e.g. Tomaševski (1995) or Riedel (2009). Tomaševski (1995: 126) identifies international health law as the normative framework for a human right to health; this would mean that positive norms are the ultimate foundation for the human right to health. In his essay, which serves as the first chapter of a book devoted to the realisation of the human right to health and which is entitled ‘The Human Right to Health: Conceptual Foundations’, Riedel only addresses legal sources of the human right to health. His conceptual foundation is confined to a positivist account of human rights, but forgets or avoids going one step further to see what lies beyond the realm of legal positivism.

human right to health “remain largely a matter of guesswork” (Toebe, 1999b: 32)⁸ – which is partly due to the fact that we do not have a record of the reasoning and reasons of the creators of the human right to health.

Again, it could be replied that the international instruments enshrining the right to health in law usually refer to the ‘inherent dignity’ of all members of the human family, thereby positioning the human right to health as a right grounded in the dignity of man. This is how the authors of the ICESCR have envisioned the foundation of human rights; they explicitly state that the rights asserted in the ICESCR “derive from the inherent dignity of the human person” (ICESCR, Preamble).⁹ But, without further explication of the exact understanding of the concept of ‘dignity’, i.e. what it is and why it is had (and such explication is unfortunately missing), this is not a foundation of the human right to health but a stipulation that needs to be questioned.

⁸ Also cf. Ruger (2009: 119): “The question of a philosophical and conceptual foundation – a theory – for the right to health has fallen through the cracks at the interdisciplinary intersection of medical ethics, international relations, international human rights law, health policy, health law, and public health law. [...] And while General Comment No. 14, issued by the UN Committee on Economic, Social, and Cultural Rights (UNCESCR), provides the most reliable report on the right to health – defining the goal of this right as ‘the highest attainable standard of mental and physical health’ – it too, by necessity and purpose, lacks a systematic philosophical grounding for the right to health.” Unfortunately, despite her correct analysis of the problem, Ruger (2009) fails to offer such a systematic philosophical grounding of health as human right. She merely refers us to the Aristotelian idea of human flourishing as well as the capability approach and stipulates that the “capability paradigm offers a philosophical justification for a right to health” (Ruger, 2009: 118) – a position, which cannot be upheld if scrutinised closely. The best it can do is to establish health as a moral duty. Any other conclusion would be a misinterpretation of the natural law theory upon which the capability approach is based (cf. chapter I. 3.2.1). In the end, Ruger’s grounding of health as (human) right is a mere stipulation and still highly nebulous.

⁹ Also cf. Pillay (2008: 2005): “The right to health is a fundamental part of our human rights and of our understanding of a life in dignity.”

Consequently and regrettably, this means that – as the concept of human rights in general – the human right to health is theory-free and lacks philosophical foundation. This diagnosis is alarming and positively calls for a treatment and cure! In worst case scenario, the human right to health might just be an arbitrary legal fiction, which does not exist in the realm of morality. However, if it cannot be upheld from a philosophical perspective, what would be the point in talking about its implementation and application as a moral right? In the end and prior to any concerns about or allocation of resources for its implementation, the human right to health is a philosophical problem – and has to be dealt with consistently by means of philosophy first. It may be studied as a problem of law, some other social science or even a natural science for that matter, but these disciplines can only shed light on one part of the picture, whereas only philosophy can provide a unified account of a human and therefore special class of moral right to health.

3 Purpose and Structure of this Thesis

The lack of a philosophical foundation of the alleged human right to health should not be taken lightly. The mere observation that the concept of human rights as presented in today's world – though contested and indeterminate – is already being applied and implemented, however, does not exempt it from the need to be defined. Rather, I agree with Freeman's statement that "evading the task of finding the best grounding for human rights [...] demonstrates a lack of intellectual responsibility" (Freeman, 1994: 493). When it comes to human rights, "conceptual doubts must [...] be satisfactorily addressed, if the idea of human rights is to command reasoned loyalty and to establish a secure intellectual standing" (Sen, 2004: 317). And since the human right to health – despite its worldwide and apparently unquestioned acceptance – lacks conceptual clarity, it is a worthy object of enquiry.

This thesis is therefore devoted to overcoming the lack of intellectual responsibility prevalent in the discussion of health as a human right. In

doing so it shall offer a philosophical reflection on the human right to health – although this might involve “deciding some fairly hefty ethical matters” (Griffin, 2001a: 307) and is likely to be a stumbling block causing controversy (but at least there would be debate, which is the necessary catalyst for truth). As should have become clear by now, this thesis shall not be about what is actually covered by international declarations but shall rather present an enquiry into the philosophical foundation of the human right to health and thus attempt to find an answer to the question, whether health can be considered a human right from a philosophical perspective – a discussion that has not been addressed in detail by any international body. The aim of this thesis is to critically assess the stipulation that “health is a fundamental human right” (CESCR, General Comment No. 14) which “derive(s) from the inherent dignity of the human person” (ICESCR, Preamble). The research question of this thesis can therefore be posed as follows:

Assuming that human rights are grounded in the inherent dignity of the human person, can health be conceptualised as a human right from a philosophical perspective?

What follows constitutes a philosophical assessment of the hypothesis that health can be conceptualised as a human right if we assume that human rights are grounded in the inherent dignity of the human person. This thesis takes the metaphysical premise implied by international law (namely that there is such a thing as inherent human dignity) seriously and asks whether the conclusion drawn from this premise (namely that the human right to health is grounded in this premise) is tenable or not.¹⁰ The

¹⁰ As any work in the realm of (moral) philosophy, this thesis and especially the development of its accounts of health and human rights cannot do without certain assumptions and premises, which also serve as its foundation: “In what a great philosopher says there is a pattern. It all flows from one source, a few fundamental ontological ideas. In the light of this source and only in this light, it can all be understood.” (Bergmann, 1969: 82) Unfortunately, the validity of these assumptions and premises – though decisive for the validity of the whole argument (because only true premises produce true conclusions) – cannot be exhaustively defended within the necessarily confined limits of a doctoral thesis.

reader should note that while offering a philosophical argument, this thesis shall not be philosophical-historical or doxographical in nature; it shall thus neither present and trace back the history as well as the development of the concept of the human right to health as it is used today nor outline or compare the prevalent opinions and arguments in this field. Rather, the purpose of this thesis is to analyse the concept of the human right to health systematically and determine whether the hypothesis that such a right exists can be upheld or not. Although it will eventually conclude that health cannot be conceptualised as a human right based on the inherent

“All argument begins with an assumption; that is, with something that you do not doubt. You can, of course, if you like, doubt the assumption at the beginning of your argument, but in that case you are beginning a different argument with another assumption at the beginning of it. Every argument begins with an infallible dogma, and that infallible dogma can only be disputed by falling back on some other infallible dogma; you can never prove your first statement or it would not be your first. All this is the alphabet of thinking.” (Chesterton, 1907)

Strictly speaking, this thesis is built on only one ontological or metaphysical assumption, namely that everything that lives, lives because it has a soul. Although, as I mentioned before, this premise (or the first philosophical principles informing it) cannot be proven in an empirical fashion, I shall nevertheless attempt to demonstrate its reasonableness (cf. chapter I. 1.1), that is, why it is reasonable and rational to explain the phenomenon of life through the concept of soul, i.e. an entelechial principle of life (as far as I am concerned, I do not see how it could be explained differently). Furthermore, the reader will find that the argument posed by this thesis most prominently draws on Aristotelian-Thomistic reasoning. This school of thought has not been chosen, however, because this thesis is meant to be an exercise in Aristotelian-Thomistic philosophy (if this had been the case, a different approach to the topic and structure of the thesis would have been in order). Rather, it has been chosen because it is the paradigmatic case of a philosophy, which takes the concept of soul seriously.

Regardless of whether the reader likes or agrees with the answer to this thesis' research question, I ask him to benevolently engage in this thesis' line of reasoning. By that I mean, to accept its underlying premise, see where it takes him and judge the quality of the argument of this thesis not by its philosophical-historical and doxographical breadth or its premises, but rather by its analytical rigour and consistency of thought.

dignity of the human person, this thesis, however, should not be misunderstood as an offer of an ex-post rationalisation of a preconceived opinion with respect to the possibility of the existence of a human right to health. Rather, it is a quest for truth and reason which is meant to uncover what we can reasonably demand from each other when it comes to health. Its conclusion is the result of an impartial and open-minded assessment of the above-mentioned hypothesis based on what I consider to be the best and most stringent philosophical accounts of health as well as human rights grounded in dignity.

A right is a conclusion which calls for an explanation of its premises; without knowing them, the right assertion is of no actual use, since it would be a mere stipulation. As a result, the following chapters will contain a great deal of groundwork and – by breaking down the research question into its logical components and analyse them systematically – try to construct the concepts needed to answer the question whether health is a human right grounded in the inherent dignity of the human person. The question whether health can be conceived of as a human right grounded in the inherent dignity of the human person can be easily answered once we know what it is we are actually talking about:

“Quaedam vero propositiones sunt per se notae solis sapientibus, qui terminos propositionum intelligunt quid significant, sicut intelligenti quod Angelus non est corpus, per se notum est quod non est circumscriptive in loco, quod non est manifestum rudibus, qui hoc non capiunt.” (I^a-IIae q. 94 a. 2 co.)¹¹

So, the search for an answer to the research question of this thesis has to start with a clarification of the concepts underlying the idea of a human right to health grounded in dignity, namely health, (human) rights and dignity. Once we understand what the terms contained in the proposition

¹¹ This translates as: Some propositions are self-evident only to the wise, who understand what the terms of the propositions signify: for example, to one who understands that an angel is not a body, it is self-evident that an angel is not in a place in a circumscribed fashion; that is not evident to the unformed, who cannot grasp it.

‘health is a human right grounded in dignity’ signify, the answer to the question about the proposition’s philosophical tenability should be rather self-evident. This line of argumentation demands a rather straightforward structure of the thesis at hand, namely one, which orientates by a philosophical discussion of the concepts ‘health’ and ‘human rights’ (which necessarily includes ‘dignity’). It is my firm opinion that any complete attempt – whether successful or not – to justify the idea of health as a human right has to comprise the following components:

1. A theory of health

This theory has to answer the following questions (amongst others): What is this phenomenon we call health, i.e. what is the object of an alleged right to health? Is it only the Lerichean ‘silence of the organs’? Is it subjective, objective or a mere social construct? How do we measure health? Is it static or dynamic?

2. A theory of human rights

It is not possible to convincingly compile and stipulate any list of human rights without an “inquiry on the foundations and cogency of human rights” (Sen, 2004: 318), i.e. without first gaining a substantial understanding of what human rights are and where they come from. Before asking, ‘What human rights are there?’, we have to answer the question, ‘What are human rights?’. Although the second question can be answered without knowledge about the first, it is not possible to answer the first without having dealt with the second one first. As the ‘Λόγος’ (Logos) was in the beginning of the world, a clear, coherent and sustainable conception of human rights, i.e. a theory of human rights, has to exist at the beginning of our discussion of human rights. But in order to find out what human rights are, we first have to immerse ourselves in its constituent concepts and understand what is meant by ‘rights’ and ‘duties’, the distinction between positive, conventional, moral and human rights as well as the notion of dignity, which is usually advanced as the justification for the existence of human rights. Therefore, a theory of human rights has to be explained with reference to what we mean by ‘human *rights*’ and what we mean by ‘*human* rights’ (i.e. what is so

special about the human being and his dignity that warrants granting him such rights).

These components also serve as the main building blocks of this thesis. Following this introduction, the second chapter (Chapter II) shall be devoted to a thorough discussion of the concept of health. In an attempt to approximate the nature of health, this chapter shall first outline the foremost condition for health: life. Health is inextricably linked with life, since without it there can be no health (although there can be life without health). Therefore, in order to understand the phenomenon of health, one has to have an understanding of the underlying phenomenon which is life. Having chiselled out the essence of life and its counterpart, death, the chapter then goes on to discuss and criticise the main contemporary notions of health and highlight their defective and tenable aspects. This critical discussion shall then form the basis and open out into the development of a complete philosophical theory of health. The third chapter (Chapter III) shall be devoted to the explication of a theory of human rights. It shall address both the question of (a) what is meant by ‘rights’ (including ‘duties’) and (b) what is so special about the human being that we grant him human, i.e. special moral, rights. Whereas the answer to (a) mainly draws on (but also amends) the Hohfeldian instances of rights (claim-rights, liberty-rights, power-rights, immunity-rights), discusses the notion of ‘duty’ and finally distinguishes between positive, conventional as well as moral rights, (b) shall be answered with reference to what I consider the most comprehensive and integrative concept of human dignity. The last chapter (Chapter IV) shall interweave the ideas developed in the previous chapters and answer the research question of this thesis, namely whether health can be conceptualised as a human right grounded in dignity from a philosophical perspective. Despite the fact that health cannot be conceptualised as a human right – which is the conclusion of the philosophical reflections put forth in this thesis – it shall, however, also be argued that health can still be thought of as a moral, passive negative claim-right either grounded in the human right to life or in a moral duty to health – even though such a moral right would be rather limited in scope.

II UNVEILING THE ENIGMA OF HEALTH

Die Krankheiten befallen uns nicht aus heiterem Himmel,
sondern entwickeln sich aus täglichen Sünden wider die Natur.
Wenn diese sich gehäuft haben, brechen sie scheinbar auf einmal hervor.
Hippocrates of Cos (ca. 460 B.C. – ca. 370 B.C.)

Gesundheit kauft man nicht im Handel, denn sie liegt im Lebenswandel.
Karl Kötschau (1892-1984), Professor of Medicine

Gesundheit ist ein Geschenk, das man sich selber machen muss.
(Swedish) Proverb

At the core of many disputes in the realm of individual, public and/or global health as well as in regard to the human right to health are differing views of what it means to be healthy and unhealthy. If we do not ask ourselves what sets health apart from unhealth and which criteria have to be fulfilled to apply these terms, it becomes impossible to have an argument about the status of individual instances of unhealth. Health and unhealth are critical and crucial concepts, and without an understanding of them, talking about any health-related topic would be futile. Without a theory of health and its opposite, it would be rather useless to ask whether the common cold or homosexuality is an instance of health or unhealth, as we would not know what criteria and conceptions such judgement would be based on. But an account of health is also needed for the purposes of this thesis: if we are to make up our minds about and do some philosophical groundwork with respect to the problem of health as a human right, we should know what it is that this alleged human right is actually securing. So, let's start by answering the question: What is health?

In answering this question, it might be helpful, at least as an initial step, to engage in some comparative etymology and find out about the linguistic roots of the term 'health' across different languages. De Almeida Filho (2000) has compiled an overview, whose main points I take the liberty of summarising below:

- Etymologically speaking, 'saúde' (Portuguese) and 'salud' (Spanish) both come from the Latin root 'salus'. In turn, 'salus'

stems from the Greek term ‘holos’ (meaning whole) and designates the main attribute of whole intact individuals. ‘Salus’ is also the root for the Latin ‘salvus’, which implies having overcome threats to or maintained one’s physical integrity.

- ‘Santé’ (French), ‘sanidad’ (Spanish), ‘sandidade’ (Portuguese), ‘sanity’ (English), ‘sanitario’ (Portuguese), ‘sanitary’ (English), ‘sanatório’ (Portuguese), ‘sanitarium’ (English), ‘Sanatorium’ (German) and the adjective ‘são’ (Portuguese) stem from the medieval Latin word ‘sanus’, meaning ‘pure’ and ‘immaculate’, but also ‘correct’ and ‘true’. The Latin ‘sanitas’ designates ‘sanus’ as a condition.
- The German word ‘Gesundheit’ implies integrity or wholeness. The word is composed of the prefix ‘ge-’ (designating a totality or accumulation of something), the radical ‘-sund-’ (meaning solid or firm, as in the Anglo-Saxon ‘sound’) and the suffix ‘-heit’ (indicating a quality or faculty).
- The archaic form of the English term ‘health’ – derived from the medieval English ‘hal’ and related to the German ‘heil’ – is ‘healeth’. This form is equivalent to the past participle ‘healed’, meaning treated or cured. The medieval ‘hal’ defines the semantic area of health as akin to that of ‘fullness’.
- All of the words of the Scandinavian semantic family, which designate health, such as e.g. ‘hälsa’ (Swedish), derive from ‘höl’, an old German word, which implies wholeness and refers to the Greek radical ‘holos’.

In conclusion, the etymology of the term ‘health’ denotes “a quality of intact, unharmed, uninjured beings, with the meaning linked to properties of wholeness or totality” (de Almeida Filho, 2000: 301). Health, therefore, can be seen as the ordered and proper functioning of the organism as a whole. However, while such etymological inquiry can give us an initial understanding of what the word ‘health’ means, it cannot supersede a thorough philosophical inquiry into the concept of health. But before shedding light on the enigma of health, I want to devote some pages to a

topic, which is closely related to the phenomenon of health and also establishes its temporal limits.

1 Preconditions of Health: Life and Death

Health is not an isolated phenomenon; it is embedded in the most basic phenomenon there is: life. We are not only healthy, but we also lead healthy lives. Without life, there is no health. Dead matter cannot be said to be healthy or unhealthy. There is no such thing as a healthy chair or an unhealthy chair; a chair can be more or less purposeful, but speaking of a chair's (or any dead matter's) health would be nonsensical. Health, therefore, is an attribute or quality of something, which is alive. But since being alive is not necessarily contingent on being healthy, health cannot be the essence of life. Of course, it is sometimes said that life without health is no life at all; strictly speaking, however, life without health is still life – it is just life experienced in a more or less undesired fashion. But lack of health can also end life and cause death; while some unhealth might merely diminish the quality of life, too much unhealth might lead to losing one's life and to death. Health and unhealth only happen within to an individual's lifetime (i.e. the time between the beginning¹² and end¹³ of his life). Life, death and health seem to be inextricably linked. In light of these thoughts, the first step in looking for the nature of health is to gain an understanding of the phenomena we call life and death – which is “die Grundfrage, die allen Fragen zugrunde liegt” (Brenner, 2007: 8).

¹² It is undeniable that individual human life begins at conception, i.e. the completion of the fertilisation of the ovum and the formation of the zygote. At that moment in time, “a new life is begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth” (Pope John Paul II., 1995: paragraph 60). Also cf. this thesis' chapter on personhood.

¹³ As we shall see, the determination of the exact moment of death is much more disputed than the unquestionable beginning of human life.

1.1 Human Life

It is a peculiarity of man that he is the only living being amazed by his own existence and that, which keeps him in existence. It was Socrates who said that “ὁ δὲ ἀνεξέταστος βίος οὐ βιωτὸς ἀνθρώπῳ” (Apology, 38a), i.e. that the unexamined life is not worth living for man. In order to examine one’s life it is reasonable to first ask what this life actually is. So, what is life?

The dictionary definition tells us that life is the abstract noun of the verb ‘to live’, whose meaning – etymologically speaking – is equivalent to such verbs as ‘to remain’, ‘to persevere’ and ‘to continue’. Life, therefore, is not only the period from birth to death, but what makes us persevere during this period. It is the principle or force that is considered to underlie the distinctive quality of animate beings; it is “that irreducible power and actuality of which we comprehend that it must lie at the root of all the activities and marks of living organisms” (Seifert, 1997: 34)¹⁴. This means then that life is some form of force, power, actuality or principle. But this account is merely a step out of the frying pan into the fire as it substitutes one abstract for another.

According to Seifert (1997) we have to acknowledge our limitedness in trying to define exactly what life is. Life is irreducible, i.e. not definable through any other known entities, and therefore cannot be reduced to other notions or properties: “Life is an ultimate and irreducible datum” (Seifert, 1997: 16). As George Edward Moore has shown for ‘good’ in the first chapter of his ‘Principia Ethica’, any attempt to define such a datum in terms of other entities is doomed to failure.¹⁵ In a sense, life only allows us

¹⁴ The reader might find that this chapter draws heavily on Seifert (1997). While this might be ominous from a scientific perspective, which is keen to support an argument by means of a canon of references, which are as broad as possible, I nevertheless think that this can be excused for a simple reason: there is virtually no other philosophical treatise on the phenomenon which is life (I, at least, have not found one).

¹⁵ Also cf. Seifert (1997: 17): “Any attempt to define everything in terms of something else or of another element is just as circular as any effort to prove everything. For as

to say: life is life. Accordingly, we should realise and recognise our limitedness in being able to define life exactly through anything else:

“Das schönste Glück des denkenden Menschen ist, das Erforschliche erforscht zu haben und das Unerforschliche ruhig zu verehren. – Derjenige, der sich mit Einsicht für beschränkt erklärt, ist der Vollkommenheit am nächsten.” (Johann Wolfgang von Goethe)¹⁶

But it would be wrong to conclude – as George Edward Moore did (1903/1993)¹⁷ – that what is absolutely undefinable is also unknowable. It is true that we cannot know what life is, but we can know how it unfolds as we see its signs in living beings. This knowledge then allows for inferences about the phenomenon called life, because certain qualities and features of

every definition requires first undefinable essences, so each argument presupposes first premises and laws of correct inference that cannot be further proven without falling into circular argument or begging the question. Any effort to define irreducible essences through their parts, or by proximate genus and specific difference, already presupposes preceding notions of other essences that cannot be endlessly defined. It also requires the notion itself which we are seeking to explain.”

¹⁶ Also cf. Goethe (1989: 1. Band, 1. Teil, 2. Abteilung, Nr. 177): “Wäre denn aber auch ein solches Urphänomen gefunden, so bleibt immer noch das Übel, daß man es nicht als ein solches anerkennen will, daß wir hinter ihm und über ihm noch etwas Weiteres aufsuchen, da wir doch hier die Grenze des Schauens eingestehen sollten.” (This translates as: Even if such an Urphenomenon were to be found, there still remains the evil that one does not want to acknowledge it as such, that one is trying to find that something more behind it and above it, whereas here we should concede that we have reached the limitation of looking.) Also cf. Goethe (1989: 1. Band, 1. Teil, 5. Abteilung, Nr. 754): “Jedoch wie schwer ist es, das Zeichen nicht an die Stelle der Sache zu setzen, das Wesen immer lebendig vor sich zu haben und es nicht durch das Wort zu töten.” (This translates as: How difficult it is, however, not to take the sign for the thing, to vividly envision always the essence and not to kill it with the word.)

¹⁷ While George Edward Moore clearly saw the irreducibility of terms such as life, value, being or good, he concluded that we cannot say more than, ‘the good is the good’: “If I am asked ‘What is good?’ my answer is that good is good, and that is the end of the matter. Or if I am asked ‘How is good to be defined?’ my answer is that it cannot be defined, and that is all I have to say about it.” (Moore, 1903: chapter 1, paragraph 6; 1993: 58f)

living organisms “do not find a proper explanation either in themselves or in a material substance or machine” (Seifert, 1997: 35). As has been stated above, life is the principle from which certain phenomena in living things proceed; if an entity does not show these signs of life any more, we consider it dead. Although we might not be able to define this principle the same way we can e.g. define a second as “the duration of 9 192 631 770 periods of the radiation corresponding to the transition between the two hyperfine levels of the ground state of the cesium 133 atom” (Bureau International des Poids et Mesures, 2006: 113) we are still able to observe and describe it. Life might be indefinable in a strictly scientific sense, but it can be analysed. Life’s indefinability in terms of anything else does not hinder us from approaching life “by analyzing its essential marks or by giving an essential definition of it” (Seifert, 1997: 34). What we are thus looking for is a description of the essential marks of life, i.e. of those which characterise its essence. Such a description aims at unfolding distinctive marks and characteristics of the datum life without explaining its essence through another thing or its elements and without reducing it to its elements or characteristics.

So, let’s start the description with the way and forms we can encounter life in our everyday lives. If we look at the nature surrounding us, we experience three kinds of beings which are alive:

1. Plants, “which show only the marks of vegetative or ‘purely biological’ life” (Seifert, 1997: 24).
2. Animals, “which possess in addition many features such as perceptions, drives, instincts, feelings, etc.” (Seifert, 1997: 24).
3. Human beings “who are endowed, above and beyond this, with reason, knowledge, language, the ability of logical thinking, and moral qualities, religion, and who differ in countless other ways from animals” (Seifert, 1997: 24).

As can be seen from this classification, the life, which these three groups have in common, is what is generally called ‘organic life’ or ‘biological

life'. In contrast to plants, animals and human beings furthermore exhibit what can be called 'sensitive life', whereas 'mental life' or 'rational life' is a characteristic of human beings and persons only (cf. Seifert, 1997: 33).¹⁸ When talking about human life one has to always bear in mind that this phenomenon is a composite of the sub-phenomena biological, sensitive and mental life. Since this thesis is about human rights, it is sufficient for our purposes to discuss human life and ignore the life of animals and plants. In trying to understand human life, I want to concentrate on and expand briefly on the aspects of biological and mental life; for, biological life is the most fundamental aspect of life and basic to an understanding of the phenomenon life, whereas mental life is that aspect of life which is characteristic of human life only. Furthermore, in contrast to sensitive life, biological life and mental life are at the centre of the debate about death. With respect to their prominence in philosophical debate as well as to the purpose of this thesis, this focus should be sufficient.

1.1.1 Biological Life

As has been established, biological life is common to all beings which are alive. But how do we get to the bottom of it? Science and philosophy each possess authority to claim whatever they can justify rationally by their respective methods, however:

“Even if a scientist could prove that a living organism comes to be out of some broth of molecules, she or he could not presume to have answered the question of the reducibility of life to inorganic matter itself

¹⁸ A fourth kind of life is only subject to philosophical knowledge and can be derived at by means of a logical argument: since contingently (non-necessarily) and imperfectly existing beings cannot account for their own lives, their life must be derived from an absolute being. Thus, “human life requires a supremely and eternally living divine being as the cause of all life” (Seifert, 1997: 24). Knowledge of this absolute life can also be reached by a variety of other arguments (cf. Swinburne, 2004). Seifert (1997: 24f) furthermore introduces a fifth type of life, that of purely spiritual finite beings, i.e. pure spirits or angels.

because life qua life escapes the scientist's methods of observation and cognition. Even if we could produce a living organism by combinations of inanimate chemical substances, we would still not have demonstrated that no entelechial principle of life is required to explain the coming to be of an organism, just as the fact that in vitro fertilization or natural conception give rise to a human person does not prove that mere biological causes explain sufficiently the coming to be of a new human person [...]. Natural science cannot answer the question whether the biological phenomena are sufficiently explainable in terms of physical systems, because the principle of life is essentially invisible and unobservable" (Seifert, 1997: 77).

When thinking about biological life we have to thus take a two-step approach and consider what the methods and insights of both the humanities and science can offer us with respect to a description of biological life. As we shall see, the explanation of the objective essence of life is ultimately an object of philosophical knowledge alone, whereas the contingent and morphic aspects of life, i.e. its manifestations, are accessible only to empirical science.

1.1.1.1 The Empirical Marks of Biological Life

There are two ways, by which science tries to make empirical statements about biological life. The first is to try to develop “an exhaustive enumeration of the main characteristics and biological functions of living organisms (with the problem that not every living organism shows all these functions)” (Seifert, 1997: 36). The second is to identify “among these functions those which are present in all living individuals (with the danger of losing the wealth of phenomena that pertain to life)” (Seifert, 1997: 36).

Following the first method, Jessop (1988) advances the following list of properties of all biological life on earth:

- Nutrition (which, in a broad sense, includes ingestion, digestion, absorption, transport (which includes the circulatory and respiratory systems), metabolism, exchange of gases (which includes respiration) and excretion). Seifert (1997: 36) calls this property “dynamogenesis”.

- Regeneration
- Reproduction
- Endogen motility
- Irritability
- Adaptive capacity
- Further properties such as organisation, i.e. being composed of one or more cells, which in turn are composed of certain elements, among them DNA/RNA, are less accessible by our common experience and require the use of special instruments.

While this list might look sound at first, this approach brings with it the problem that none of these properties is absolutely necessary for biological life and that not all of these properties are exhibited by organisms we consider to be living organisms (also cf. Seifert, 1997: 39ff as well as 53). This can be easily seen if we ask ourselves if it would be counterintuitive to consider organisms, which no longer grow, which no longer have the ability to regenerate, are sterile and unable to propagate, as dead. Take for example the dormant states of a seed of a walnut tree, which does not exhibit the properties mentioned above in their actualised form¹⁹. However, once put in a favourable growing medium it starts to exhibit all of the above-mentioned properties of biological life. So, was the seed dead and brought back to life or had it been alive the whole time, only dormant? Furthermore, Storey & Storey (1990, 1996) point out that nutrition and respiration/oxygen supply in the usual sense (i.e. gas exchange with the environment, but maybe not on a sub-cellular level) can stop in frozen animals; some polar fish, frogs or insects can survive in sub-zero temperatures while showing no signs of the above-mentioned properties in an actualised state.

“Hundreds of species of terrestrial insects survive long periods of freezing while they overwinter. At the extreme, insects of the high arctic, such as woolly bear caterpillars [...] may spend 10 months of the year

¹⁹ Another example would be the spores of a virus.

frozen solid at temperatures that descend to -50°C [...] or even lower. [...] But of the greatest interest [...] are a group of amphibians and reptiles that survive freezing during their winter hibernation. [...] While frozen, all these animals show no movement, respiration, heart beat or blood circulation, and [...] barely detectable neurological activity.” (Storey & Storey, 1990: 62f)²⁰

To enrich this account of cases where the characteristics of biological life are non-existent, although the being in question is alive, Seifert refers to the “unique cases of phenomena described and empirically verified in some mystics who lived for years without taking any food” (1997: 41). Although all of life’s properties are suspended in these examples, the organism miraculously awakes given the right temperature or other circumstances.

Following the second method, identification of some or only one property, which is present in all living entities, is required. However, equating a single property with life can only be part of the whole picture and has the serious disadvantage that “it loses the fullness of the content of life” (Seifert, 1997: 38). Furthermore, it suffers from the same problem as the first approach, namely, that no one single feature is absolutely necessary for biological life.

In the end, both approaches are deficient when it comes to characterising life or telling us what life is. Seifert thus argues that the empirical approach to and description of life should be complemented by a “philosophical grasp of the intelligible marks and essence of life” (Seifert, 1997: 38). Such a description should go beyond an empirical description of the properties of life, which could be imitated by an automaton and should reveal the intelligible essence of life. Or as Spaemann puts it (1994: 86): “Modern biology [...] can only attempt to approach the living by simulating it. Its

²⁰ Storey & Storey (1996: 368f) list a variety of animals which can survive sub-zero temperatures. To mention just a few, four common species of frogs survive freezing even if 60% or more of their total body water has turned into ice and young turtles survive at -8°C of nest temperatures. For a review of the mechanisms used by these animals to either avoid freezing or tolerate it, see Storey & Storey, 1996. Furthermore, human embryos can be frozen, too.

mistake consists in believing that the simulation is the original.” Life cannot be reduced to the mere properties of living things!²¹

Where does this leave us? We have tried to develop empirical insights into the phenomenon of life. But upon further scrutiny these empirical properties do not seem to be very helpful in describing biological life since there is also life which does not exhibit the actualisation of these properties. We can say, however, that biological life, from an empirical perspective, must at least show the potential to unfold these properties. When speaking about empirical characteristics by which to describe life, we always have to bear in mind that we are not necessarily speaking about actualisations but potentialities. The empirical essence of biological life cannot always be observed; but if it cannot be observed, empiricism has a hard time acknowledging it. As helpful as the above given properties may be when actualised, they do not fully allow us to describe the essence of biological life.

1.1.1.2 The Philosophical Marks of Biological Life

Trying to overcome the weaknesses of the empirical view, we should complement it by a philosophical approach, which seeks to identify the “underlying core of the essence of biological life” (Seifert, 1997: 43; cf. Brenner, 2007: 9). So, what can philosophy tell us about the essence of biological life? What are the essential characteristics of biological life that are open to philosophical knowledge?

²¹ “The existence of a unified essential core of life is also suggested by the fact that we understand clearly that even the potentiality to produce all effects of life [...] is not yet life. We know that if the essential marks of life, namely, nourishment, growth, etc. were found in an artfully constructed puppet [...] and if they were produced by complicated machines or by mechanical or physical processes and devices [...] none of these dead entities which could be imagined to show signs as those we observe in living things would be living organisms.” (Seifert, 1997: 42) A speaking chess computer or any other machine, which imitates our actions is a not living being!

A first characteristic of life is rather obvious: biological life is “first of all inseparably linked to the physical sphere of some bodily being” (Seifert, 1997: 43; cf. *De Anima*, 413b), i.e. organism. Life is not only life but it enlivens something; the German language is more suited to express this idea with its verb ‘beleben’. It should be clear that all life on earth is always within something, a plant, an animal body or a human body.

A second essential mark of life accessible only through philosophical investigation is the value of life, its positive importance and nobility, its non-neutrality: “Grounded in its essence, life possesses a nobility that surpasses that of any dead being and of any deprived of life.” (Seifert, 1997: 61) This nobility has been acknowledged all over the world, by all people and since the early days of mankind – an aspect, which will be important when talking about the foundation of human rights in human dignity (for the following examples also cf. Fleming, 2005):

- Rule 218 of the Code of Hammurabi (Babylonia, ca. 1760 BC) dictates to cut off the physician’s hand if he kills a (free-born) patient during surgery or destroys his eye in an attempt to open a tumour.
- The Oath of Hippocrates (Greece, ca. 400 BC) appeals to the physician to do no harm, give no deadly medicine to anyone, even if asked, nor suggest any such counsel, not to give a woman a pessary to induce an abortion and to practice within the limits of one’s competence.
- The Indian physician Caraka Samhita (1st century AD) instructs teachers to tell students not to cause another’s death or commit an act of great unrighteousness or one, which leads to calamity.
- The oldest Hebrew medical text, the Oath of Asaph the Physician (ca. 200-600 AD) requires the students to take an oath not to prescribe or use lethal drugs or potions or to cause a pregnant woman to miscarry.
- Ali ibn Abbas al-Majusi’s (or in his latinised form: Haly Abbas’) *Liber Regius* (Kamel Al Sanaah al Tibbia) (Persia, ca. 950 AD)

advises the physician to worship God and obey His commands as well as to never prescribe or use a harmful drug or abortifacient.

- In Islamic Persia, in the *Kholash Al Hekmah* (1170 AD), there is a list of ethical duties of the physician. Rule 15 states that the physician should never recommend any kind of fatal, harmful or enfeebling drug.
- The ‘17 Rules of Enjuin’ appeal to the physician to not kill living creatures (rule 8) or to give abortives to people (rule 9).

The third and most important philosophical insight can be derived from the following idea: “the living organism could be compared to the miracle in which an artist would have put the artist’s creative idea into materials that would paint on their own the paintings or construct the cities intended by the artist – from a plan that resides in themselves” (Seifert, 1997: 48; also cf. Conrad-Martius, 1963: 284). What is characteristic about life is the fact that it can build itself. Life is directed teleologically toward an end residing inside the bodily being. Thus, an essential mark of biological life is entelechy (‘ἐντελέχεια’)²². Life has its own end within itself, whereas ‘end’ here should be understood “not only formally, as a purpose toward which means are directed, but as a meaningful and good form or goal that resides in the fully developed actuality of the organism” (Seifert, 1997: 49). But we should not stop at this rather one-dimensional notion of entelechy. Having one’s end in oneself as opposed to being a means to an end is not a unique characteristic of life but also of e.g. works of art. What sets living bodily beings apart from these dead things which have their end in themselves is that “in living organisms we find a further moment which involves a dynamic structure aiming at the realization of its own form” (Seifert, 1997: 49). This essential mark of biological life from a philosophical perspective is not only the self-containment of an end, but “an active and end-oriented self-engendering” (Seifert, 1997: 49). A living organism is a “dynamic teleological structure” (Seifert, 1997: 50) which is

²² Entelechy is derived from Aristotle’s ingenious linguistic invention: en (in), telos (end) and echein (to have).

assembling, sustaining, preserving and propagating itself. This dynamic and teleologically ordered self-engendering, which is entelechy is commonly understood as soul. The following insight by Aristotle allows us to see this essential mark of biological life:

“In everything the essence is identical with the ground of its being, and here, in the case of living things, their being is to live, and of their being and their living the soul in them is the cause or source.”
(Aristotle, *De Anima*, 415 b 12-14)

The soul is an “active principle of its own, as a principle distinct from matter that actualizes and generates from within the form, order and essence of the living entity” (Seifert, 1997: 51). We could thus dare to state that entelechy is not only an essential mark of biological life, but can be identified as life itself. Even though we cannot experience the soul in a direct way, we are capable of grasping it as the foundation of the empirical properties we perceive.²³ Therefore, the essence of biological life can only lie “in the very principle and subject itself that underlies all the magnificent operations of the organism: in a dynamic reality which Aristotle called entelecheia and psyché (soul)” (Seifert, 1997: 54; also cf. Brenner, 2007: 28ff). This has been also confirmed by St. Thomas Aquinas, who wrote that “anima dicitur esse primum principium vitae in his quae apud nos vivunt” (I^a q. 75 a. 1 co.), i.e. the soul is the first principle of life of those things that live (animate things). There can be no life without some ‘ψυχή’ (‘psyché’), i.e. life-principle which is really distinct from the physical-chemical make-up of a body: the soul brings life to whatever contains soul.²⁴ It is the soul, which brings about biological life; it is its source, origin and primary seat.

²³ For an overview of four groups of arguments for the existence of the soul see Seifert (2004: 105ff).

²⁴ Also cf. Plato, *Phaedo*, 105d:

“ψυχή ἄρα ὅτι ἂν αὐτὴ κατάσχη, αἰεὶ ἔχει ἐπ’ ἐκεῖνο φέρουσα ζώην;
ἔχει μέντοι, ἔφη.”

This translates as: ‘Accordingly, whatever the soul has taken possession of, is it always present bringing life to it? It is indeed, he said.’ This also necessitates the

To sum up: Although the soul is only experienced and given in an indirect way, the explanation for the phenomena of biological life and the deepest philosophical mark of biological life is its root in a ψυχή ('psyché') or in an entelechial principle of life. Life, i.e. the "dynamic auto-organization and integration of the whole living organism" (Seifert, 1993), originates in our soul, consequently it is irreducible to physical systems of any sort²⁵; life can never be explained merely physicalistically as e.g. Ricardo & Szostak (2010) attempt to do.

1.1.2 Mental Life

In thinking about mental life we could repeat the same steps we took in thinking about biological life, i.e. engage in an empirical and a philosophical examination of this aspect of human life. However, even though inquiring into the mental life of human beings is an activity, which would be worthwhile, I want to restrict this chapter to a few central ideas.

Mental life – the distinctive aspect of human life – refers to the human mind and its activity, i.e. to that in an individual, which feels, perceives, thinks, wills and reasons. As human beings we are able to step back and think about what we do and think; we are not bound by some instinctive programming but can change our actions according to sound reasoning. In short: we can transcend ourselves. The full actualisation of mental life is conscious life, "lived and experienced from within" (Seifert, 1997: 81). The mind is a curious thing – it is not solid or material, does not occupy space, it cannot be measured, it has no shape, weight, length, width, height, colour, mass, velocity or temperature. What would be the weight of a desire? But its most curious aspect is that it "is directly observable only by

conclusion that the soul cannot be corporeal for a principle of life cannot belong to a body as such.

²⁵ Consequently, human biological life can also not be reduced to the life of some parts, cells or organs of a human being, but is understood as the biological life of the organism as a whole. Life, i.e. soul, is a principle which manifests itself in all of the body.

the person who owns it” (Pojman, 2006: 226) – only the individual can think his thoughts, feel his emotions, dream his dreams, suffer his pain. We might know what an individual’s brain looks like, but we cannot observe the respective individual’s mind, beliefs, sensations, emotions or desires. The only thing we can do is detect its activity by means of e.g. an electroencephalogram. Consequently, mental life is always an individual and personal life. Thinking, willing, feeling, desiring etc. all require someone who thinks, wills, feels, desires, etc.. The existence of this ‘I’, this person who wills and thinks is clearly corroborated by our experience as a single and indivisible subject. This personal aspect of mental life – an aspect not present in biological life – does not have to be inferred, but can be encountered. Mental life is what makes human life individual; in this sense, mental life is life in a higher sense than biological life.

As biological life, the mind and mental individual life seem to be a datum one cannot deny; and like biological life, mental life cannot be explained merely physicalistically. Our mind is not an epiphenomenon of the brain; rather, mind and brain are distinct from each other. The mind, as well as the mind’s life (e.g. beliefs and desires), cannot be reduced to the material system of the brain. That such materialist notion, i.e. the notion that mental states are the result or extension of physical states and processes, must be wrong and that the mind-body dualism (i.e. the idea that our thoughts are not the effect of a physical cause) is true, has been argued for by what has come to be known as the ‘Argument from Reason’. In his essay, ‘Is Theology Poetry?’, C. S. Lewis wrote: “If minds are wholly dependent on brains, and brains on biochemistry, and biochemistry (in the long run) on the meaningless flux of the atoms, I cannot understand how the thought of those minds should have any more significance than the sound of the wind in the trees.” (Lewis, 2001: 139) If all of our thoughts are the effect of a physical cause, then we have no reason for assuming that they are also the consequent of a reasonable ground.

“Just as it is impossible that a computer, whose output is entirely dependent on physical events, could know or check its own program in any real and ultimate way, so we human beings could never know anything if our knowledge were causally dependent on material processes and their causal connections, and if we did not have a mind

distinct from matter and its causal effects. But human beings know with certainty some things. Therefore, they have a mind.” (Seifert, 1997: 86)

One could now state that this only holds true if we assume that rationality cannot arise out of non-rationality. But it can be easily shown that it cannot; indeed, one cannot combine several carbon atoms and hope to create oxygen atoms (i.e. atoms which are different in kind and quality); in the same fashion, rationality and thought are something different in kind and quality than our brain (i.e. physical material). In order to speak of rationality at all, it has to be there as the source and not the result of the physical processes in our brains. Consequently, our thoughts and reason cannot be explained in materialistic terms. While the mind manifests itself by means of and is dependent on the brain as the empirical condition of mental activity, we should not confuse the brain as being the mind’s cause or the brain as being equivalent with the mind. Doing so would mean to make the same mistake we have been trying to avoid when thinking about biological life, i.e. confusing actualisations with the thing itself. It is essentially and necessarily impossible that mental life be identical with the brain which, in its physical complexity of cells and of parts thereof, is utterly incapable of producing even the tiniest thought or conscious act.

What is mental life then, and what can we say about it if we cannot explain it physicalistically? In short, what is at work with mental life is the same principle as that of biological life (cf. Seifert, 1997). As the soul is the principle of all biological life, the human soul is different from animal or plant souls in that it also is the source of mental life. Reason and intellect are therefore powers of the soul (cf. I^a q. 79). As such, soul underlies all conscious operations and activities. Our soul is what allows us to have a mental life and to think, act and feel freely and individually.

1.1.3 The Human Soul as the First Principle of Human Life

So, what should we take away with respect to our understanding of the phenomenon of ‘life’? Life is what distinguishes what is alive from what is inanimate. And as the wording already suggests, this distinction is due to ‘anima’, i.e. the soul, which is “the very principle of man's life” (von

Hildebrand, 1957: ch. XI; also cf. Forschner, 2006: 60ff)²⁶ – his bodily, sensitive and intellectual life. Saint Thomas Aquinas wrote:

“Manifestum est autem quod primum quo corpus vivit, est anima. Et cum vita manifestetur secundum diversas operationes in diversis gradibus viventium, id quo primo operamur unumquodque horum operum vitae, est anima, anima enim est primum quo nutrimur, et sentimus, et movemur secundum locum; et similiter quo primo intelligimus.” (I^a q. 76 a. 1 co.)²⁷

As has been said before, human life is a composite of biological, sensitive and mental life; as such, the human soul – in contrast to plant and animal souls – is capable of grounding biological, sensitive and mental operations. This could easily lead to the assumption that man has three distinct souls – a sensitive, intellectual and biological one. But as St. Thomas Aquinas holds, the sensitive soul, the intellectual soul, and the nutritive soul of man are numerically one (“eadem numero est anima in homine sensitiva et intellectiva et nutritiva” (I^a q. 76 a. 3 co.)). Thus, as there is only one human life, which manifests itself in three aspects, so is there only one soul with three different aspects. Life and soul are both composites but numerically one. The soul organises a body from the inside in a way that becomes a human body with typical human functions and behaviours. It follows then that human functions and behaviours are the

²⁶ As Saint Thomas Aquinas furthermore holds (I^a q. 75 a. 2 co.), it is an incorporeal and subsistent, i.e. independently existing, principle (“principium incorporeum et subsistens”).

²⁷ This translates as: “It is clear that the first thing by which the body lives is the soul. And as life appears through various operations in different degrees of living things, that whereby we primarily perform each of all these vital actions is the soul. For the soul is the primary principle of our nourishment, sensation, and local movement; and likewise of our understanding.”

Also cf.: “Anima dicitur esse primum principium vitae in his quae apud nos vivunt animata enim viventia dicimus, res vero inanimatas vita carentes.” (I^a q. 75 a. 1 co.) This translates as: “The soul is defined as the first principle of life of those things which live with us, for we call animate those things which live and inanimate those things which lack life.”

result of animation, but that life and soul are not the same as these functions and cannot be explained physicalistically.

1.2 Death

“Id autem moritur quod et nascitur.”
 (That undergoes death which is also born.)
Tertullian (De Carne Christi, Chapter VI, 7)

“Dinumerare dies nostros sic doce nos, ut inducamus cor ad sapientiam.”
 (So teach us to number our days that we may lead our heart to wisdom.)
Psalmus 90 (89), 12

As Tertullian’s words adumbrate, life and death come as an inseparable pair; there can be no life without death and there can be no death without previous life. Death is the unavoidable finale of life. A complete understanding of the phenomenon, which is life, necessarily requires us to shed some light on its sibling named ‘death’. Generally, death is “a change in kind of a living entity marked by the loss of some essential property” (Lizza, 2005: 32). Consequently, the term ‘death’ can refer to either the moment at which life ends or the state of being dead, i.e. the state that follows life. As a state, it is a negative, an absence – the state without life, non-life; as an occurrence, it is an incision in time, the moment at which the death as state can be said to begin. Therefore, in order to do justice to the concept of death we have to address two questions: What is death and when does it occur?

Given our account of life, the first question can be easily answered. A dead object is an object, which has lost the essential property of life, namely its soul. Death is the state, which begins with loss of the soul. Death is lack of soul. It is as straightforward as that. We can then turn to the second question, the problem of the ‘when’ of death. From a theoretical perspective, the answer is rather easy. If death is characterised as the lack of whatever property is deemed essential to life, the moment of the loss of this essential property is thus decisive for determining the exact moment of death. However, applying this finding in practice has proven rather difficult. As one cannot observe the soul leaving the body, one has to rely

on other, observable, as well as measurable criteria in order to determine the exact moment of death. But, as death criteria – though highly interesting – are not at the heart of this thesis I shall not delve into a discussion and weighing of possible candidates. Rather, I content myself with pointing out the results of an exhaustive discussion, which I have undertaken elsewhere (cf. Erk, 2010) and which comes to the conclusion that neither the permanent loss of all brain functions (from consciousness to primitive brain stem reflexes; ‘brain death criterion’) nor the cessation of heartbeat as well as breathing (‘cardio-respiratory or cardio-pulmonary criterion’) can or should be accepted as the sole yardstick for diagnosing death. The reason for this is that a brain-dead person is a living person with an irreversibly damaged brain²⁸ and that a person’s heartbeat as well as breathing can be restarted under certain circumstances. Death, then, can only be declared if the person in question

1. does not show any signs of life, i.e. if there is destruction of at least the three basic unifying systems of the body, namely, the circulatory and respiratory systems and the entire brain, and
2. shows the signs of death, i.e. palor mortis, rigor mortis, algor mortis, livor mortis and decomposition/ sceletonisation.

Any other criteria are unsafe, because as long as the human organism lives personal human life could, at least in principle, and does with great

²⁸ Brain-dead persons can breathe, sweat, get goose bumps, have elevated body temperature, gnash their teeth, sit up in bed, lash and kick about, egest and shed tears; their skin can get tanned by the sun, they feel warm, their heartbeat and metabolic system is intact, their limbs can move and their chest is moved by the activity of their lungs and their skin – if pierced or cut – heals. If male, brain-dead persons are able to beget a child; if female, a brain-dead woman can nurture a child in her womb and can give live birth even several weeks after brain death has occurred. People without brain activity are narcotised before their organs or living tissues are removed (explantation) – as it seems, dead people can still feel pain! Furthermore, when making the incision to take out the organs, the brain-dead person’s heart rate and blood pressure increase (cf. Erk, 2010). How can such persons be declared dead in the full sense of the word? They cannot!

probability, still exist. Only if these two criteria can be proved, can we be sure that an individual is truly dead and that his soul has left his body.

2 A Comprehensive Theory of Health

Now that we have an understanding of the most fundamental phenomena of our existence, namely life, as well as its counterpart which form the basis and temporal boundary for health, we can now devote ourselves to developing a comprehensive theory of health. In what follows I want to address this challenge and engage in a philosophical enquiry about the essence of health. What is it the alleged human right to health is actually had to?

2.1 Contemporary Concepts of Health and what we can learn from them

A great deal of clinical literature exists that deals with the concept of health. There are also writings that deal with this concept from a philosophical perspective, although the volume of material is much less. Contemporary medical philosophy features two main contrasting concepts of health: a reductionist and a relativist concept.²⁹ The foundation for the reductionist concept was set forth by the philosopher Christopher Boorse with his article 'Health as a Theoretical Concept' (Boorse, 1977); the protagonist of the relativist concept is the Swedish philosopher Lennart Nordenfelt, who first published his complete theory in 1987 (Nordenfelt, 1987). While these two concepts are not the only ones that exist, they

²⁹ Skimming through the relevant literature shows that there are several synonyms for these two terms. The reductionist concept is also called mechanistic, bio-statistical, biological or naturalistic; the relativistic concept is also called normativist or holistic, referred to as the action-theoretic approach or welfare theory of health.

certainly are the main exponents, have generated a broad range of reactions and criticism and have also been modified and adapted throughout the years. Given their prominence in political debate and in the realm of international relations, I shall amend these two concepts with the definition of health as proposed by the WHO. In what follows I shall thus introduce and discuss these three perspectives and assess their supportability. As we shall see, none of them is actually tenable. Nevertheless, the ensuing discussion and critical assessment will allow us to develop some valuable insights into the concept of health. I am well aware of the fact that focusing on these three theories cannot do justice to and brushes over details of the philosophical debate. However, I believe that the prominence of these theories as well as the particular focus of this thesis justify such simplification.

2.1.1 The WHO's Understanding of Health and its Deficiencies

In the preamble to its constitution, the World Health Organization (WHO) – the agency of the United Nations, which aims to further international cooperation in improving health conditions – stipulates that “health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” (WHO, 1946). While this might sound appealing at first, this stipulation is not convincing for several reasons (cf. van Spijk, 2002: 212ff; also cf. Bohrmann, 2010):

- The WHO's definition of health defines it positively as well-being, but what is this ‘well-being’? In trying to find a meaning for the abstract term ‘health’, the WHO unfortunately chose another abstract term. The ambiguity of the concept of health is substituted with the ambiguous concept of well-being.
- Another problem closely connected to the one mentioned above is that the relation between health and well-being is completely unclear: is health just one aspect of well-being, is well-being a symptom of health or are both concepts congruent? The WHO's stipulation does not explain why people we consider unhealthy should not be able to enjoy well-being.

- As van Spijk notes, the WHO's definition creates "a myth or a symbol and cannot be understood as a concrete reality" (2002: 212). A state of complete physical, mental and social well-being covers more than the word 'health' can actually cover. As an example, complete social well-being also comprises a good education, but is it reasonable to conclude that persons who cannot read or write are unhealthy? I do not think so. The WHO's definition is a depiction of a paradisiac but unrealistic state of mankind: "in ihr wird ein Vollkommenheitsanspruch zum Ausdruck gebracht, der unrealistisch ist" (Bohrmann, 2010: 3). As Seifert (2004: 54) points out, the WHO's definition falls prey to utopianism as it rather "refers to perfect beatitude than to health" (Seifert, 2004: 54). What the WHO proposes is an unattainable ideal rather than a definition of health.
- A further problem arises from the word 'complete'. If we make complete well-being the measure of health, the term becomes useless "because no real living human being will ever live in a state of absolute equilibrium or a state of absolute well-being" (van Spijk, 2002: 213). This would mean that everyone would have to be considered unhealthy. Bohrmann (2010: 4) explains: "Deshalb führt eine solche Gesundheitsbestimmung zu Illusionen und fördert zudem Anspruchs- und Erwartungshaltungen, die im Blick auf begrenzte Ressourcen im Gesundheitswesen nicht zu realisieren sind." Furthermore, the word 'complete' seems to make the promise that disease can be eradicated; but such a view masks "die prinzipielle Leidensmöglichkeit und Leidensfähigkeit des Menschen [...]. Krankheit und Leid gehören zum menschlichen Leben. Hinzu kommt, daß kein Gesundheitswesen den Schmerz gänzlich beseitigen kann, alle Krankheiten völlig ausmerzen und den Tod endgültig besiegen kann." (Bohrmann, 2010: 4)
- For Callahan (1973) it is by no means clear how health and well-being are supposed to be related and why health plays such a fundamental role in the attainment of well-being. Adhering to the WHO's notion of health as well-being can have dangerous implications, namely that all political, economic and social

problems become a matter of health. But then, health would become a normative concept, “the golden key to the relief of human misery” (Callahan, 1973: 83). This might be a nice idea, but actually is unrealistic utopianism. Reality shows that not all of these problems can simply be reduced to health: “it would be sheer folly to believe that all, or even the most important, social evils stem from bad mental health: political injustice, economic scarcity, food shortages, unfavourable physical environments, have a far greater historical claim as sources of a failure to achieve ‘social well-being’.” (Callahan, 1973: 81)

- In light of the distinction drawn above, the WHO’s definition seems to be a nominal one, rather than a real one. As van Spijk points out, the definition “does not give us any background knowledge of how a human being must be viewed and understood” (2002: 216) and it also “does not give us references to where we can find such information” (2002: 216). This preparatory intellectual work has not been done by the WHO; the WHO did not consult scientists, philosophers or authors from antiquity, since it was in “too much of a hurry” (2002: 217). The definition was the result of a political negotiation process and created *ex nihilo* – we are somehow reminded of Jacques Maritain’s (1998: 77) analysis of the formation of the UN’s Universal Declaration of Human Rights.

Given this wide range of deficiencies, it would be too easy to simply adopt the WHO’s stipulation. Although its virtue is its attempt to place health in the broadest possible human context, in the end the WHO’s definition is “simply a bad one” (Callahan, 1973: 78) which in addition contains “many muddled and hazardous ingredients” (Callahan, 1973: 83).

2.1.2 Boorse's Reductionist Theory of Health

Christopher Boorse aimed at developing a descriptive (objective) and value-free theory of health and disease, so that “recognition is a matter of natural science, not evaluative decision” (Boorse, 1977: 543). The

normativism Boorse wants to exclude from his definition claims that to call a condition unhealthy equals its condemnation and that health signifies a desirable condition. The result of his efforts (cf. Boorse, 1977 and 1997) is what has come to be known the ‘biostatistical theory of health’ (BST), which states that “health is normal functioning, where the normality is statistical and the function biological” (Boorse, 1977: 542). Health is conformity to the species’ design and not the conformity of the species’ design to our values. Therefore, Boorse’s objective criterion by which to maintain the distinction between health and unhealthy is statistical normality: “all conditions that do not deviate significantly from the statistical average would be considered healthy, and all conditions which do deviate significantly would be considered unhealthy” (Lavados, 2002: 196). For Boorse, health is a matter for empirical investigation.

2.1.2.1 The Main Elements of Boorse’s Theory

In particular, BST consists of the following four components:

1. “The *reference class* is a natural class of organisms of uniform functional design; specifically, an age group of a sex of a species.
2. A *normal function* of a part or process within members of the reference class is a statistically typical³⁰ contribution by it to their individual survival and reproduction.” (Boorse, 1977: 555)
3. “A *disease* is a type of internal state which is either an impairment of normal functional ability, i.e. a reduction of one or more functional abilities below typical efficiency, or a limitation on functional ability caused by environmental agents.
4. *Health* is the absence of disease.” (Boorse, 1977: 567)

³⁰ For simplicity’s sake, it will be assumed that ‘statistically typical’ or ‘normal’ means that the health variable is a cardinal value and within two standard deviations of a standard normal curve. A measurement is ‘normal’ if it falls within the middle ninety-five percentile of the range of all given measurements.

A living being thus is healthy if it is not diseased. Disease, in turn, is determined by characteristics – both in terms of structure and function – which are specific for the living being in question. Accordingly, “health requires a person to manufacture insulin but not vitamin C, since our species does make one and not the other. Controlled diabetes remains a disease; to control scurvy is to eliminate it” (Boorse, 1977: 564). A healthy human being is one who functions according to the pattern that is typical for his age group and sex. He would be unhealthy if one or more of his characteristics deviated from this pattern (either below or above what is considered normal), i.e. if “species-typical functionality consistent with one’s reference class within a statistical normal range” (Lavados, 2002: 196) could not be maintained. It has to be noted, that Boorse’s understanding of normal functioning refers only to the contributions of those parts and processes, which are related to survival and reproduction. This means that a part or process, which is not causally connected to reproduction or survival is automatically excluded from the domain of health. According to this Boorsean theory, health is an important prerequisite of a species-typical, statistically normal functioning, which is geared towards the end of survival and reproduction. For Boorse, a disease is a state of an organism that “interferes with the performance of some natural function, i.e. some species-typical contribution to survival and reproduction” (Boorse, 1976: 62). Functions which do not contribute to the goals of survival or reproduction do not have any place in the theoretical definition of disease and health.

2.1.2.2 Exposing the Deficiencies in Boorse’s Theory

Despite the appeal that Boorse’s BST might have for those who come across it for the first time, a deepened and mindful examination of its premises and implications reveals the following toeholds for criticism:

(1) Boorse’s BST aims to be value-free and thereby reduces health to statistics and statistical judgements, which is why it is called ‘reductionist’. But in reality, health is not about standard deviations and p-values but value and disvalue. We desire health and it motivates and regulates action (e.g. seeking treatment). Therefore, there must be more to it than mere

numbers. Boorse addresses this criticism by admitting that health is desirable insofar “as it promotes goals one can justify on independent grounds” (Boorse, 1975: 61). This desirability usually attached to health as well as the undesirability attached to unhealth is not intrinsic, but instrumental. Health is a means for survival and procreation, Boorse’s only intrinsic ends; if these ends could be achieved by means other than the functional organisation typical of a species, then health is not something to be desired. Boorse captures this value aspect, i.e. “the presumption that health is desirable” (Boorse, 1975: 60) by distinguishing his theoretical concept of disease from that of illness. For Boorse, illnesses are “a subclass of diseases, namely, those diseases that have certain normative features” (Boorse, 1975: 56). Tooth decay is not a disease for young children as it is a normal function of their reference class; but it is a disease for grown-ups because it is not in the nature of the species to lose its second set of teeth. But – according to Boorse – this statement has no normative content per se. It does not tell us whether the disease is desirable or not; in order to determine a disease’s desirability we have to ask whether it incapacitates us to achieve the ends of survival and procreation. If it does, it is also an illness. Therefore, a disease is an illness “only if it is serious enough to be incapacitating, and therefore is (i) undesirable for its bearer; (ii) a title to special treatment; and (iii) a valid excuse for normally criticizable behavior.” (Boorse, 1975: 61) A Boorsean disease can be the case without the diseased being aware of it. What Boorse does basically, is combine the dimensions ‘illness’ and ‘sickness’ of the triad of unhealth (cf. chapter I. 2.2.1) and contrast them with disease.

(2) The BST is contrary to clinical reality; “when the physician judges a condition to be unhealthy, or more precisely pathological, he does not do so based primarily on a possible deviation or lack of deviation from statistical averages” (Lavados, 2002: 197). Rather, “the clinician establishes a correlation between what he observes and the foreseen impact or influence of that defect on the individual’s overall functionality” (Lavados, 2002: 197), which in turn is measured against the individual’s natural norm.

(3) While BST gives us a criterion to distinguish health from non-health, it does not allow for a comparative use of the word ‘healthy’. As long as

the parameters of an individual's parts and processes which are relevant to survival and procreation are within the normal range of his reference class the BST is unable to say if someone is less or more healthy. It follows then that the BST is a rather insensitive instrument.

(4) If we subscribe to the BST, we have to be aware that yesterday's disease can be tomorrow's health and vice versa – depending on the numbers. While child obesity was a negligible phenomenon in the past, the percentage of obese children has been dramatically rising during the last decades. As long as only a low number of the children of the world are obese, BST considers obesity a disease; but as soon as the majority of the children of the world become obese, obesity becomes healthy. Therefore, BST seems to be highly counterintuitive. As statistical normality is determined by the group with the highest number of cases, subscribing to BST means that health is a matter of demography: what is most common becomes the standard for what is healthy.³¹ But, as Chesterton rightly points out, 'normal' must not be equivocated with 'average': "Wenn es nur vier Menschen auf der Welt gibt, und einer von ihnen hat eine gebrochene Nase, ein anderer ein Auge verloren, der dritte ist kahlköpfig, und der vierte hat ein Holzbein, dann ändert dies nichts im geringsten etwas an der Tatsache, daß ein normaler Mensch, dem sie aufgrund verschiedener Unfälle alle nicht entsprechen, ein Mensch ist, mit zwei Augen, zwei Beinen, natürlichem Haarwuchs und einer ungebrochenen Nase. [...] Selbst wenn es keine anderen Menschen auf der Welt gäbe als diese vier, existiert immer noch als Idee der 'normale' Mensch, von dem jeder eine Variante oder aber eher eine totale Abweichung darstellt." (Chesterton, 2004: 158f)

³¹ A proponent of the BST could argue that this criticism would be begging the question as the critic needs to have another way of determining health; he has "every right to ask how the critic determines that some statistically normal condition is unhealthy" (Lennox, 1995: 500). Unless the critic actually offers an alternative answer to the question of health, this criticism is pointless and toothless.

(5) Furthermore, Boorse's attempt to offer an objective species-wide account of health and disease fails on its own terms. Consider the following examples:

- Imagine a small island somewhere in the Pacific Ocean with only a single human being living on it. He has been stranded there since childhood with no knowledge of any statistics about species-wide normalities of biological functionings. How should our protagonist know whether he is healthy or not? According to Boorse, normality would have to be defined with respect to himself as he is his only reference class. Consequently, he would always be healthy as he would always be in conformity to the statistics. Of course, our island inhabitant could keep a record of his health status and watch the statistical changes over time; statistics could give him *an* answer to the question about his health. Still, he could never be sure whether it would be *the* answer, as he could have been stranded there with an affliction considered a chronic disease in the rest of the world to begin with.
- Imagine somebody running a marathon. In his endeavour to finish the 42,195 kilometres as fast as possible, he is sweating, he is breathing faster and his heart is beating fast. He is the only participant in his age group because his entire reference class is not running a marathon. Consequently, BST would classify the runner as diseased for the duration of the marathon since the values for his breathing and heart rate and other bodily functions fall outside the normal distribution range of his reference class. Another example would be an Olympic weightlifter whose strength deviates from the statistical normal range of strength in his reference class in an unusual fashion; Boorse would have to declare him pathological. This is highly counterintuitive, as no one would consider the runner diseased. Rather, we might say that his elevated heart rate is a healthy response to the challenge.
- Imagine that society A and society B do not know of each other's existence. Society A is living in an undeveloped part of the world where there is no stress, whereas society B lives in a highly

developed part of the world. As we all know, a high standard of development and living is also accompanied by certain chronic lifestyle diseases (e.g. cardiovascular disease). Consequently, in society A the mean and median blood pressure level values are considerably lower than in society B. A (statistically speaking) average specimen from society A – although healthy in his society – would be highly diseased in society B and vice versa. So, which society should be the one defining statistical normality? Boorse would say to take the average of both societies. But then why does Boorse allow for the distinction of reference classes by sex and age? If there is a statistical normality for a female adolescent as opposed to a male adolescent or a female grown-up, why should there not be a statistical normality for a female adolescent living in the Swiss mountains as opposed to a female adolescent living in the steppes of Kazakhstan?

As can be seen, the BST is subject to serious criticism. As stated above, the Boorsean reference class is a natural class of organisms of uniform functional design. In reading this definition, one could be led to think that the reference class of a human being is actually the natural class of human beings: “In the case of organisms [...] the ideal of health must be determined by empirical analysis of the species rather than by the intentions of a designer.” (Boorse, 1975: 59) The species-typical cardiac frequency would be that interval within which the cardiac frequency of most people is to be found. Instead, Boorse specifies and subdivides the reference class by age and sex. By allowing for this qualification, Boorse seems to implicitly acknowledge the fact that some physiological parts and processes change over the course of a lifetime and are different in males and females. The only reason for this concession I can think of is a statistical one. Boorse seems to have realized that health related statistics are significantly different for human beings of different sex and age. In order to achieve more reliable and relevant results, he complemented the variable ‘species’ with the variables ‘sex’ and ‘age’. Understanding the functional normality of the BST as a species-wide concept would therefore be highly exaggerated and wrong.

The human body is not a static machine, which always operates on the same level, but a highly adaptive and dynamic system, which allows for adaptations. According to Boorse, health is functioning in conformity with the species design. Human beings, however, are designed to be adaptive. These adaptations can be due to progressing age, which is why Boorse tells us to discriminate by age. But as the examples show, such adaptations can also be due to a change in activity levels as well as the environments, whereas the term environment should not be reduced to mere geography, but also encompasses technological, social and other dimensions. The aim of statistics is not to end up with just any number, but with a relevant one. If ‘activity level’ and ‘environment’ are further variables, which help to raise the relevance of the statistic by qualifying the human species’ design, why should we exclude them? Doing so would evidently be false. Surely, caries is not a normal affliction, but one rooted in the way of life and the environment modern societies are characterised by. Obviously, the spread of the so-called lifestyle diseases of modernity cannot be understood as a change in species design and thus normality; rather they are the result of abnormal changes in the environment. Nevertheless, the BST holds both activity and environment as constants. For Boorse, what is healthy is what occurs most frequently in a normal (i.e. typical and constant) environment as well as activity level of a species. However, since the levels of activity as well as the environments of different societies are highly diverse and different all over the world, it is highly doubtful whether and how a statistic which only considers species, sex and age could be relevant or useful.

Therefore, if one allows for the variables of age and sex, it would be inconsistent to exclude further helpful variables; either we use only ‘species’ or we have to allow for any variable which helps to create a significant reference class allowing us to improve the informative value. Proponents of the BST now face a dilemma: if the BST is not taking the interaction between an individual and his environment into consideration, it will misclassify individuals as being diseased when they are actually adapting to their immediate environment or level of activity in order to survive. But if it allows for additional variables, the BST would have to consider all adaptations in all environments and all functionings during all

activities as being within the normal range. As a result, it would lose its analytical power and informative value: everything would be statistically normal as any deviation could be explained with reference to certain features of activity or environment. In the end, every person would be his own reference class. In Boorse's version, the BST is not consistent; however, making it consistent would mean choosing between oversimplification and overcomplexity.

The objectivity of the BST is lost in both cases: If we allow for varying environments and activities, we end up with as many reference classes as there are individuals – which can hardly be called objective. If we standardise the variables 'environment' and 'activity', this means that biological functioning would be standardised to a particular geographical location; with the consequence that disease and health would be geographically relative and specific to a subgroup of the human species. There is one more point to consider: Human beings are not only reactive beings living in nature but can shape nature and their environment. If we make the normality of human functionings dependent on a particular environment, human beings would shape the normality of their own biological functionings to a significant extent. But this counters the Boorsean notion that human biological functions are objectively designed for survival and reproduction.

I think that Boorse is absolutely right in stating that desirability or undesirability do not make a mental or physical condition healthy or unhealthy. We do not consider shortness to be a disease although we might not desire it; we also do not consider "the child who luckily evades his exam due to an influenza" (Lavados, 2002: 195) healthy. There must be some objective standard for deciding what is regarded as a disease and what is not. Boorse is also right in holding that this standard is drawn from nature; "the normal is the natural" (Boorse, 1977: 554) and disease is a deviation from some kind of natural design. Where he goes wrong, however, is in supposing that species design is a statistical norm, which can only be accessed and uncovered by means of statistics, i.e. in trying to objectify it in a reductive fashion. Species design is not a statistical but a natural norm, i.e. a norm discovered in nature. And the discovery of this norm is not a matter of statistics; rather, all of the sciences available to man

(humanities, social sciences and natural sciences) partake in the discovery and unveiling of this natural norm. Nature, in this regard, is the “discernible, general design or structure that determines an individual as a member of a living species” (Donohue-White & Cuddeback, 2002: 179).³² Developing and functioning according to that design is natural and thus normal.

2.1.3 Nordenfelt’s Welfare Theory of Health

As a reaction to the problems of Boorse’s theory, a completely different type of theory has emerged, whose main proponent is Lennart Nordenfelt with his holistic welfare theory of health. His theory suggests that health has to do with an individual’s abilities rather than Boorse’s species design and can only be properly understood in the context of and should thus be founded on a subjective idea of human welfare and happiness. Crudely spoken, it is “a necessary condition of health that one can pursue the goals one both wishes to pursue and has the opportunity to pursue” (Edwards, 1998: 89).³³

2.1.3.1 The Main Elements of Nordenfelt’s Theory

Whereas Boorse was only able to give a negative definition of health as the absence of disease, Nordenfelt tries to develop “a positive

³² This account presupposes the philosophical notion of nature, i.e. the idea that a living organism is structured according to an end, which is a state of activity or functioning that is intrinsically good for the organism – as contrasted with being contingent on subjective stipulations or individual desires.

³³ Nordenfelt’s theory is one example of the theories which are indexed to goals and which Murphy (2008) refers to as “embedded instrumentalism”. Nordenfelt’s version defines goals with respect to the ambitions and desires of the respective individual, namely his vital goals. The other version (which will not be discussed here) sees the goals that are relevant to health as needs (Daniels, 2008), which in turn are thought to have a biological basis.

characterisation of health without leaning on a previous understanding of disease and illness” (Nordenfelt, 1993: 279). The central focus of his theory of health is a person’s experience of health rather than a theoretical concept of disease. In Nordenfelt’s view, such experience of health is closely connected to an evaluation of the things a person is able to be and do, i.e. his abilities and disabilities: “The starting point for this kind of theory is to view the human being as an active creature living in a network of social relations. Thus health and illness are viewed as phenomena which involve the individual as a social agent.” (Nordenfelt, 1993: 279) According to Nordenfelt’s action-theoretic approach to health, health constitutes the ability to take action.³⁴ Health is not just internal to the biological structure of the body but also reflects external environmental influences and constraints, such as physical or social forces. Within this social network, a person should be able to act and reach his goals. Nordenfelt argues that a person should be understood to be unhealthy if his ability to perform goal-directed actions is constrained; this is what

³⁴ Given its focus on abilities, Nordenfelt’s theory of health has often been compared to and combined with Sen’s capability approach (cf. Venkatapuram, 2007) which has been developed as a concept for developmental policies. For Sen, “development can be seen [...] as a process of expanding the real freedoms that people enjoy” (2001: 3) and is aimed at the promotion and expansion of valuable capabilities by expanding the choices that people have to live full and creative lives. A capability “represents the various combinations of functionings (beings and doings) that the person can achieve. Capability is, thus, a set of vectors of functionings, reflecting the person’s freedom to lead one type of life or another [...] to choose from possible livings” (1992: 40) A capability then is the freedom to achieve functionings, i.e. the various things a person may value doing or being, and “to choose a life one has reason to value” (2001: 74). In explicating the meaning of ‘capabilities’, Sen emphasizes that he is concerned not with what persons have or are, with their achievements or functionings, but rather with what they can have or be. Capabilities are options to achieve valuable functionings. In order to understand Sen’s concept of capabilities correctly, we can turn to the example of affluent persons fasting by choice: though they may be undernourished, they are not to be grouped with other hungry people who cannot afford enough to eat. What matters is their capability to be well nourished, in terms of not being any worse off than other affluent people who are eating three square meals a day.

Nordenfelt calls “first-order abilities” (Nordenfelt, 1987: 50). Being unhealthy is not only determined by a first-order disability, but also by the inability to overcome that constraint, i.e. “second-order abilities” (Nordenfelt, 1987: 50)³⁵. Being healthy means not being constrained in one’s first-order abilities to act or in one’s second-order abilities to learn to overcome a constraint that hinders from acting. A person is healthy if he wants to reach a certain goal and is either directly able to do so or if not, is at least in a position to overcome the inability to do so. Lack of first-order abilities is a necessary but not sufficient condition to be considered unhealthy; second-order abilities must also be constrained. By implication, this means that a person is temporarily unhealthy during the period in which he is learning the ability to overcome the constraint, but would be permanently unhealthy if there would be no possibility to do so.

So far, we know that a healthy person in a Nordenfeltian sense has the ability to act and in doing so to achieve a set of goals. Nordenfelt then asks which goals are necessarily related to human health and necessary for an assessment of it. His answer to this question is: “What a human being needs to be able to do in order to be healthy is [...] to realise all of his or her vital goals.” (Nordenfelt, 1993: 280) The criterion for recognising a goal as vital is the extent to which the fulfilment of the goal leads to a state that is necessary for individual minimal welfare and happiness.³⁶ A goal is vital if reaching the goal is necessary for the respective individual to achieve a minimum degree of welfare and happiness. Happiness, in turn, is explained by Nordenfelt as the equilibrium between an individual’s wants and desires and the satisfaction of those wants and desires. If we are able “to fulfil those goals which are necessary and jointly sufficient” (Nordenfelt, 1987: 79) for our minimal welfare and happiness, we are

³⁵ Cf. Nordenfelt, 1987: 50: “A has a second-order ability with regard to an action F, if and only if, A has the first-order ability to pursue a training program after the completion of which A will have the first-order ability to do F.”

³⁶ It is not completely clear what the actual relation between welfare and happiness is. Sometimes these terms are used interchangeably and sometimes health is understood as a precondition for the very welfare, which is itself the minimal condition for happiness (cf. Nordenfelt, 1993: 35).

healthy. Which goals are necessary is a moral choice, which is determined by every individual for himself during the course of his life, based on his societal and cultural value system and his hierarchy of goals, ambitions, etc.. Health then constitutes the set of abilities which are identified as instrumental for the satisfaction of desires which constitute an individual's minimal well-being. Nordenfelt's own definition of health thus reads as follows:

“P is completely healthy, if and only if P has the ability, given standard circumstances, to realise all his or her vital goals. P is unhealthy (or ill) to some degree, if and only if P, given standard circumstances, cannot realise all his vital goals or can only partly realise them.” (Nordenfelt, 1993: 280)

Whether a person is healthy is dependent on what is necessary for the happiness of the respective person; and what is necessary depends on the person's desires and wants, given societal circumstances. In short: an individual is healthy if he has the (at least second-order) ability to fulfil his minimal desires as well as wants and disease “a bodily or mental process which is such that it tends to reduce its bearer's health” (Nordenfelt, 1993: 280)³⁷.

2.1.3.2 Exposing the Deficiencies in Nordenfelt's Theory

Nordenfelt is right in pointing out that health always has a subjective component and is embedded in a context of environmental as well as socio-cultural circumstances: the health of an individual person is not solely and exhaustively determined by his natural norm, but also by a variety of background factors, “such as essentially individual traits and abilities, individual choices and desires, and external factors such as social structures, culture and environment” (Donohue-White & Cuddeback, 2002:

³⁷ It should be annotated that a disease does not actually have to reduce a person's health (as is the case with latent diseases) in order to be a disease. “It is, however, still called a disease because it belongs to a type, of which the majority of instances actually reduce the health of their bearers.” (Nordenfelt, 1993: 280).

179). However, Nordenfelt's theory of health as a person's ability to achieve minimal happiness by realising subjective vital goals in a particular environment brings with it serious problems:

(1) Nordenfelt's proposition of a culturally but also subject-relative conception of health is an overly moral relativistic one, both on the social and individual level. Consequently, his definition of health is either self-defeating or vulnerable to the extremes of subjectivism and individualism on the one hand and oppression of individualism by the state or cultural norms and practices on the other:

- Nordenfelt's account of health is "fundamentally dependent upon individual wishes and desires, and varies with individual wishes and desires" (Donohue-White & Cuddeback, 2002: 169). But basing health on the satisfaction of individual desires leads to an insurmountable problem: the impossibility of avoiding counterintuitive conclusions without introducing factors that in the end force us to prescind from the individual and his desires (cf. Donohue-White & Cuddeback, 2002: 170ff). As this problem cannot be solved without abandoning subjectivism, it eventually destroys any desire-satisfaction theory. As we have seen, Nordenfelt allows and argues in favour of a culturally and individually relative set of vital goals, which are instrumental in achieving happiness. But if man is free to determine his own vital goals, all of them must be equally accepted. But what about a person who is only happy if he is drunk? What about a racist who desires to kill and annihilate a certain ethnic group? What about the individual who sees his disabling affliction as a motivation to better himself and changes his vital goals accordingly, i.e. by setting only those goals for himself, which he can fulfil despite his affliction? According to Nordenfeltian theory, we have to consider these people healthy as long as they are actually able to fulfil their goals – a highly counterintuitive notion. Therefore, in order to deny such counterintuitive notions of welfare, Nordenfelt allows for constraints on individual goals, which evaluate individually set

goals and eliminate the irrational ones (Nordenfelt, 1987: 76-96)³⁸. By introducing an external, objective measure, he denies his fundamental premise, namely, that subjective desires and wants determine welfare and happiness. A desire-satisfaction theory such as Nordenfelt's welfare theory of health can either opt for theoretical consistency by allowing all conceivable desires and wants or it can introduce objective factors depending on which desires and wants are excluded. Whereas the first option leads to undesirable results³⁹, the second option is self-defeating. Even if a proponent of the Nordenfeltian view were to bite the bullet, concede that it is self-defeating and allow a subjective theory to have objective elements, the second option would inevitably lead to a conflict of opinion between the individual and an external observer. As Nordenfelt recognises "this conflict of opinion is

³⁸ Accordingly, goals are not vital if they are forcefully desired and if they are trivial, counterproductive, i.e. contrary to other vital goals, and unrealistically high. In addition, goals cannot be vital if they are set by a defective (unrealistic, extreme, weak or morally defective) will. In other words, in order to be able to set vital goals one has to be mentally healthy, which is a contradiction in itself. Furthermore, this would only be applicable to grown-ups; children, on the other hand, can never be healthy since they cannot set their own vital goals. Realising this weakness, Nordenfelt developed a special definition for the health of infants and children (which would also apply to individuals lacking full mental capabilities): "Infant I is in health if, and only if, the internal constitution and development of I is such that, given standard adult support, the necessary and jointly sufficient conditions for I's minimal happiness are realized." (Nordenfelt, 1987: 104)

³⁹ Some people might be led to say that the poor choice of the desire of a racist longing for ethnic cleansings is due to a lack of education. If he had been more knowledgeable, he might have been able to determine a set of ideal desires. However, as Donohue-White & Cuddeback argue (and as has been already known in ancient and Christian philosophy) "it is not evident why this knowledge would alter the subject's actual desire or become normative for the actual subject's action" (2002: 171). Desires can persist even in the face of knowledge and better judgement; a drug addict might know that what he is doing is self-destructive but this knowledge does not make the desire for his drug of choice disappear. The problem is not a lack of knowledge, but a lack of will and motivation.

theoretically unsolvable” (Nordenfelt, 1987: 96); in practice, the external observer should take the subject’s view in determining the subject’s minimal happiness. While this solution avoids a socio-political definition of health, it again leads to undesirable results as there is no standard by which to measure happiness but individual desire.

- Apart from this individualistic relativism, Nordenfelt’s theory is also weakened by its cultural and social relativism. The latter is due to and has to be accepted because of the clause “given standard circumstances” (Nordenfelt, 1993: 280) which is included in his definition of health. But what does ‘standard circumstances’ mean? Although this phrase does not seem to be problematic at first, problems arise if and when individual vital goals contradict cultural norms and practices:

“Local cultural norms or social practices are significant determinants of much avoidable mortality and morbidity around the world. [...] Because cultural norms can undermine the achievement of vital goals of individuals, especially affecting those who are socially powerless, the meaning of health becomes empty if local cultural practices have absolute determining power over the content of vital goals, or who can achieve them and when.” (Venkatapuram, 2007: 10; also cf. 48).

Cultural norms and practices are the limiting factors of individually chosen vital goals. And this is fine where those limits are reasonable and moral; but Nordenfelt’s social relativism goes too far in cases where society oppresses the individual choice of morally acceptable vital goals. If the ‘standard circumstances’ feature e.g. a caste system, female genital mutilation, slavery or state-run family planning (all of which clearly hinder the individual from choosing his vital goals), Nordenfelt’s theory of health has no means by which to exclude any of them as detrimental to the individual’s health.

But what if somebody cannot attain minimal happiness and realise his goals because he is unable to adapt to such standard circumstances? Is he unhealthy? Or is there something wrong with

the standard circumstances? Who is to decide which standard circumstances are acceptable and which are not? Thus, a definition of health cannot be given without reference to some objective concept of ‘reasonable standard circumstances’.

Furthermore, we can act from the assumption that Nordenfelt’s phrase ‘standard circumstances’ also includes environmental factors. As with cultural circumstance, Nordenfelt also fails to produce any content of the physical environment which is absolutely necessary for human survival. Although we have to assume that this is not what Nordenfelt intended, it would be perfectly possible – at least from a conceptual point of view – to live in an environment without oxygen, food and potable water. Surviving would be excluded as a vital goal, but this would be acceptable as it would be part of the standard circumstances, which have to be assumed as a given.

While Nordenfelt takes a clear stance as far as the problem of subjectivism is concerned, he does not discuss what vital goals would look like in different societies. As Venkatapuram points out, “he does not even consider whether individual survival is a shared goal across human societies” (2007: 46). The important question of what an adequate environment and what adequate circumstances for achieving individual vital goals look like are left completely open.

Again, Nordenfelt’s theory faces two options: either it can opt for theoretical consistency by allowing for all conceivable standard circumstances or it can choose to introduce objective factors by which certain desires and wants are excluded. Again, while the first option leads to the undesirable results just mentioned, the second option is self-defeating.

As a consequence of these conceptual flaws, Nordenfelt’s subjectively and socially relative definition of vital goals and standard circumstances has to be enriched by an objective component, i.e. a definition of at least basic vital goals or an objective set of human functionings. Otherwise, the individual’s ability to achieve vital goals in life becomes an empty set of abilities, as vital goals will be whatever different societies choose to

include as basic. Such a spongy concept would not be of any use at all. Although it is true that health has a subjective component, we must not overemphasise it; what is needed is both an objective and subjective determination of the content of vital goals in different societies.

(2) A further problem with the welfare theory of health has been pointed out by Edwards (1998: 93f) who finds fault with the theory's close relationship between illness and disability. According to Nordenfelt, disability is both a necessary and sufficient condition of illness⁴⁰; consequently, he reduces illness to mere disability instead of a composition of disability, pain, suffering, discomfort, etc.. Intuition and experience tell us that a person can have a disability yet not be ill. A person in a persistent vegetative state or with Down's syndrome can be said to be disabled, but we are in no position to conclude that they are suffering because of these disabilities. Hence, "whilst disability may be a necessary condition of illness, this intuition suggests that it is not a sufficient condition" (Edwards, 1998: 94). Nordenfelt's account of disability as illness only works because he sacrifices the richness of the subjective experience, which we call illness.

(3) The counterintuitive character of Nordenfelt's concept of health also becomes apparent when referring to what we generally call a chronic or lifestyle disease (e.g. obesity). A welfare theory of health cannot account for these cases. Those afflictions do not necessarily disable the individual concerned the way acute afflictions do; on the contrary, if an obese individual is happy when overeating and if doing sports does not feature in his vital goals then he has to be considered healthy.

(4) If we take a close look at Nordenfelt's definition that "P is completely healthy, if and only if P has the ability, given standard circumstances, to realise all his or her vital goals" (Nordenfelt, 1993: 280), we will see that it is actually not a definition of health. It is rather a

⁴⁰ Also cf. Nordenfelt, 1987: 36: "The concept of disability has a much more central place in the characterization of illness than the corresponding concepts of pain and suffering. If only one of these characteristics is essential to the notion of illness, then disability is the prime candidate."

description of a necessary and – what we have to assume is in his view – a sufficient condition for being considered healthy. Being in the state called ‘health’ is characterised by having the ability to be an agent and fulfil one’s vital goals; but the same holds true for being alive or being conscious. Consider the following examples:

- ‘An individual is conscious if and only if he has the ability, given standard circumstances, to realise all his vital goals.’ Or: ‘An individual is alive if and only if he has the ability, given standard circumstances, to realise all his vital goals.’ To my mind, the above statements seem to make perfect sense. However, do they tell us anything about what consciousness or life is? I do not think so.
- ‘An individual is alive if he has the ability to move on his own.’ Would we, given our above-mentioned account of life, take this to be a valid definition of life? I guess not.

So, why should we allow abilities to be equated with health? Are we not mixing up the consequences of health with its essence? Is the ability to achieve the functionings characteristic of human health, health itself or its consequence? The problem is basically the same as the one we had when trying to define life. The same way that we had to exercise caution in not mistaking the consequences (e.g. motility) of life for life itself, we must also be careful not to mistake the consequences of health for health itself. Functionalism cannot do justice to the phenomenon of health, since we do not know what enables it to function. From this perspective, Nordenfelt does not tell us anything about what health actually is. Health is what enables us to have the ability to have vital goals and fulfil them. But equating health with ability would be highly reductive. Therefore, it seems highly dubious to conclude that Nordenfelt’s definition allows a reformulation and state that health, as Venkatapuram holds, is a “meta-capability [...] to achieve, exercise or, express [...] a cluster of basic and inter-related capabilities and functionings” (2007: 9; also cf. 30). Health

itself is not an ability nor a capability, although the consequences of health are various abilities and capabilities.⁴¹

(5) If we take Nordenfelt's wording seriously, we are led to believe that life is an aspect of health; for, we have to be alive in order to realise our goals. Life would be instrumental to our health. But, as has been said above, life is not an instrumental good but a value in itself. Health is an aspect of life and life is a prerequisite for health, not the other way around.

2.2 Health as Norm and State

So, where does this analysis of the most prominent concepts of health featuring in medical philosophy and international relations leave us? We have found out that neither the WHO's definition nor statistical normality nor ability to desire-satisfaction can help us in determining what health is – at least not on their own. If we step back for a moment and think about our findings, we will see that despite all their intra-theoretical deficiencies and inter-theoretical contradictions, there is something to be learnt about the phenomenon called health on a very fundamental level.

⁴¹ A similar misconception is supported by Bircher & Wehkamp (2006), who equate health with a special sort of potential: "Gesundheit ist ein dynamischer Zustand von Wohlbefinden, bestehend aus einem biopsychosozialen Potential, das genügt, um die alters- und kulturspezifischen Ansprüche des Lebens in Eigenverantwortung zu befriedigen. Krankheit ist der Zustand, beidem das Potential diesen Ansprüchen nicht genügt." (2006: 53) This definition – which Bircher & Wehkamp also call the "Meikirch-Modell" (cf. 2006: 53) – is basically a Nordenfeltian one (since it equates health with the ability/capability to some action) and therefore has the same weaknesses. It can also be subjected to the same criticism as the WHO's definition of health, namely that one abstract is substituted with another abstract (e.g. 'Gesundheit' or health with 'Wohlbefinden' or well-being). By combining the WHO's idea of health as a state of well-being and Nordenfelt's idea of health as ability (or potential for that matter), Bircher & Wehkamp might have managed to create a new approach to defining health, but not to overcoming the deficiencies in the ideas used to create that definition.

If one compares the three definitions of health, one will soon see that they differ in the approach they take or the angles they adopt to describe health. These angles are usually captured by the distinction between a positive and a negative definition of health. Boorse tries to define health by means of its opposite. For him “health is the absence of disease” (Boorse, 1977: 567) or, on a more abstract level, the absence of unhealth. What Boorse tries to do is give a negative definition of health, i.e. explain what health is distinct from and opposed to.⁴² What would cold without hot be, left without right and male without female? The underlying rationale of the negative approach assumes the definiens/explanans (i.e. that which is doing the defining) to consist in the absence of the opposite of the definiendum/explanandum (i.e. that which is to be defined). The negative answer to the question of health would thus be that health is the absence of all the phenomena we connect with unhealth and thus everything that is not unhealth. In contrast to Boorse, Nordenfelt and the WHO have taken another approach and try to understand health in a positive sense, not only in terms of the absence of unhealth, but also in terms of the presence of something more. Adherents of this position consider equating health with the absence of unhealth as highly reductive; they do not take the absence of unhealth to be a sufficient criterion for health, but only a necessary one and therefore introduce criteria for health other than mere unhealth. A positive definition of health manages to do without unhealth. Health can be called the absence of unhealth; but that does and cannot shed any light on what health is; only on what health is not. This problem of negative definitions and the above-mentioned prevalence of negative definitions has already been touched upon and criticised by Gilbert Keith Chesterton:

⁴² Such an approach is not only popular with Boorse: reality shows that unhealth has received more philosophical attention than health and that health is therefore often defined in a negative fashion via its counterpart unhealth (cf. Murphy, 2008). Such a negative approach was also taken by Aristotle (Metaphysics, 1032b 4-6) where he states that it is by the absence of health that disease exists. The appeal of this approach and the reason for its prevalence might be due to a general asymmetry in ethics (cf. Tranøy, 1967) which makes us attach more weight to and thus more ready to define negative concepts such as ‘bad’ or ‘unhealthy’, rather than positive ones such as ‘good’ or ‘healthy’ (Tranøy, 1967: 355).

“I maintain, therefore, that the common sociological method is quite useless: that of first dissecting abject poverty or cataloguing prostitution. We all dislike abject poverty; but it might be another business if we began to discuss independent and dignified poverty. We all disapprove of prostitution; but we do not all approve of purity. The only way to discuss the social evil is to get at once to the social ideal. We can all see the national madness; but what is national sanity? I have called this book ‘What is wrong with the world?’ and the upshot of the title can be easily and clearly stated. What is wrong is that we do not ask what is right.” (Chesterton, 1924: 18, 33)

Although a close scrutiny of the WHO’s definition does not reveal too many merits, the WHO has nevertheless been on to something in drafting its understanding of health, namely that health can be defined without reference to unhealth and therefore is more than its absence. This has also been seen by Nordenfelt, whose definition of health is a positive one as well and is meant to be a counterpart to Boorse’s negative understanding of health. If one wants to further one’s understanding of health, one has to engage in a positive definition of health without reference to its counterpart, avoid the reductionism that a negative definition necessarily brings with it and “apprehend or assimilate the essence of the thing or its form” (Rommen, 1964: 169). Consequently, a positive definition in the full sense of the term is “something like a non-reductive ‘essential definition’” (Seifert, 1997: 16), whereas the essence of a thing comprises its essential marks, characteristics and relationships (cf. Seifert, 1997: 34). These are the properties, which the respective thing cannot change without losing its identity, without which it cannot exist or in the absence of which one would not apply the respective term. It is by virtue of its essence that a substance is what it is: “ἐστὶ τὸ τίῃν εἶναι ἐκάστου ὃ λέγεται καθ’ αὐτό” (Aristotle, *Metaphysics*, 1029 b 14)⁴³ – it is its nature. The essence of ‘man’ is the cause of a man being a man and not an animal. In the same fashion, the essence of health is the cause of health being health and not

⁴³ This translates as: The essence of each thing is that which it is said to be per se (whereas ‘essence’ is the standard English translation of Aristotle’s neologism ‘*to ti ên einai*’, which literally means ‘the what it was to be’ of a thing)

unhealth. In dealing with the idea of health in this chapter then, we are looking for “an account (lógos) that signifies an essence” (Aristotle, *Topics*, 102a) – or to be more precise: for an account of health that signifies its essence and nature, i.e. that by virtue health is what it is.

An analysis of the above-mentioned theories allows us to establish the following: health can be understood in a positive or a negative sense. But this is not to say that both options are equivalent or on par. Rather, a positive definition necessarily is superior to a negative one. If we want to find something out about an object, we have to search for a positive definition. Negative definitions can shed light only on some facets of an object. If we want to explain to a child what ‘hot’ means, it does not help to show him snow and ice and state that hot is the opposite of the temperature of snow and ice or that touching ice results in the opposite sensation as touching a hot iron. In the same fashion, we do not learn too much about women if we are told that women are not men and then hear a treatise on the nature of men. These explanations might be a good indicator and allow us to gain a first insight into the object in question. But as has been said, it only allows for knowledge of what the object in question is not. If one wants to gain any real knowledge about something it is inevitable that sooner or later one will have to engage in a positive definition.

This first finding is complemented by a second discovery. There seems to be a common element to all of the above-mentioned concepts, namely the reference to some norm, i.e. some account of what constitutes normality. There is always a standard of health. Boorse advocates an objective standard although he is wrong in supposing that this standard is a statistical instead of a natural or bio-medical norm which is accessible with the instruments of the bio-medical sciences. Nordenfelt points out that health can be measured against a subjective and a social standard, but is wrong in overemphasising these dimensions at the expense of objectivity and equating health with a mere ability. As the theories presented show, health can be measured against an objective, subjective (individual) or

social frame of reference. The second finding then is that health has an objective, subjective (individual) or social dimension.⁴⁴

It is interesting to note that Boorse proposes a negative objective definition of health, while Nordenfelt argues in favour of a subjective-social positive definition; the WHO again has developed a subjective positive definition of health. Therefore, our two findings can be combined. If we do so graphically, the resulting possible options for describing health can be summarised as follows (cf. Figure 1):

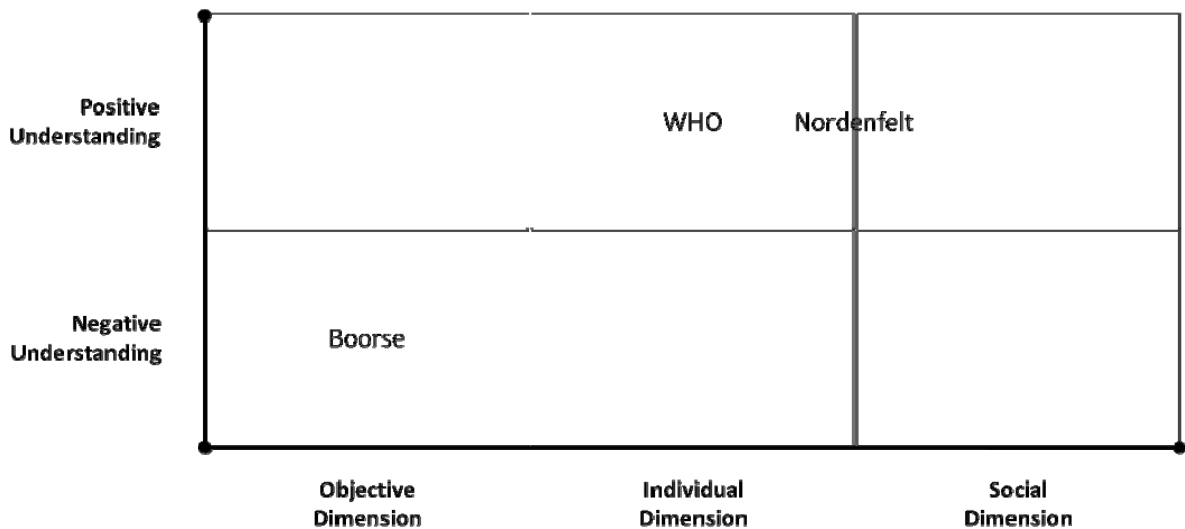


Figure 1: Understandings and Dimensions of Health and Unhealth

In what follows I shall outline the negative and positive understandings of health in their three facets or dimensions.

⁴⁴ This finding is corroborated by Rothsuh (cf. 1975: 398, 414), who states that there are three observers ('Beobachter') who understand something different by unhealthy ('Krankheit'), namely the unhealthy person, the doctor and society.

2.2.1 The Negative Dimensions of Health: The Triad of Unhealth

In contrast to the German language, which only has one word for unhealth ('Krankheit'), the English language refers to the status or process of unhealth by means of three concepts – illness, disease and sickness – that are usually used to refer to the individual, objective and social dimensions of unhealth. Although this distinction is not uncontested (cf. Nordenfelt, 1994), it “has become commonplace in medical sociology, medical anthropology, and philosophy of medicine” (Hofmann, 2002: 651).⁴⁵ Every part of this cluster – or as Hofmann (2002) calls it: “triad” – of concepts, is meant to signify important distinct, but not exclusive or disjoint aspects and facets of unhealth and human life. According to the proponents of this distinction, which was initially introduced by Andrew Twaddle (1968; also cf. 1994), unhealth is observed and experienced as an instance of one of these categories. Therefore, the illness-disease-sickness-triad is a useful tool for both empirical investigation and philosophical reflection. But what is the exact difference in meaning of these terms?

2.2.1.1 *Illness*

The first term, ‘illness’, is generally used to refer to a subjectively experienced and undesired state of unhealth. It “corresponds to the experience of having something wrong with oneself and having something wrong within oneself in this case is to have a condition wherein the person is suffering or has increased probability of suffering some evil whose cause is indistinct from his or her body” (Lavados, 2002:192). The most evident of such evils are pain, weakness, dizziness, numbness, disability and death. Illness thus is a feeling or a change in feeling, a subjectively experienced

⁴⁵ Lavados suggests that the term ‘injury’ be introduced, since the notion of injury is distinct from disease, illness and sickness: “when one is suffering from, e.g., a broken arm, one is not necessarily ill” (Lavados, 2002: 193). An injury does not constitute a principle of illness. The general meaning of injury is “a disruption of the integrity of a tissue or an organ by external forces that are usually mechanical but also chemical, electrical, thermal or radiant” (Jennings, 1991: 976).

and interpreted state of unhealth; it is entirely personal and interior to the respective individual. According to Twaddle, “it consists of subjective feeling states (e.g. pain, weakness), perceptions of the adequacy of their bodily functioning, and/or feeling of competence” (Twaddle 1994: 8). Such undesired differences in feeling warrant an individual’s search for help by consulting a doctor to seek relief of the respective symptoms.

2.2.1.2 Disease

The quality, which identifies disease, is some deviation from a biological norm as acknowledged, defined and categorised by bio-medical science and pathology. Disease signifies a condition of the body as a whole or one of its parts, which impairs normal functioning and is typically manifested by distinguishing signs and symptoms which result in “an actual or potential reduction in physical capacities and/or a reduced life expectancy” (Twaddle, 1994: 8). A disease, therefore, is what is able to cause such a condition or that condition itself. Whereas illness is rather subjective, “there is an objectivity about disease which doctors are able to see, touch, measure, smell” (Marinker, 1975: 82). A doctor is expected to transfer the subjective symptoms of illness into the objective disease categories offered by bio-medical science. As we know, this is not always possible because the language of medicine is not always in a position to describe illness as disease: “Sometimes illness exists where no disease can be found. Traditional medical education has made the deafening silence of illness-in-the-absence-of-disease unbearable to the clinician. The patient can offer the doctor nothing to satisfy his senses - he can only bring messages of pain to the doctor, from an underworld of experience shut off for ever from the clinical gaze.” (Marinker, 1975: 82) Lavados manages to express the relation between illness and disease in a more essential manner: disease “seems to refer to the ‘entity’ which is the principle of the particular experience of infirmity signified by the word ‘illness’” (Lavados, 2002: 192) whereas ‘principle’ is to be understood in an Aristotelian sense as that from which something derives its being, becoming or knowledge (cf. Aristotle, *Metaphysics*, Book V, 1; 1013a). Disease, therefore, is the principle of illness

1. “as that which explains or causes specific clinical phenomena (that from which illness derives its being);
2. [...] as the origin of a process of change (that from which illness derives its becoming);⁴⁶
3. [...] as simply that which serves to gnoseologically classify a specific clinical entity (that from which the knowledge of illness is derived).” (Lavados, 2002: 192)

Disease is the cause that produces the clinical symptoms; in turn, illness specifically refers to an individual’s personal experience of his disease or the symptoms in which the disease manifests itself. Disease is a disorder or the cause of disorder of a certain sort within the functional range of ongoing life; as such, it can end life prematurely. However, it should be emphasised that a symptom must not be mistaken for a disease; it is indicative of a disease, but should not necessarily be equated with it. A fever is not necessarily the disease, but the body’s means to end the disease and counter an infection. We must also be careful not to take bacteria or viruses to be diseases; as Antoine Béchamp proved and as his counterpart Louis Pasteur admitted toward the end of his life, human beings are not sterile units that become unhealthy once a bacteria or virus enters it. Rather, viruses and bacteria mean nothing; the soil is everything. Germs could be considered the result and not the cause of or the disease itself. Germs cannot cause anything, unless they find a suitable soil in which to live, i.e. feed, grow and multiply.

2.2.1.3 Sickness

The third facet or dimension of unhealth is sickness. While illness is a particular subjective experience as well as the interior and personal dimension of unhealth and disease the objective principle of illness, sickness is related to the way in which others interpret the conditions of an individual. It is the external and public dimension of unhealth. It is a social

⁴⁶ Meaning as characterised by the appearance and development of symptoms and signs that follow a specific course in time.

label or social status of having a health problem, which an individual is given by others when he fails to perform his social activities or functions: “Sickness is a social identity. It is the poor health or the health problem(s) of an individual defined by others with reference to the social activities of that individual” (Twaddle, 1994: 11). If an individual is not able to fulfil certain present and future social obligations in keeping with his social standing (e.g. going to work), society considers him sick and if the individual is sick, he occupies a certain social role. Irrespective of the reality of the basis for the claim to the role, i.e. whether it is actually based on illness and/or disease, once an individual is labelled sick, society entitles him to certain rights (such as economic assistance, medical treatment and/or sick leave) not shared by others but also imposes certain obligations (e.g. quarantine). Sickness is “a bargain struck between the person henceforward called ‘sick’, and a society which is prepared to recognize and sustain him” (Marinker, 1975: 83). The security of the individual’s social status as sick depends on a number of factors, not least on the existence of the objective phenomenon disease; sickness based on subjective experience (i.e. illness) alone is a rather uncertain status.⁴⁷

2.2.1.4 Manifestations of Unhealth

As has been shown, the triad model allows for three levels of analysis (subject, bio-medical sciences and society) of the negative understanding of health and thus represents personal, objective and social perspectives of unhealth: “Disease is negative bodily occurrences as conceived of by the medical profession. Illness is negative bodily occurrences as conceived of

⁴⁷ This third dimension of unhealth corresponds to what Murphy (2008) describes as the constructivist notion of unhealth, which is mainly concerned with “tracing the social processes by which categories are formulated and changed over time” and which stipulates that “we look for the biological facts that ground disease judgments selectively, based on prior condemnations of some people and not others”. Conrad, for example, writes that he is “not interested in adjudicating whether any particular problem is really a medical problem [...] I am interested in the social underpinnings of this expansion of medical jurisdiction” (2007: 7f).

by the person himself. Correspondingly, sickness is negative bodily occurrences as conceived of by the society and/or its institutions.” (Hofmann 2002: 657) Correspondingly, “illness explains the person’s situation to himself, disease permits medical attention, and sickness frees him from ordinary duties of work and gives him the right to economic assistance” (Hofmann 2002: 658). While illness (phenomenologically speaking) is the first facet of unhealth, thereby enjoying some primacy over the other two concepts, logically and chronologically speaking disease comes first. There is a theoretically ideal temporal pathway between the three dimensions of unhealth: the paradigmatic case occurs when a physiological disequilibrium (disease) causes some symptom, which the subject experiences as negative (illness) and which is socially recognized as sickness⁴⁸. Since using graphs to support theoretical trains of thought often furthers understanding, the triad of unhealth and the interrelation between its concepts can be summarised graphically as follows (cf. Figure 2:):

⁴⁸ As Hofmann has shown (2002: 665ff) this temporal pathway is an ideal one but too simplistic since the three concepts can vary over time and influence each other: The attribution of sickness is influenced by distinctions made, processes described and entities applied in the medical profession (as e.g. since infertility has become treatable as a disease, it has – at least in some countries – be acknowledged as sickness). The experience of illness is affected by medical knowledge as the personal experience of illness and is influenced and sensitised by medical terminology). The experience of illness influences the activities of the medical profession (by initiating research into the sources of pain, for example). Disease is influenced by the social status of a sickness (by triggering research and influencing medical education).

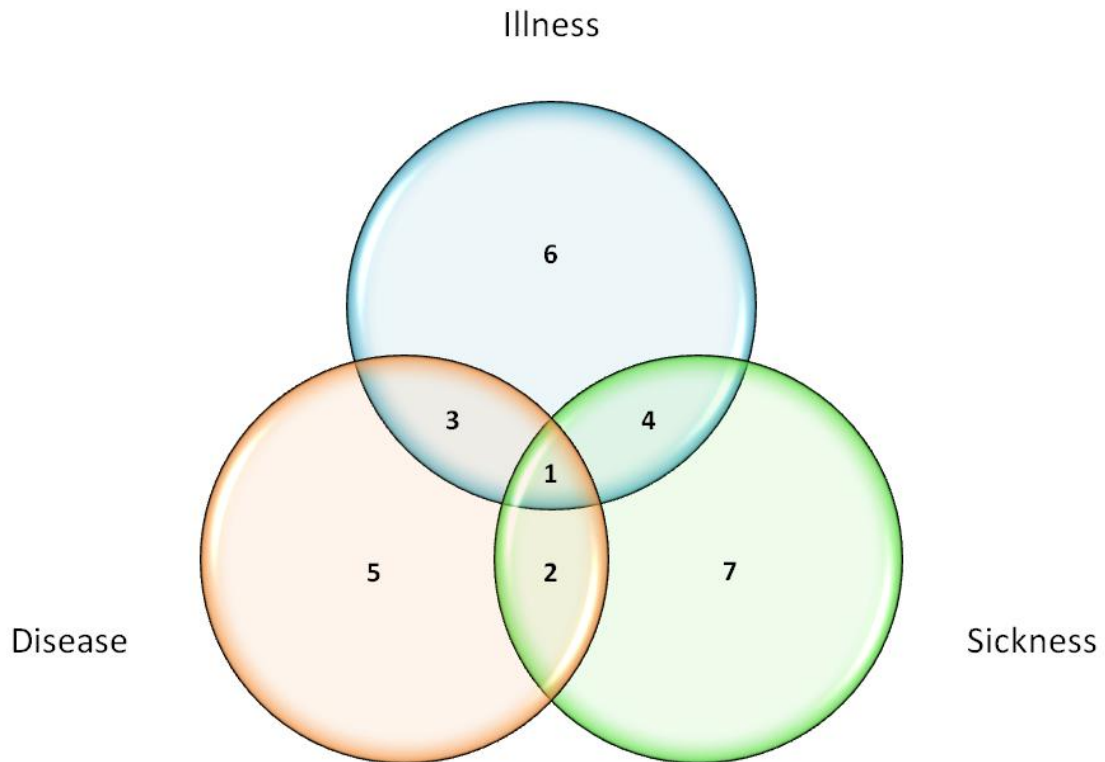


Figure 2: The Triad of Illness, Disease and Sickness
(Own illustration; adapted from Hofmann, 2002: 653)

Ideally speaking, unhealth is a sickness as well as a disease as well as an illness; this is depicted by the overlap resulting in area 1. However, as we shall see, this does not necessarily have to be the case. Illness, disease and sickness can also occur as separate phenomena and in several combinations of overlap. The following combinations and pure forms are possible (cf. Hofmann, 2002: 658-664):

- Area 2: Occurrence of disease and sickness but not illness
An example would be high blood pressure. A doctor recognises and diagnoses a disease, i.e. finds something wrong with an individual's health and society has come to acknowledge this condition as a sickness, thereby entitling the individual to treatment and economic support. However, the individual does not experience anything wrong with himself.
- Area 3: Occurrence of disease and illness but not sickness

Examples are tooth decay and the common cold. While the medical profession recognises these conditions as objective pathologies (i.e. diseases) and while these conditions certainly result in individual experiences of pain and discomfort, “they do not normally qualify for sickness” (Hofmann 2002: 658).

- Area 4: Occurrence of illness and sickness but not disease
Pregnancy is not a disease in the sense of an objective pathology, but can be experienced as illness (e.g. morning sickness) and gives the pregnant woman the right to stay at home (at least in the final stage) and to some form of financial support.⁴⁹
- Area 5: Condition of pure disease (i.e. occurrence of disease but not illness and sickness)
Moderate hypertension is a disease, but is not usually recognised by the individual or society as such. Another condition that falls into this category is obesity or, as mentioned by Hofmann (2002: 658), lactose intolerance in areas where people are not used to drinking milk.
- Area 6: Condition of pure illness (i.e. occurrence of illness but not disease and sickness)
A pure form of illness is every condition, which allows for an individual experience of discomfort, but does not qualify for or allow medical intervention and does not qualify for an adjustment in social status. Examples are “a general feeling of dissatisfaction, unpleasantness or incompetence, anxiety or melancholia” (Hofmann 2002: 659).
- Area 7: Condition of pure sickness (i.e. occurrence of sickness but not illness and disease)
Pure forms of sickness are the area of social stigma: “Delinquency, dissidence, homosexuality, skin color, and masturbation may count as examples of cases where social

⁴⁹ Interestingly, this has not hindered the medical establishment from hospitalising pregnant women as if they were suffering from a disease.

institutions have entitled people to have the sick role, but where the person has not felt ill and the medical profession has not recognized any negative bodily occurrences” (Hofmann 2002: 659).

I am well aware of the fact that some areas – especially those where only one of the pure forms is valid (Areas 5, 6 and 7) – present problems and cause perplexities with respect to a clear attribution of phenomena of unhealth.⁵⁰ Such questions call for special attention and deserve further reflection; however, this is not the place to engage in such reflections.

Summing up our deliberations so far, we could state that viewed from a negative perspective, health is the absence of illness, disease and sickness. However, we also have to recognise that these three concepts are not on the same level. The *primus inter pares* undoubtedly is disease, which is the principle of illness as well as of sickness. If sickness does not have an objective or at least a subjective foundation, it easily becomes an unreasonable and arbitrary social stigmatisation. We are not unhealthy just because society says so; without illness and disease – although conceptually possible – there is no sickness. While sickness is the most subordinate concept, the relation between illness and disease is rather complex. Although disease is the principle of illness, the fact that some

⁵⁰ Take area 5 for example: consider a case (e.g. obesity) where there is something objectively wrong but the individual does not perceive himself as ill and society does not recognise the respective disease as sickness and as basis for an alteration in social status. Should medicine intervene? If so, would this not lead to the medicalisation of society? Or take area 6: What about invisible and contested illnesses, which are not recognised by medical science and society? Are we to let these people suffer? However, cases where two of the attributes of the triad overlap are problematic as well: cases of disease and illness, but not sickness “are subject to pressure from professionals and interest groups for support” (Hofmann, 2002: 660). Cases of illness and sickness, but not disease put pressure on medical research to find causes and cures for subjectively experienced and societally acknowledged conditions; cases of disease and sickness, but not illness pose the question of how to deal with predictive, as well as genetic testing and how and whether to communicate a bad test results.

illnesses cannot be explained by the bio-medical sciences does not allow for the conclusion that there is no disease. For, it could be the case that our methods of bio-medical scientific inquiry may not be developed enough yet. We need to be careful not to make the same mistake as Boorse, who tries to over-objectify unhealth and in doing so excludes illness. If disease is the principle of illness, then “to consider the former (disease) while disregarding the latter (illness) is quite philosophically dangerous” (Lavados, 2002: 197). Illness can serve as a balance for the over-objectification and absolutisation of disease – and vice versa. An illness can be an incentive for research and the discovery of a new disease, while diseases make us aware that we need to interpret and treat our illnesses in a certain way.

So far, so good. As already mentioned above however, these insights cannot help us in gaining any positive knowledge about health “because health is immeasurably more than just the absence of disease” (Sigerist, 1996: 204). In order to fill this gap, the next section will deal with a positive understanding of ‘health’.

2.2.2 A Positive Understanding of Health: The Triad of Health

“When health is absent, wisdom cannot reveal itself,
art cannot become manifest, strength cannot fight,
wealth becomes useless and intelligence cannot be applied.”
Herophilos, Alexandrian physician

In pondering the question of life, it has been said that one should realise and recognise one’s limitedness in exactly defining life through anything else but also that this indefinability does not necessarily imply unknowability. We were still able to gain some knowledge about life by means of an analysis of its essential characteristics. Similarly, although we might not be able to define health exactly through anything else (many great minds have tried to do so and failed), we might still analyse its essential characteristics. A first step in doing this has already been introduced above. As the analysis of the most prominent theories of health has revealed, both the negative and positive understanding of health have three dimensions, namely an objective, subjective and social dimension.

While this finding has already been translated into the triad of unhealth, it is interesting to note that it has not been applied to health itself. Medical philosophy, therefore, does not feature a triad of health, which tries to capture the positive understanding of health. In what follows, I want to propose a three-tiered positive understanding of health and thereby fill the gap. Like the triad of unhealth, the ‘Triad of Health’ has an objective, subjective and social dimension. Unlike the triad of unhealth, however, neither English, German nor any other language I know, contain three words, which convey the meaning of these three dimensions exactly. Objective unhealth is disease and subjective unhealth is illness; but there is no term for objective health or subjective health. To make up for the lack of terminology, I propose to name the objective dimension of health ‘bio-medical health’, the subjective dimension ‘perceived health’ and the social dimension ‘social health’. Health can, therefore, be observed and experienced as an instance of one or more of the positive dimensions listed in the third column of the figure respectively table below (cf. Figure 3):

Triad of Unhealth (Negative Understanding of Health)	Dimension	Triad of Health (Positive Understanding of Health)
Disease	Objective	Bio-Medical Health
Illness	Subjective	Perceived Health
Sickness	Social	Social Health

Figure 3: The Triads of Unhealth and Health

Following is an analysis and discussion of each of the positive dimensions.

2.2.2.1 Perceived Health

The term ‘perceived health’ is used to refer to the subjectively experienced state of health. The problem with this experienced state of health is that we cannot say much about it. We are healthy if and when we

are feeling well and consider ourselves whole and intact. However, there is no specific feeling or state of perception, which we can ascribe to health. Health is generally lived without a clear awareness of it; we only experience an evident lack of health. If we are healthy we usually do not experience anything; with illness we feel pain, weakness, dizziness, numbness or disability. How do we feel health? We usually do not because health is life without symptoms or to use a renowned expression: “life lived in the silence of the organs” (René Leriche; also cf. Gadamer, 1993). Health is not experienced “until an illness affects us and we long to regain good health” (Mordacci, 1995: 477). As far as our perception is concerned, health is a state of affairs which is often experienced only when it is or after it has been lost, if something is wrong with us – ‘wenn uns etwas fehlt’ (cf. Gadamer, 1993: 74). Health has an “enigmatic character” (Gadamer, 1993: 133) and only becomes apparent if we experience a “nicht mehr übersehbare Störung” (Gadamer, 1993: 77). It is only an illness, which makes us realise that we had something, which we have lost. A pure disease cannot have the same effect on us since it does not – at least conceptually – necessitate any recognisable symptoms. We can feel perfectly healthy although there is something objectively and verifiably wrong with us. Perceived health thus is the opposite of illness, i.e. the subjective perception of unhealth.

2.2.2.2 *Bio-Medical Health*

Like disease, there is objectivity about bio-medical health, which we are able to see, touch and measure. Whereas disease is the deviation from a biological norm, bio-medical health – understood in a broad sense as physical, mental and health of the soul – means that life happens within the parameters of the natural-biological norm as acknowledged, defined and categorised by objective bio-medical science.⁵¹ An individual who is

⁵¹ I understand that there is no uncontested bio-medical norm. Rather, a determination of who is healthy will differ depending on the standard, that is, the exact bio-medical model of health used.

healthy in the bio-medical sense is one “whose biology works as our theories say it should” (Murphy, 2008). Bio-medical health is the actualisation of our objectively definable natural-biological norm, which is an end and thereby intrinsically as well as instrumentally good for us; health is the flourishing of our nature. While disease manifests itself by distinguishing signs and symptoms, bio-medical health manifests itself through the absence of any symptoms, but can also be defined in a positive fashion by establishing certain parameters, which are indicative of bio-medical health. The frame of reference for bio-medical health is not statistics; the norm is not the average, but what is natural: “The state of an organism is theoretically healthy, i.e., free of disease, insofar as its mode of functioning conforms to the natural design of that kind of organism” (King, 1945: 493f). The proper and healthy bodily structures and processes of human beings are necessarily geared towards the natural norm of human beings. The claim that a bodily process or function, e.g. the immune system, is functioning successfully presupposes “(a) that it is possible for it to function unsuccessfully and (b) that there is an objective way of differentiating success and failure” (Lennox, 1995: 507). If an immunologist makes the judgement that his patient’s immune system is functioning successfully, he does so based on a particular standard of value. As Lennox (1995: 507) argues, this standard is the life of the organism. It could be said then, that life is the fundamental goal toward which organic activity is oriented. Health, therefore, “identifies, as a value, the state in which all of an organism’s goal-directed systems are contributing to this goal” (Lennox, 1995: 507). Disease fails to make this contribution. Thus, the objective dimension of health should be understood as “the condition of a living thing whose biological functions are operating in a way that promotes uncompromised living, holding the organism’s flourishing life as the standard” (Sade, 1995: 523). This flourishing life and natural design and norm are the research object of the bio-medical sciences, whose aim it is to uncover it in a gradual process of understanding as well as progression and accumulation of knowledge. As disease is the principle of illness, bio-medical health is the cause of perceived health, i.e. that from which perceived health derives its being. So, while health undeniably has a subjective aspect, we must not reduce health to subjective desires and feelings as Nordenfelt does. Health should

rather be conceived as an objective natural norm, which is not necessarily absolute, but sufficiently stable to allow for subjective specification within a certain range. The basic character of health is determined “by the general nature of the human person modified through its instantiation in particular human subjects” (Donohue-White & Cuddeback, 2002: 182).

2.2.2.3 *Social Health*

The third facet or dimension of health is social health. In this context, social health does not refer to the characteristic of a society but that of an individual. Therefore, it is not the health of a society, but the societally related aspect of individual health. Social health is meant to signify the standard by which others, i.e. the environment or society, interpret and define the condition of health. It refers to the external dimension of health and covers what society and social norms consider and determine to be health; this attitude is influenced by a society’s values at a given time, e.g. a society’s current attitude to the environment or the extent to which health technology is perceived as something positive. Some decades ago, homosexuality was considered a disease; today many take it to be a normal and healthy sexual orientation. This shows that social health also mirrors cultural, social and political values as well as the influence and power of modern mass media.

2.2.2.4 *Manifestations of Health*

To sum up: as the triad model of unhealth, the triad model of health allows for three levels of analysis and thus represents personal, objective and social perspectives of health and can be summarised graphically as follows (cf. Figure 4):

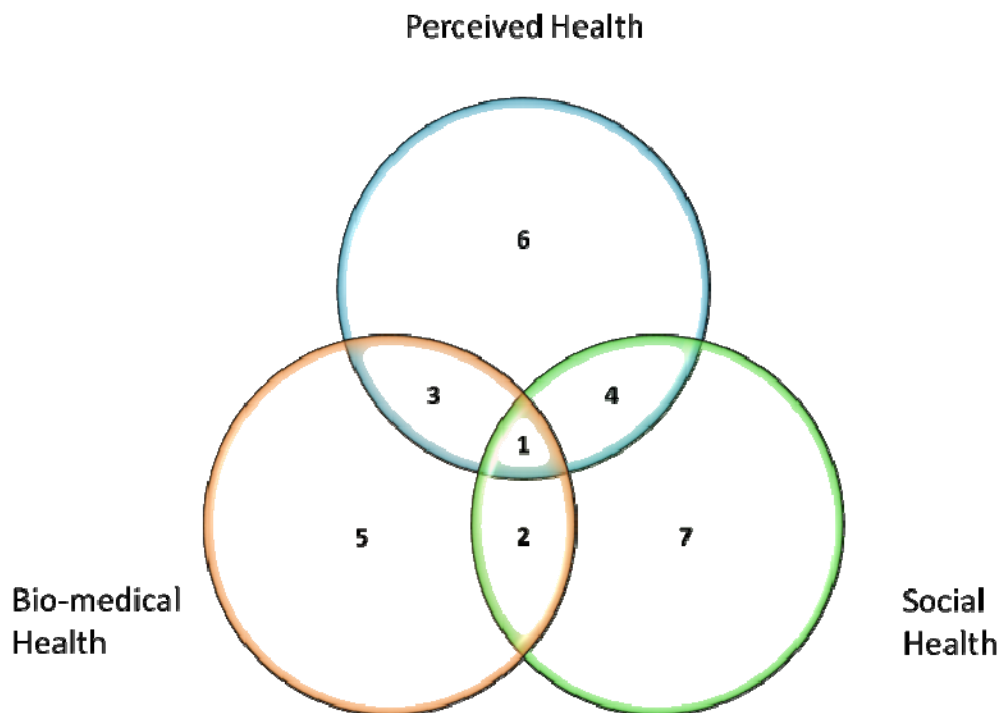


Figure 4: The Triad of Health

Ideally, social health, bio-medical health and perceived health overlap (area 1). However, this does not necessarily have to be the case; social health, bio-medical health and perceived health can occur as separate phenomena and in several combinations. The following combinations and pure forms are (at least conceptually) possible:

- Area 2: Occurrence of bio-medical health and social health but not perceived health
This area covers every condition, in which an individual experiences something wrong with himself, but neither is his condition acknowledged as unhealthy by society nor are doctors able to recognise and diagnose a disease. Cases like these often serve as stimulus to conduct further bio-medical research. This area actually corresponds to area 6 of the triad of unhealth, i.e. a pure form of illness.
- Area 3: Occurrence of bio-medical health and perceived health but not social health

This area corresponds to area 7 of the triad of unhealth, i.e. it represents a pure form of sickness. In such cases, an individual feels healthy and bio-medical science cannot find anything wrong with him. However, society sees him as unhealthy. As has been said above, pure forms of sickness are the area of social stigma.

- Area 4: Occurrence of perceived health and social health but not bio-medical health
Obesity or moderate hypertension are diseases (i.e. constitute a lack of bio-medical health) but are usually not recognised by the individual or society. This area corresponds to area 5 of the triad of unhealth, i.e. it represents a pure form of disease.
- Area 5: Condition of pure bio-medical health (i.e. occurrence of bio-medical health but not perceived health and social health)
This area corresponds to area 4 of the triad of unhealth. An example would be pregnancy, which is not a disease in the sense of an objective pathology. However, it can be experienced as illness (e.g. morning sickness) and – at least in the final stage – is considered a sickness (i.e. gives the pregnant woman the right to stay at home).
- Area 6: Condition of pure perceived health (i.e. occurrence of perceived health but not bio-medical health and social health)
Examples would be high blood pressure or a diagnosis of the early stages of cancer: a doctor recognises and diagnoses a disease and society has come to acknowledge this condition as a sickness, but the individual is not experiencing anything wrong with himself. This area corresponds to area 2 of the triad of unhealth.
- Area 7: Condition of pure social health (i.e. occurrence of social health but not perceived health and bio-medical health)
This area corresponds to area 3 of the triad of unhealth. Examples are tooth decay and the common cold, which are objective pathologies (i.e. diseases), and certainly result in individual experiences of pain and discomfort. However, they do not normally qualify for sickness. Such afflictions would thus be examples of somebody being healthy from a social perspective.

The core message of the triad is that health can be looked at and defined from a subjective, objective and social perspective. There are of course many theories which have opposing ideas of what exactly constitutes social or bio-medical health; and when it comes to perceived health there are as many theories as there are individuals with the ability to perceive. However, this is not the place to get lost in these secondary areas of conflict. The question we have to answer with respect to the scope and purpose of this thesis is whether this classification scheme allows for a sufficient and satisfactory understanding of health. If we compare these findings with the theories of health introduced above, we will soon see that this account of health is less concrete and could even be said to be a meta-level theory. At the same time, it serves as a frame of reference, which allows for a classification of the theories above. The WHO, Boorse and Nordenfelt have all gotten one or some parts of the puzzle right, but have regrettably missed the big picture. The merit of the model introduced so far is that it allows for a holistic, yet structured approach towards health.

2.2.3 The Concept of Health as Norm and State: Room for Improvement

So, where does this leave us? We now know that health can be looked at from a positive or negative angle and that it has three dimensions (perceived, bio-medical and social), which establish norms against which the individual is measured and against which his state of health is judged. If he lives up to these standards he is deemed healthy, if not then he is unhealthy. Although the two understandings (positive/negative) and the three dimensions seem to be on the same level and on par with each other, this is not the case. We clearly have to favour the positive angle on health. In addition, with regard to the three dimensions of positive health, we have to be aware of the fact that subjective health is concerned with individual norms of feeling well, bio-medical health with the discovery of an objective norm of health and social health with the results of societal processes of opinion formation, which then become societal norms. As has been shown above, however, bio-medical health is the cause and principle

of perceived health – as disease is the principle of illness. Therefore, bio-medical health, which is the actualisation of our objectively definable natural-biological norm, has to be given primacy– although this primacy must not end in tyranny, which would be the case if an illness, i.e. a lack of perceived health, were to be ignored and not taken as a stimulus for further research.

Closely scrutinising the three dimensions (subjective, objective or social) of positive health reveals that each of them has two facets: health is both a norm and something we possess or a state of being. Health as norm gives us the standard of what it would mean to be in perfect health. As Twaddle points out, however, perfect health is “an ideal toward which people are oriented rather than something they expect to attain” (Twaddle, 1974: 31) – even the healthiest individual gets a cold from time to time. Since we all fall short of this ideal virtually all the time, Twaddle (1974) suggests that there is a range of less than perfect health, which is considered normal or at least acceptable to either the individual, bio-medical science or society.⁵² Consequently, health as norm has to be subdivided into normal and perfect health. Health is not a narrow ideal that we usually fail to reach but becomes a continuum, which ranges from perfect health to good health and normal health to bad health, whereby the latter borders on unhealth. The idea of health as possession is meant to confer that health can also denote a state (‘Zustand’) we are in and which is measured against and judged as good or bad with respect to social,

⁵² Twaddle, however, is not the first to suggest this distinction. In 1795, Christoph Wilhelm Hufeland had pointed out the difference between absolute health (‘absolute Gesundheit’) and relative health (‘relative Gesundheit’): “Absolute Gesundheit heisst ein durchaus vollkommener regelmässiger und harmonischer Zustand der Organe, Kräfte und Functionen des menschlichen Wesens, – gleichsam ein Ideal der Gesundheit. – Diess ist ein Zustand, der sehr selten, wenigstens in den Klassen der verfeinerten und verkünstelten Menschen, angetroffen wird, und, nach dieser Bestimmung, wäre jetzt der allergrösste Theil der civilisierten Menschen krank. Aber es gibt eine relative Gesundheit, und das isst, was wir gewöhnlich Gesundheit nennen. Das heisst, der Zustand der Organe, Kräfte und Functionen kann zwar etwas vom naturgemässen abweichen, aber die Abweichung ist nicht von der Art, dass sie die Verrichtungen wirklich stört, oder als Abweichung percipiert wird.” (1975: 19)

individual and/or objective norms. All definitions and explanations of health that we have introduced so far have been based on this common and fundamental assumption. Both Boorse and the WHO explicitly use the term ‘state’ in their definitions; and although Nordenfelt does not mention this term, he implicitly thinks of health as a state, namely the state of having the first- or second-order ability to realise one’s vital goals. According to the health-as-state-position, health is measured at some point in time (t_1); the results are then compared with the subjective, bio-medical and/or social norm. Depending on where on the yardstick the result comes to rest, the respective individual is either considered perfectly healthy, healthy or unhealthy. Thus, the triad of health only allows for a classification of health as a state, whereas we should keep in mind that both health as norm and health as state are two facets of the same understanding of health, which I call the static concept of health. These thoughts are depicted in Figure 5::

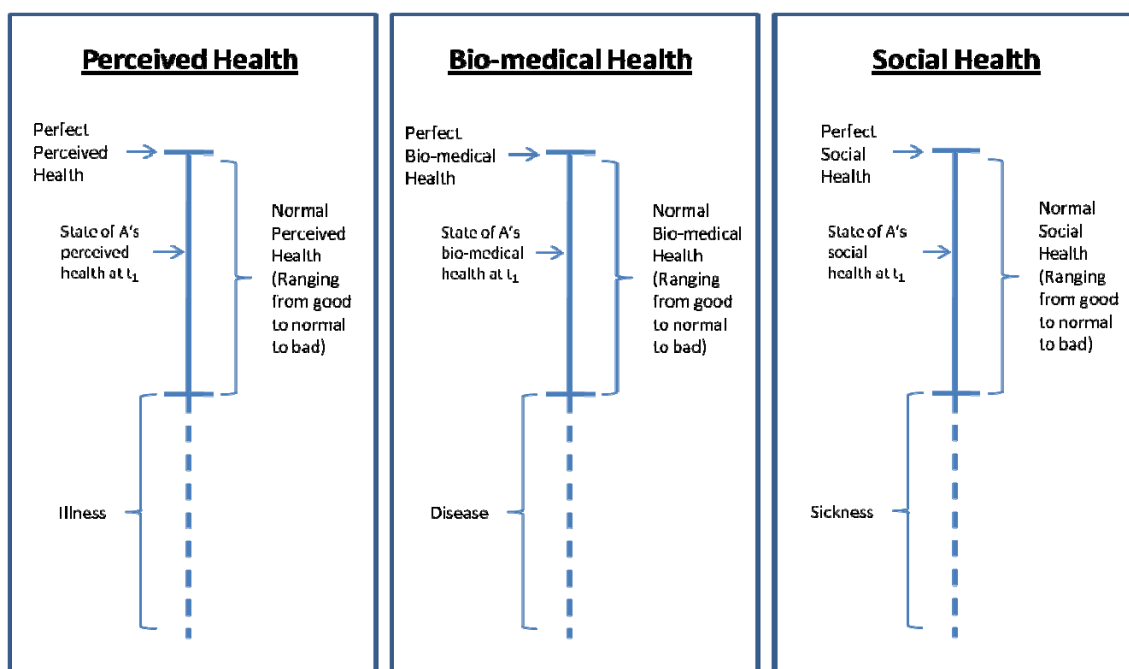


Figure 5: The Static Concept of Health: Health as Norm (perfect, good, normal, bad) and State

One might be tempted to stop here and state that the essential aspects and dimensions of health have been chiselled out; this is what most

theorists do. Nevertheless, I do not think that we are done yet and have reached the end of our endeavours in understanding health. This is not all there is to health. That health is more than just a state qualified by some norm can be easily seen once we try to answer the question of how this state comes about. Health and unhealth have a history, their changes over time are not a given but influenced and determined by a variety of factors, which are supportive of (protective factors) or detrimental to (risk factors, stressors) our health and which – at least to a certain degree – can be influenced by us. Explaining health just as a state completely disregards the dynamic and behavioural aspects of health. Our health status is just the tip of the iceberg and the result of previous processes. An individual who was healthy a few days or hours ago can now be unhealthy; he can also become healthy again a few days or hours in the future. A static theory cannot compensate for or explain these changes; it can give us snapshots of an individual's health status over time, but it has no means of explaining the changes as well as their why and how. If we want to learn about the full essence of a positive understanding of health we have to look further.

2.3 A Complementary Understanding of Health: Health as Good Habit

As we have seen, a static theory of health and unhealth is deficient, since it cannot account for the changes between and within health and unhealth. Consequently, what our inquiries have turned up so far cannot be the essence of health, since these results only reveal one aspect of the enigma, which is health. A deeper aspect of health, its truly essential characteristic, is still to be uncovered. This uncovering is what this chapter shall be devoted to. As mentioned above, it is by virtue of its essence that a substance is what it is (cf. Aristotle, *Metaphysics*, 1029 b 14; also cf. Seifert, 1997: 34); according to this definition, the essence of health is the cause of health being health and not unhealth or more precisely: of health being and remaining health and not becoming unhealth. So, the essence of health is what perpetuates our health and not only some status at a certain point in time. In order to reveal the complete nature of health, we have to

enrich our account of health with a component, which explains changes in health status. Without such perpetuating component, a theory of health – and especially the static theory introduced above – cannot be considered complete. We are thus looking for an answer to the questions: What makes health remain health? What makes an individual stay healthy? The first step in finding the answer is to gain an overview of the determinants of health, which are either supportive of (protective factors) or detrimental to (risk factors, stressors) our health.

2.3.1 Determinants of Health

At least since Hippocrates' essay 'De Aere, Aquis et Locis' ('On Air, Waters and Places') written in 400 B.C., humans have been aware of the fact that health is multi-factorial, i.e. the result of interactions of factors and multi-factorial causation. It is common knowledge and common sense that our health is affected by a variety of factors, which may occur together and/or in different degrees. When we speak of determinants of health, this is not meant to imply a belief in determinism, but rather that these factors affect an individual's health either as risk factors (detrimental to health) or protective factors (beneficial to health). Determinants of health are factors or conditions, which influence and have implications for health. So, what are those determinants?

To cut a long story and discussion short: a review of the relevant literature (Lalonde, 1974; Evans & Stoddart, 1990; Dahlgren & Whitehead, 1991a: esp. 11; Institute of Medicine, 2000: 43; Committee on Assuring the Health of the Public in the 21st Century, 2002: 46ff, esp. 52; Scutchfield & Keck, 2002: 47ff; Barton, 2005; Barton & Grant, 2006) shows that the factors that play a primary role in influencing an individual's health are:

- Individual biology
 - Age
 - Sex
 - Race

- Constitutional factors/ genetics (such as body size, special abilities, resistance and susceptibility to disease, genetic diseases, general robustness)
- ...
- Individual behaviour
 - Lifestyle choices
 - Diet and nutrition
 - Physical activity
 - Sexual behaviour
 - Work-life balance
 - Substance abuse and addictions
 - Religion
 - Approach to safety (risk averse, risk neutral or risk seeking)
 - ...
- Social environment (living and working conditions, 'Interaktionskontext')
 - Social, family and community networks (mutual support from family, friends, neighbours and local community)
 - Cultural factors
 - Values and customs
 - Historical traditions
 - Behavioural characteristics and beliefs common to a nation or community
 - Religion
 - Socioeconomic status
 - Education
 - Income
 - Occupation
 - Housing situation
 - Work-related factors
 - Employment status,
 - Work environment and other occupational factors (e.g. stress, tight deadlines etc.)
 - Food production (agricultural production issues, home production, access to food, distribution of food, diversity of food available, food safety, ...)

- Local economy (wealth creation, markets)
- Medical care/public health (care) services
- Waste
- Urbanisation
- ...
- Physical environment
 - Natural
 - Food
 - Water
 - Air
 - Land, natural habitats
 - Climate
 - Radiant energy (solar ultraviolet radiation)
 - Existence of beneficial (e.g. iron, iodine, copper) and non-existence of harmful chemical elements (e.g. lead, mercury, cadmium)
 - Existence and exposure to beneficial organisms (e.g. bacteria of the gastrointestinal tract, symbionts) and non-existence of harmful biological microorganisms (e.g. pathogenic microorganisms)⁵³
 - Existence of essential dietary nutrients (fats, carbohydrates, proteins, minerals and vitamins derived from plant and animal sources)
 - ...
 - Built
 - Buildings, places, streets
 - Transportation (safety, pollution, traffic noise, ...)
 - Public sanitation

⁵³ It should be pointed out that “if humans are totally shielded from exposure to pathogens such as common cold viruses, they lose their immunities and can be overwhelmed when they are eventually reexposed” (Scrutchfield & Keck, 2002: 48). As with almost everything that pertains to the determinants of health, the following holds true: health is optimal when the right balance is struck between excess and deficit.

- Energy production
- Other dimensions of urban planning
- ...
- Structural factors such as general social, economic, cultural, technological, legal and environmental conditions, which usually can only be changed by taking political action at the global, national, state and/or regional level

These determinant factors of health are not necessarily discrete as one determinant can influence one or more other factors to a higher or lesser degree and interact with them along complex and dynamic pathways to produce health. Furthermore, individuals are unlikely to have direct control over many of these determinants. Therefore, along a first dimension, these factors can be grouped according to whether the respective factor can be directly influenced or not influenced at all. The distinction between influenceability and uninfluenceability, however, is not as black and white as it might seem at first sight. While there are factors that we can clearly influence (our own behaviour) and those we cannot influence (such as sex, gender, age or structural conditions)⁵⁴, there are factors we can influence indirectly, although our degree of influence varies (we have a very limited influence on e.g. climate change, but are in a better position to shape local policies). This first dimension should thus be understood as a continuum, which ranges from complete direct influenceability on one end to indirect influenceability to complete uninfluenceability on the other end of the spectrum. Along a second dimension, we can distinguish between macro-level (e.g. social, economic, cultural, and environmental), mid-level (e.g. working conditions, housing) and micro-level (e.g. behaviour, sex) factors.

⁵⁴ It has to be annotated that the latest scientific research in the field of epigenetics has shown that our genes do seem to be uninfluenceable and an unchangeable given. Rather, we can and do influence the way our genes work, e.g. by our behaviour (cf. Spork, 2009). Therefore, genetics has to be taken not as an uninfluenceable, but a directly influenceable determinant of health (although the exact degree of influenceability can be questioned).

Combining these two dimensions gives us the following matrix (cf. Figure 6:):

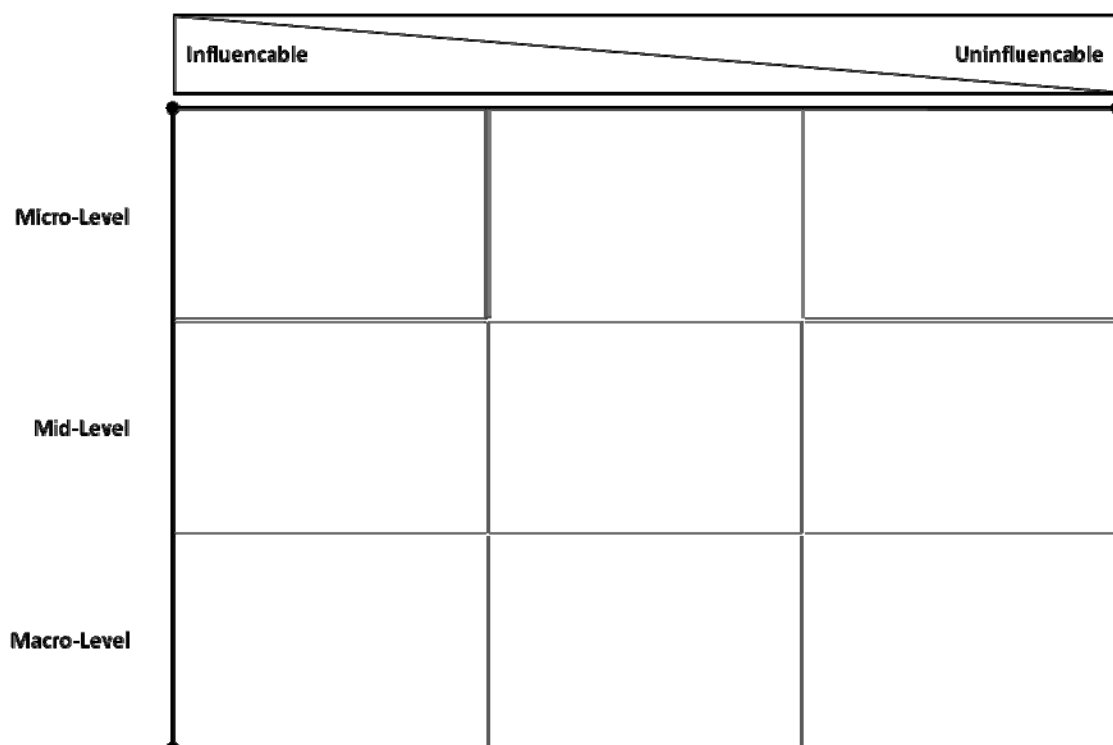


Figure 6: An Organising Matrix of the Determinants of Health

It should be noted that there seems to be a correlation between the three different levels of determinants and their influenceability. Micro-level determinants are much more susceptible to our individual influence than mid-level or macro-level determinants and mid-level determinants are more susceptible to our influence than macro-level ones. An individual is clearly in a better position to influence his own behaviour than he is to influence his working conditions and only has a negligible chance of determining the social or environmental factors, which influence his life. Since it is not within the scope of this thesis to assign all of the above-mentioned determinants their space in the above grid, I have not included them and shall abstain from doing so. The important thing to keep in mind is that there are some determinants, which can be directly influenced by us and by means of which we are directly shaping our individual health, and some determinants which cannot be influenced by us. Feuerstein, Labbé and Kuczmierczyk have translated this insight into medical language and

distinguish between external pathogens, i.e. those detrimental factors, which cannot be influenced by us, as well as behavioural pathogens, i.e. “the habits and life-style behaviors of the individual” (1986: 237) which are directly susceptible to every individual’s influence. Although the underlying distinction between those factors that cannot and those that can be influenced is reasonable, the terminology of Feuerstein, Labbé and Kuczmierczyk is a rather unfortunate. We must be cautious not to mistake determinants of health with mere pathogens, i.e. factors which are detrimental to our health; rather, the determinants of health can be either pathogenic to our health but could also have no effect on or perpetuate it. Take, for example, food, which is counted among the determinants of health: food, which is contaminated, is pathogenic, but organic food surely is not. The determinants of health tell us, which factors have an influence on our health, but without further qualification, they do not contain any information as to the quality of their influence, i.e. whether they have a positive, neutral or negative effect on our health. Therefore, we should not only speak of external and behavioural pathogens, but of external pathogens, external apathogens and external salutogens as well as behavioural pathogens, behavioural apathogens and behavioural salutogens. I am well aware that the distinction between external and behavioural is rather crude and cannot do full justice to the whole range of determinants which can only be indirectly influenced. However, it is sufficient for our purposes to include all determinants which can be directly or indirectly influenced in the class of behavioural pathogens, apathogens and salutogens (although I shall neglect apathogens for the remainder of this thesis).

The question now becomes what role health behaviour plays in the concert of health determinants, i.e. how relevant the influence of individual behaviour is in comparison to the influence of external pathogens. As the next chapter shall show, its role is not to be underestimated.

2.3.2 Behavioural Pathogens and Salutogens: The Relationship between Health and Behaviour

The important message of the preceding chapter is that there are some determinants of health, which can be directly and completely influenced by our behaviour, namely those listed under the heading ‘individual behaviour’. The importance of individual behaviour for our health has been emphasised by the WHO. It considers individual lifestyle choices and behaviour to be the cause of many chronic or non-communicable diseases (cf. WHO, 2005: 48, 52) which in return are “the leading cause of death and disease burden worldwide” (WHO, 2005: 45; also cf. Strong et al., 2005) – both in developed (cf. WEF, 2007: 6, 12; also cf. Wikler, 2004: 111) and developing countries (cf. WHO, 2005). This burden of non-communicable diseases (at least in Europe and the developed world) is caused by our own behavioural choices which are negatively influenced by the affluence we live in:

“In 1948, the task for the new British welfare state was to deal with the five ‘giants of too little’: too little income, work, education, housing, and health care. Now new giants have emerged: the ‘giants of too much’. Excessive consumption of alcohol, tobacco, and food have significantly affected both population health and health care budgets.”
(Schmidt, 2008: 3)

While the giants of too little were instances of mid- and macro-level determinants of health, the giants of too much have to be allotted to the micro-level determinants of health. It is not external factors, but our own behavioural choices, which are pathogenic to our health. This is underscored by bioethicist Daniel Callahan who states that “nothing is more evident in the statistics of public health than the role played by individual health behavior in contributing to accidents, illness and disease” (Callahan, 1986: 205). In the same fashion, Minkler states that “an impressive body of evidence” (Minkler, 2000: 5) has been amassed, supporting the high impact of individual behaviours on health, whereas “recent evidence suggests that the prevalence of some unhealthy behaviours has significantly increased over the last few years” (Minkler, 2000: 6).

The importance of individual behaviour for our health is not only intuitive and philosophically defensible, but can and has also been proven empirically. A now classic series of studies of 6'928 adults by Breslow, Belloc and Enstrom (Belloc & Breslow, 1972; Belloc, 1973; Breslow & Enstrom, 1980; also cf. Feuerstein, Labbé and Kuczmierczyk, 1986: 239f) have shown, morbidity and mortality, i.e. incidence of disease and life expectancy, are significantly related to the following seven basic health behaviours:

1. Having three meals a day at regular times and no snacking (i.e. never or rarely eating between meals)⁵⁵
2. Eating breakfast every day
3. Regular physical activity, i.e. moderate exercise two or three times a week
4. Adequate sleep (7 to 8 hours a night)
5. Not smoking
6. Moderate weight, i.e. being at or near the prescribed height adjusted weight
7. No or moderate alcohol consumption

The outcome of this series of studies was that individuals who engaged in all of these health behaviours had better health than those who did not. A 45-year old man who practices none, one, two or three of these habits has a remaining life expectancy of 21.6 years (i.e. on average dies at the age of 67), while one exhibiting six or seven of these habits has a life

⁵⁵ Of course, the quality of the food should be added as an important factor as well. Besides tobacco use and physical inactivity, Magnusson (2007) maintains that the main behavioural factor responsible for chronic diseases is the overconsumption of nutrient-poor foods that contain too much fat, salt and sugar. “The ‘nutrition transition’ towards diets that are richer in saturated fats and poorer in complex carbohydrates and dietary fibre, fruit and vegetables, the growth of urban lifestyles involving less physical exertion, and the promotion and rising consumption of tobacco and alcohol, have set the scene for ‘lifestyle epidemics’ to become the greatest health challenge of the twenty first century.” Also cf. Reeves & Rafferty (2005) who consider a healthy lifestyle to include eating five or more fruits and vegetables daily.

expectancy of 33.1 years (i.e. on average dies at the age of 78). In other words, eleven years can be added to life expectancy by relatively simple changes in living habits. If we keep in mind “that only 2.7 years were added to the life expectancy at age 65 between 1900 and 1966” (Knowles, 1977: 62) as a result of medical progress, we see how much can be gained with simple changes in lifestyle. Another result was that the health status of people aged 75 and older, who practiced all seven habits, was similar to those between the ages of 35-44, who observed less than three of the health behaviours. Interestingly, these associations are independent of age, sex or economic status (cf. Belloc & Breslow, 1972: 419f). The relationship between the above-mentioned health behaviours, health and age can be depicted as follows (cf. Figure 7:, in which higher ridit values indicate worse states of health):

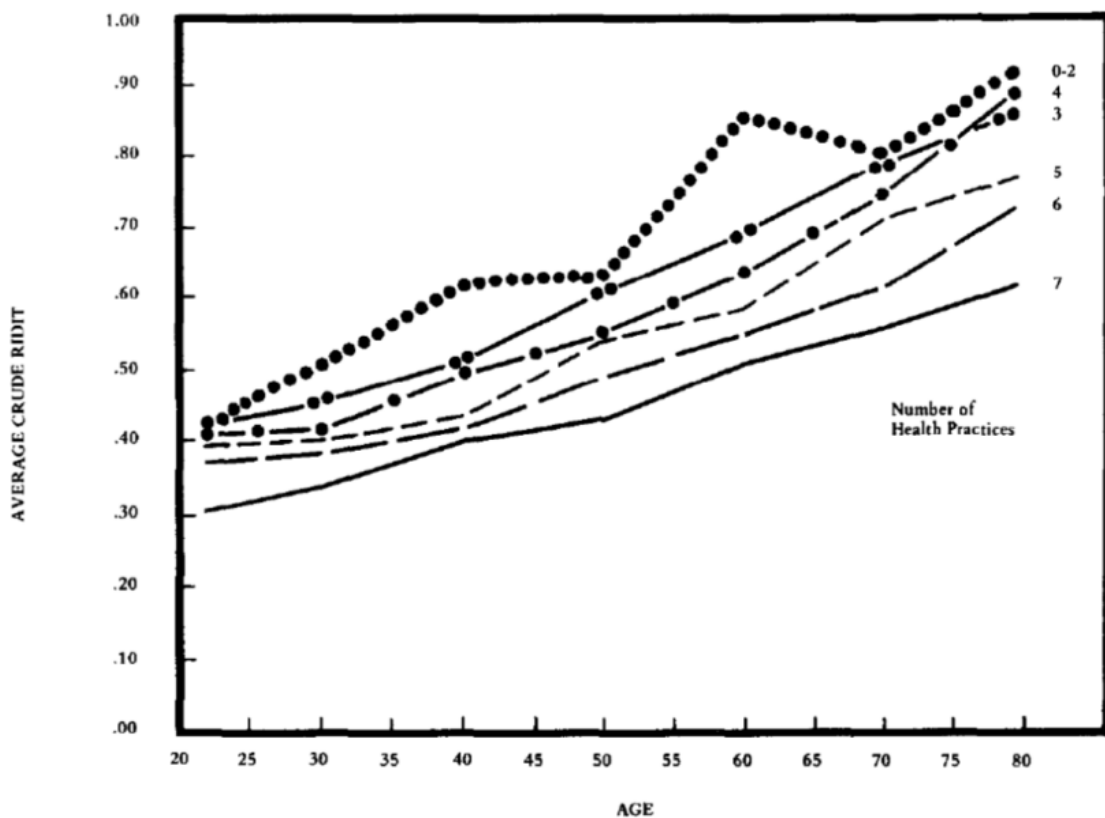


Figure 7: Average physical health ridit by age group and number of health practices

(Belloc & Breslow, 1972: 420)

But while the simplicity of these findings is promising in theory, reality and actual behaviour show another picture. Although following very few simple lifestyle rules would provide the health we all strive for and although following them does not require medical expertise, since they involve basic nutritional and behavioural aspects, only few people are prepared to actually follow these rules. We all know that fast food, lack of movement and stress are bad for us. But still, we often and unwisely expose ourselves to these threats to our health – maybe because doing so is the most convenient option. Using data gathered from more than 153,000 adults, Reeves & Rafferty (2005) found that only a negligible quantity of these adults followed a healthy lifestyle whereas they defined a healthy lifestyle as composed of four elements: no smoking, moderate weight, consumption of five or more fruits and vegetables daily and regular physical activity. Although 76% of the adults surveyed did not smoke, 40% maintained a moderate weight, 23% ate five or more fruits and vegetables per day and 22% exercised regularly, only 3% did all four. Extrapolating from these findings, we can guess how many people actually engage in all seven of the habits mentioned by Breslow, Belloc and Enstrom – virtually none.

Much more could be said about the influence of individual behaviour on health and how behaviour could actually be changed. However, the most important fact for our purposes is that there is impressive evidence that an individual's behaviour and health habits, directly, cumulatively and positively, are correlated to the respective individual's health status; unhealth is therefore directly related to the absence of certain health behaviours.

“The control of communicable diseases depended as much (or even more) on broad changes in the environment attendant upon economic development (improved housing and nutrition, sanitary engineering for safe water supplies, and sewage disposal) as it did on the individual's knowledge and behaviour [...]. However, control of the present major health problems [...] depends directly on modification of the individual's behaviour and habits of living.” (Knowles, 1977: 61)

As Wikler points out, “illness is not something that just happens to a person. We are more likely to remain healthy if we take care of ourselves.”

(Wikler, 2004: 109) This is a well-established position and truth, which I think needs no further explanation. It is precisely the fact that our choices have such a grave influence on our lifestyle that we are in the best position to make them. Nobody else has as close a connection to us as we do. We wake up with ourselves every day of our lives; our lives are made up of myriads of small and big choices and it is us who make them – everyday anew. We choose what to eat and drink, when and how long to sleep, what to wear, which risks to take etc.. There may be restrictions to what we can choose, but nobody can deny that there is room for a considerable amount of choice when it comes to our health. Although personal behaviour might be restrained due to individual, environmental and social data, we are free to choose how to conduct our lives within the boundaries set by the uncontrollable factors surrounding us. There is undeniably a range of actions and decisions that every individual can influence (directly or indirectly) as well as measures he can take, although we must admit that there are some disease-provoking factors we are powerless to control. We can influence our personal behaviour, i.e. adopt a healthier lifestyle to maintain or improve our health and eliminate *avoidable* infirmity and unhealth. If we do, our health behaviour will have a salutogenic effect, if not it will be pathogenic.

As has been shown, our health depends on a variety of factors – some of which can be influenced and some of which cannot. The fact that we can influence some determinants of health means that health – at least to a certain and considerable degree – is subject to our individual choices, actions and behaviour. There always will be a component of luck to our health, but a lot is up to us. From this perspective, health is more than a state which is measured or perceived. It is an attitude, a task we have to fulfil every day. Our body is much more than a machine, but like a machine, it requires some maintenance and care. Non-adherence to these rules invariably leads to disease and illness. If our health is dependent on and determined by our behaviour and acts, then behaviour is a key to obtaining and preserving health. Consequently, health shares in the intrinsic principles of human acts and behaviour: ‘power’ and ‘habitus’ respectively ‘virtue’, which – as we shall see – is a special kind of habitus. In what follows, I want to establish the foundation for the idea that health

should not only be considered a state, which is measured against a norm, but moreover, a good habit. Basically, this idea holds that somebody is healthy not if he manages to live up to a subjective bio-medical or social norm, but rather if he exhibits the quality which keeps him in this state. Health thus becomes the attitude or disposition, which guides our behaviour and by which we are said to be healthy. Since this is exactly what virtue theory is all about, the next paragraphs shall thus be devoted to an explication of the main aspects of what it means to be virtuous. Once we understand this, we will also understand what it means to possess health or be healthy.

2.3.3 A Primer on Habits and Virtues

“[...] as health is but one thing, and has been always the same, whereas diseases are by the thousands, besides new and daily additions; so, all the virtues that have been ever in mankind are to be counted upon a few fingers; but his follies and vices are innumerable, and time adds hourly to the heap.”

Jonathan Swift (1999: 23)

In what follows, I want to outline the position that health is a quality, by virtue of which we are said to be healthy. This notion – which might seem odd at first – is adumbrated in the German word ‘Gesundheit’, which is composed of the adjective ‘gesund’ and the suffix ‘-heit’. The latter is derived from the Gothic word ‘haidus’, which amongst others means kind (‘Art und Weise’) or quality. Words containing the suffix ‘-heit’ are abstract nouns, which signify that the adjective, which is contained in it, is had as a quality (‘Eigenschaft’). If we possess health, we possess a quality, which makes us healthy. As we shall see, this amounts to saying that health is a good habit, i.e. a habit, by which we live healthily. Therefore, health is not only a state or the manifest behavioural decisions that we make – these would be regrettable reductions – but a certain kind of disposition.

2.3.3.1 *Habitus*

“It is true we may distinguish two types of morally good actions. The one is accomplished with an iron will, struggling against the tendencies of our nature, and the other is joyfully accomplished without struggle, with the ease that has often been stressed as characteristic of virtue.”
Dietrich von Hildebrand (Morality and Situation Ethics, Ch. X)

‘Habitus’ or habit (Greek: ‘ἕξις’; German: ‘Haltung’ or ‘Gewohnheit’) is derived from the Latin word ‘habere’, which can mean ‘to have something’, but also ‘to have oneself’ (‘sich haben’) in the sense of ‘to behave’ (‘sich verhalten’). In this latter sense, habitus – as Aristotle explains in his ‘Κατηγορίαι’ (Categories) – is a ‘quality’, i.e. that accident in virtue of which something is said to be such and such (cf. 8b 25ff). As a quality, a habitus “λέγεται διάθεσις καθ’ ἣν ἢ εὖ ἢ κακῶς διακείται τὸ διακείμενον, καὶ ἡ καθ’ αὐτὸν πρὸς ἄλλο” (Metaphysics, 1022b 10), i.e. signifies a disposition in virtue of which the thing which is disposed is disposed well or badly, either independently or in relation to something else – whereas a disposition (Greek: ‘διάθεσις’; Latin: ‘dispositio’; German: ‘Beschaffenheit’ or ‘Neigung’) is to be understood as a tendency or inclination of something to act in a certain manner under given circumstances. A habitus, then, is a disposition to act (cf. I^a-IIae q. 54 a. 2 s.c.), i.e. disposes a substance’s powers to act in a certain way, depending on the type of habit, whereby the substance is said to be well- or ill-disposed with respect to its nature and/or with respect to its operation and final end. Having established that habitus is a certain kind of disposition – which makes both of them qualities – the next step in understanding habitus is to show what kind of disposition habitus actually is and to what extent habitus is distinct from disposition:

“Habit differs from disposition in being more lasting and more firmly established. [...] By a disposition, on the other hand, we mean a condition that is easily changed and quickly gives place to its opposite. [...] Thus habit differs from disposition in this, that while the latter is ephemeral, the former is permanent and difficult to alter. Habits are at the same time dispositions, but dispositions are not necessarily habits.”
(Aristotle, Categories, 8b 27ff; also cf. I^a-IIae q. 49 a. 2 ad 3)

Therefore, the qualities of habitus and disposition differ according to their stability and variability. Whereas a disposition is an unstable quality that can be easily changed, a habit is a quality which is deeply rooted, long lasting and hard to eradicate; it is a “*qualitas de difficili mobilis*” (I^a-IIae q. 49 a. 1 s.c.), i.e. a quality which is difficult to change. The difference between habit and disposition is not a matter of essence (for both are a quality and thus accidental), but of degree. A disposition can be said to be the preliminary stage of a habit.

As Rickaby (1919: 64), Bourke (1938) as well as Kent (2002: 116) point out, habitus differs from both faculty and action. Whereas a faculty enables, i.e. gives the power to act, a habit (presupposing power) “renders action easy and expeditious, and reliable to come at call” (Rickaby, 1919: 64); but habitus is not the action itself. Rather, it should be understood as the determinant of a faculty, which determines how a faculty is acted out. A habit, therefore, is halfway between capacity (or power) and action, between pure potentiality and full actuality; it is the “perfectant of potency” (Bourke, 1938: XIII). The concept of habitus can be depicted as follows:

Power -----> Habitus -----> Act

Consequently, a habit puts one’s actions, i.e. the way an individual makes use of his faculties, more under one’s control than they might be without a habit. Habits cannot and do not give the power to act (this power is a precondition for action), but allow the faculty to act in one of several ways. Consequently, only those powers, which are not determinate to one particular action, but are indifferently inclined to many, can be subject to habits; only the latter powers are determinate to acts by means of habits (cf. I^a-IIae q. 55 a. 1 co.). A habitus thus is a permanent disposition to use a power to produce certain acts, whereas the power has to be capable of exercise in one way or another and must not be determined by its very nature to operate as it does. There is no habitus of digesting as one cannot influence the activity of one’s digestive system; the question of how one’s digestion works is not a matter of habituation but physiology or pathology.

As Kent points out, “habits arise from actions of a power capable of exercise in one way or another, not determined by its very nature to operate as it does” (Kent, 2002: 118).⁵⁶

A habit can thus be defined as “a quality difficult to change, whereby an agent whose nature it is to work one way or another indeterminately, is disposed easily and readily at will to follow this or that particular line of action” (Rickaby, 1919: 64).⁵⁷ It signifies “a durable characteristic of the

⁵⁶ Also cf. Rickaby (1919: 65): “A power that has only one way of working, set and fixed, is not susceptible of habit. Such powers are the forces of inanimate nature, as gravitation and electricity. A thing does not gravitate better for gravitating often. The moon does not obey the earth more readily to-day than she did in the days of Ptolemy, or of the Chaldean sages.”

⁵⁷ If we compare an action resulting from a habit with the corresponding action before the habit was contracted, Dubray (1910) points out that we will observe the following differences:

1. “Uniformity and regularity have succeeded diversity and variety; under the same circumstances and conditions the same action recurs invariably and in the same manner, unless a special effort is made to inhibit it;
2. Selection has taken the place of diffusion; after a number of attempts in which the energy was scattered in several directions, the proper movements and adaptations have been singled out; the energy now follows a straight line and goes forth directly toward the expected result;
3. Less stimulus is required to start the process, and, where perhaps resistance had to be overcome, the slightest cue now suffices to give rise to a complex action;
4. Difficulty and effort have disappeared; the elements of the action, every one of which used to require distinct attention, succeed one another automatically;
5. Where there was merely desire, often difficult to satisfy, or indifference, perhaps even repugnance, there is now tendency, inclination, or need, and the unwanted interruption of an habitual action or mode of thinking generally results in a painful feeling of uneasiness;
6. Instead of the clear and distinct perception of the action in its details, there is only a vague consciousness of the process in its totality, together with a feeling of familiarity and naturalness. In a word, habit is selective, produces quickness of response, causes the processes to be more regular, more perfect, more rapid and tends to automatism.”

agent inclining to certain kinds of actions and emotional reactions” (Kent, 2002: 116) and is “something which a man can exercise in action at will” (I^a-IIae q. 49 a. 3 s.c) and which is thereby voluntary.⁵⁸

But how do habits come about? St. Thomas Aquinas gives the answer: a habit is the result or effect of habituation, i.e. repeated acts of the same kind (cf. I^a-IIae q. 52 a. 3 co.; also cf. I^a-IIae q. 63 a. 2; De virtutibus, q. 1 a. 9; EN, 1103a and b; Rhonheimer, 2001: 186)⁵⁹. In short, habit is acquired by exercise and repetition or as a Latin saying goes: Ex actu fit habitus.⁶⁰ Dubray (1910) considers the following factors to be mainly responsible for the growth of a habit:

- The number of repetitions: “every repetition strengthens the disposition left by previous exercise” (Dubray, 1910)
- The frequency of repetitions: “too long an interval of time allows the disposition to weaken, whereas too short an interval fails to give sufficient rest, and results in organic and mental fatigue” (Dubray, 1910)
- The uniformity of repetitions: “at least change must be slow and gradual, new elements being added little by little” (Dubray, 1910)
- The interest taken in and the attention given to the actions: “the desire to succeed” (Dubray, 1910) and “the resulting pleasure or

⁵⁸ Also cf. Rickaby (1919: 64): “Habit is a part of character: disposition is a passing fit.”

⁵⁹ While this is true for the acquired habits, St. Thomas Aquinas holds that there are also natural habits (cf. I^a-IIae q. 51 a. 1) as well as infused habits, both of which cannot be trained (cf. I^a-IIae q. 51 a. 4; also cf. De virtutibus, q. 1 a. 10).

⁶⁰ In reverse, this also means: *Habitus per actus cognoscuntur*, i.e. that a habit is recognised by acts. For, “*unumquodque enim quale est, talia operator*” (I^a-IIae q. 55 a. 2 ad 1), i.e. such as a thing is, such is its act. As Rhonheimer points out, the acquisition of habits by training implies that the imperfect possession of a habitus means “auch Anstrengung, innerlicher Kampf, sich überwinden können, sich enthalten, Selbstbeherrschung, usw., – und Verzeihen, wie auch Bereuen” (Rhonheimer, 2001: 187).

feeling of success which becomes associated with the idea of the action” (Dubray, 1910)

If a habitus results from exercise, this means it can be increased as well as decreased: it has a dynamic nature (cf. Limbourg, 1885; also cf. I^a-IIae q. 53 as well as I^a-IIae q. 63 a. 2). This also means that – given sufficient exercise – bad habits can be improved, but also that without continuous exercise, good habits can be corrupted or diminished: “A habit is a living thing: it grows and must be fed. It grows on acts, and acts are the food that sustain it. Unexercised, a habit pines away: corruption sets in and disintegration.” (Rickaby, 1919: 67)

As has been said, a habit inclines a man to make use of his faculties and powers in certain ways and consequently to certain acts. At the same time, however, a habit also results from the repetition of these certain acts. Therefore, without an act, there can be no habit, but without a habit, there can be no act. How can we solve this conundrum? Rickaby helps us here: “Habit is [...] an appurtenance of will, not of course independent of material conditions and structural alterations, in so far forth as a living and volitional is also a material agent, but essentially usable *at will*, and brought into play and controlled in its operation by free choice.” (Rickaby, 1919: 65) Thus, habits depend on and are subject to the will. This can be easily corroborated by the fact that we can “always refuse to act in accordance with our habits or choose to act against our habits” (Kent, 2002: 119). Consequently and following Averroës (Ibn Rushd), St. Thomas Aquinas states that a habit is that whereby one acts when he wills (“habitus est quo quis agit cum voluerit” (I^a-IIae q. 49 a. 3 s. c.). Habit is related to the will by principle (also cf. I^a-IIae q. 50 a. 5 co. as well as I^a-IIae q. 56 a. 3 co.).

To conclude this analysis of the concept of habitus: A habit is a steady disposition of the will, which has become settled, is hard to remove and inclines the agent to act and choose in a certain way. Habit is a disposition, which has become second nature.

2.3.3.2 *Virtue*

“Et genus et virtus, nisi cum re, vilior alga est.”

Horace (Sermones 2, 5, 8)

“Nulla, nisi ardua, virtus.”

Ovid (Ars Amatoria 2, 537;

also cf. Horace, Carmina 3, 24, 44)

As has been established, habitus is a steady disposition bearing on activity, i.e. the actualisation of a power. It is the durable quality whereby an agent is inclined to follow a particular line of action easily and readily at will. And as has been adumbrated, a virtue⁶¹ is a special kind of habitus (I^a-IIae q. 55 a. 1 co.) – but in what way? As St. Thomas Aquinas writes, a virtue is a “habitus operativus” (I^a-IIae q. 55 a. 2 co.), which “importat perfectionem potentiae” (I^a-IIae q. 55 a. 3 co.), i.e. a habitus bearing on activity⁶², which denotes the perfection of the power in which it is seated. This power has to be exercisable in one way or another and must not be determined by its very nature to operate as it does:

“Tugend ist die Vollkommenheit eines operativen Vermögens, und zwar jene Vollkommenheit, die durch die Natur des Vermögens nicht schon gegeben ist und die bewirkt, daß dieses Vermögen die ihm gemäßen Akte in vollkommener Weise zur Ausführung bringen kann.”
(Rhonheimer, 2001: 172)⁶³

⁶¹ Etymologically speaking, ‘virtue’ (Latin: *virtus*; Greek: ‘ἀρετή’) derives from the same root as the Latin ‘vir’ (a man) and ‘vis’ (power): “Appellata est enim ex viro virtus” (Cicero, *Tusculanae Disputationes*, II, 42). In its widest sense, it signifies masculine qualities such as strength and courage, but also refers to human excellence and perfection, which is also the meaning that the Greek term ‘ἀρετή’ is meant to convey (cf. Rhonheimer, 2001: 170). However, its strict meaning, as used by moral philosophers and theologians, is a different one – as will be shown.

⁶² Rhonheimer translates ‘habitus operativus’ with “ein auf den Aktvollzug eines Vermögens gerichteter Habitus” (Rhonheimer, 2001: 173).

⁶³ St. Thomas Aquinas expresses the same idea as follows: “Nihil est enim aliud actus virtutis quam bonus usus liberi arbitrii” (I^a-IIae q. 55 a. 1 ad 2). This translates as: The act of a virtue is nothing other than the good use of free choice.

The perfection of a power means making the best use of that power (cf. II^a-IIae q. 117 a. 3 s.c.). The measure of this perfecting best use of a power is the “natural finality of the power in question (and, by extension, the finality of the person of whom these powers are functional parts)” (Reichberg, 2002: 132; also cf. I^a-IIae q. 55 a. 1 co.). Therefore, as a principle of operation (I^a-IIae q. 55 a. 2 ad 1), a virtue is a substance’s permanent disposition to use a power to produce acts which are suitable to the substance’s and the power’s nature as well as end and whereby the substance is well disposed according to the mode of its nature (cf. I^a-IIae q. 71 a. 1 co.); or as Cicero has put it: “virtus est animi habitus naturae modo” (De Inventione, II, 159).⁶⁴ Therefore, virtue is directed to goodness as the goodness of a thing consists in its being well disposed according to the mode of its nature (cf. I^a-IIae q. 71 a. 1 co.; also cf. Rhonheimer, 2001: 227ff).⁶⁵ Given their habitual roots, the true possession of virtues not only requires the performance of certain acts; the performance of virtuous acts must also be deliberately chosen (as well as for its own sake) and spring from a firm and unchangeable character (cf. NE, 1105a 28-34; also cf. Prior, 1991: 158).

If we understand the concept of virtue, then the concept of vice can easily be understood. As “vitia virtutibus sunt contraria” (Tusculanae disputationes, IV, 32), i.e. as the opposite of a virtue is a vice, and as something has a virtue if it is permanently well-disposed with respect to its nature and end we automatically know that something has a vice, i.e. the opposite of a virtue, if it is permanently ill-disposed with respect to its

⁶⁴ Also cf. De Div. Quaest. (31): “Virtus est animi habitus naturae modo atque rationi consentaneus.”

⁶⁵ While this is an account of goodness in general (also cf. Stump, 2003: 61ff), the goodness of a particular act is determined by certain factors. They are as follows: objective (exterior objective or finis operis, whereas only what is intended by the agent can be an objective; I^a-IIae q. 18 a. 2), end (finis operantis, intention or purpose of the agent; I^a-IIae q. 18 a. 4 as well as a. 6) and circumstances (I^a-IIae q. 18 a. 3; also cf. De malo q. 2 a. 6 co.); in addition, it is also influenced by its consequences (I^a-IIae q. 20 a. 5) (also cf. Westberg, 2002).

nature and end. Thus, since a virtue is a stable disposition to act in ways, which are good, a vice is a stable disposition to act in ways, which are evil.

As should have become clear, virtues are a special kind of habit in so far as they are good habits, i.e. stable dispositions to act in ways which are good (I^a-IIae q. 55 a. 1 ad 2).⁶⁶ Although every virtue is a habit, not all habits are virtues but only those, which incline our powers and faculties towards what is good. Accordingly, St. Thomas Aquinas states that virtue “est habitus operativus, est bonus habitus, et boni operativus” (I^a-IIae q. 55 a. 3 co.), i.e. that virtue is an operative habit, a good habit and productive of good works. It thus essentially belongs to virtue to incline man to good (II^a-IIae q. 141 a. 1 co.) and to use well the things that he can also use for ill (II^a-IIae q. 117 a. 1 co.).⁶⁷

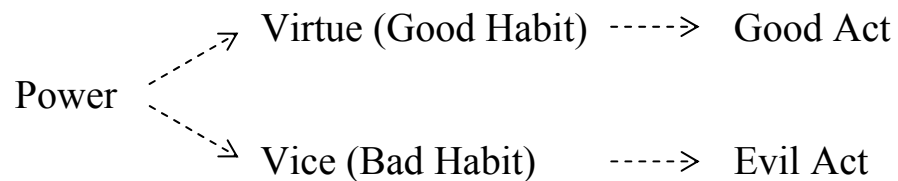
“Tugend ist also eine Art Konnaturalität mit den dem Vermögen entsprechenden Aktvollzügen, ähnlich einem erworbenen Instinkt. Tugend ist Können, Virtuosität, Brillanz, Souveränität, Kompetenz, Treffsicherheit usw. in spezifischen Bereichen des Erkennens, Herstellens und Handelns. Sie ist die Vollkommenheit des Menschseins im Bereich seiner Tätigkeit und damit auch die Vollkommenheit und Erfüllung von Freiheit.” (Rhonheimer, 2001: 173)

Adapting the depiction given in the previous chapter, the concept of virtue can be graphically described as follows:

Power -----> Habitus -----> Act

⁶⁶ Also cf. Aristotle (EN, 1103a 9f) who states that “τῶν ἐξέων δὲ τὰς ἐπαινετὰς ἀρετὰς λέγομεν”, i.e. that we call a praiseworthy habit a virtue.

⁶⁷ Also cf. I^a-IIae q. 55 a. 3 s. c. (“Virtus est quae bonum facit habentem, et opus eius bonum reddit”, i.e. virtue is that which renders its possessor and work good (also cf. Super De Trinitate, pars 3 q. 5 a. 1 ad 1; also cf. Aristotle, EN, 1106a 22)), I^a-IIae q. 56 a. 5 co. (“Virtus enim est habitus perfectus, quo non contingit nisi bonum operari”, i.e. virtue is a perfect habit, by which it never happens that anything but good is done.) as well as I^a-IIae q. 56 a. 3 co. (“virtus est habitus quo quis bene operatur”, i.e. virtue is a habit by which one works well.)



However, the virtues as understood by St. Thomas Aquinas and Aristotle are not meant to perfect just any power: the powers the virtues are meant to perfect are the very principle of our life, namely the powers of the soul (cf. I^a-IIae q. 55 a. 2 co.). Therefore, in order to further our understanding of virtue we have to touch upon the powers of the soul.

Before doing so, I want to emphasise that the depiction above must not be misread. Although virtue and good acts necessarily come and are observed together, this does not allow for the conclusion that virtue is the measure of goodness⁶⁸; unfortunately, many contemporary virtue ethicists adhere to such a deficient account of virtue (for a more detailed critique of such positions, refer to Rhonheimer, 2001: 22ff). It is not because of a virtue that an act becomes good (i.e. a virtue is not the basis for morality), but a virtue disposes one to do good acts. It is wrong and reductionist to think that virtue is a mere positive or laudable character trait (as e.g. Galston (1992: 2), Statman (1997: 10) and Wolf & Schaber (1998: 63) do) and that “an action is right if and only if it is what an agent with a virtuous character would do in the circumstances” (Oakley, 1996: 129). It is true that a virtuous man would take the right action given certain circumstances. But the action would not be right because the virtuous man takes it; rather, the virtuous man would take it because it is right. Also a virtue is not an unwavering disposition to do the right thing, but rather to recognise and do the right thing because of an unwavering disposition:

“Während der (klassische) Moralphilosoph die Erkenntnis der Richtigkeit von Handlungsweisen, entsprechende Prinzipien, Normen oder Regeln und die dadurch geschaffene sittliche Pflicht an den Anfang stellt, Tugenden hingegen dann als bloß abgeleitete Größe im Sinne einer subjektiven Verfasstheit gemäß den so erkannten Prinzipien,

⁶⁸ As Spaemann points out virtue is also “nicht definiert als Element eines glücklichen Lebens, Glück wird vielmehr zum Lohn der Tugend” (Spaemann, 2002a: 99).

Normen und Regeln begreift, versteht der (moderne) Tugendethiker die sittlichen Tugenden als das Primäre, den Ursprung von Moralität, die Richtigkeit einer Handlungsweise hingegen als abgeleitete, aus der Tugend des Subjekts, der Richtigkeit seiner Verfasstheit entsprungene Größe. Damit tritt 'Tugend' bzw. richtige Motivation an die Stelle von sittlicher Pflicht: man tut das moralisch Richtige und Gute, nicht weil man Pflichten, Regeln und Normen erfüllt, sondern weil man ein richtig verfasster, ein guter Mensch ist." (Rhonheimer, 2001: 23)

This necessitates that virtues and the branch commonly called 'virtue ethics' cannot be – as Hursthouse (2007) states – “one of three major approaches in normative ethics” with the other two being deontology and consequentialism. It cannot be a self-contained moral theory, since the correct understanding of virtue is not capable of grounding goodness or right and wrong. The concept of virtue cannot ground a moral theory, but rather is and has been framed by Aristotle and St. Thomas Aquinas as an important supplement to natural law theory (cf. I^a-IIae q. 94 a. 3 co.) whereas the natural laws “do not ground ethics; they only express what is grounded in the natures of things” (Stump, 2003: 310). In natural law, something is good if it fulfils its natural purpose. Thus, we could state that while natural law requires one to seek his 'end' as a human being, the virtues are the personal qualities that enable him to make the choices that will enable him to do so. Both virtue ethics and natural law theory are based on a fundamental understanding of the nature of humankind, as they both start from and necessitate a view of what constitutes the 'good life' – without that, neither makes sense. It is therefore possible to see them as two aspects of a single moral argument or two sides of the same coin.

2.3.3.3 The Powers of the Human Soul

As has been said, every power of the human soul is perfected by one or several virtues, whereas – strictly speaking – a single virtue cannot have more than one power as its principal subject (cf. I^a-IIae q. 55 a. 2). An analysis of the concept of virtue therefore depends on an analysis, which deepens the concept of soul as introduced above. So, the next step is to give a short account of the powers rooted in the human soul. According to St. Thomas Aquinas, there are five genera of such powers: the vegetative,

sensitive, appetitive, locomotive and intellectual (cf. I^a q. 78 a. 1 s.c.; also cf. De Anima, 414a 29-32; Rhonheimer, 2001: 170; Drefcinski, 1999).⁶⁹

The purpose of the vegetative power is to attain and conserve being (In de Anima, lib. 2 l. 6 n. 2); it is “that most general power of the soul by which life is present in anything” (De Anima, 415a 25; also cf. Reale, 1990: 306f). As such, it comprises nutritive, augmentative, and generative powers, i.e. nutrition, augmentation or growth and reproduction (I^a q. 78 a. 2). Given its basic function, the vegetative power is necessarily found in all that is born and dies (cf. De Anima 434a 22ff). As St. Thomas Aquinas points out in his commentary on Aristotle’s ‘De Anima’ (In de Anima, lib. 2 l. 5 n. 2ff) the sensitive power of the soul which works through corporeal organs and which comprises the five external (touch, hearing, sight, taste and smell; I^a q. 78 a. 3) and four internal senses (common sense, imagination and estimative as well as memorative powers; I^a q. 78 a. 4; also cf. Stump, 2003: 247ff) necessarily implies the appetitive power (cf. In de Anima, lib. 2 l. 5 n. 10)⁷⁰. Furthermore, the locomotive power, by which one realises one’s desires and intentions in the form of bodily movements, follows from the desires of the appetitive power (In de Anima, lib. 2 l. 5 n. 8). Therefore, “*motivum non potest esse sine sensitivo: sensitivum autem potest esse sine motivo*” (In de Anima, lib. 2 l. 6 n. 3), i.e. motive power cannot exist without sensitive power, but sensitive power

⁶⁹ This partition of the powers of the soul arises “from a general analysis of living things and their essential functions and hence of biology” (Reale, 1990: 304f). Although St. Thomas Aquinas and Aristotle also refer to these genera as parts of the soul, it should be noted that numerically speaking, both consider the soul to be one (I^a q. 76 a. 3 co.); there are not several souls, but just one soul with several parts, which are its powers or capacities.

⁷⁰ The reason for this is explicated in St. Thomas Aquinas’ ‘In de Anima’ (lib. 2 l. 5 n. 11): “*Omnia animalia habent ad minus unum sensum, scilicet tactum. [...] Quibuscumque autem inest aliquid delectabile et triste, his inest et concupiscentia, quae est appetitus delectabilis; ergo de primo ad ultimum omnibus animalibus, quibus inest sensus tactus, inest appetitus.*” This translates as: All animals have at least one sense, namely touch. [...] However, whatever can feel pleasure and pain, can desire pleasure. Therefore, because all animals have a sense of touch, all can desire.

can exist without motive power. So, although three distinct powers, the sensitive, motive and appetitive powers of the soul cannot be separated from each other; consequently and since the motive and the appetitive power depend on the sensitive power, St. Thomas Aquinas often subsumes the first two under the latter (cf. Reale, 1990: 307). Furthermore, the vegetative, sensitive and intellectual powers are based on each other, in so far as the sensitive power of the soul (including the locomotive and appetitive powers) cannot exist without the vegetative and the intellectual cannot exist without the sensitive power (cf. *In de Anima*, lib. 2 l. 6 n. 1ff; also cf. *De Anima*, 414b 32ff). This order also corresponds to the order of beings: while all of these powers are found in man, the rest of the animated beings (i.e. animals as well as plants) only exhibit some⁷¹ of them and inanimate beings do exhibit none of them (cf. *In de Anima*, lib. 2 l. 5 n. 10 and lib. 3 l. 17 n. 1ff).

As St. Thomas Aquinas shows (cf. I^a-IIae q. 55 a. 3ff), not all of the above-mentioned powers can be subject to virtue in the sense of human virtue ('*virtus propria hominis*') but only the appetitive and the intellectual power. The reason for this restriction is that a truly human virtue is "*solum virtus quae est ad opera rationis, quae sunt propria hominis*" (I^a-IIae q. 55 a. 2 ad 2), i.e. only a virtue which is referred to works of reason which are proper to man: "human excellence (i.e. human virtue) is only that into which the activity of reason enters" (Reale, 1990: 322) or as St. Thomas has put it: "*virtus humana [...] rationi attribuitur*" (I^a-IIae q. 55 a. 3 ad 3). This statement is based on the fact, that what characterises human beings and distinguishes them from everything else is the intellectual power of their soul and their rational activity, by virtue of which man has "dominion over his own acts thanks to reason and will" (McInerny, 1993: 202; also cf. Stump, 2003: 77). Truly human acts are acts "insofern sie aufgrund von Vernunft und vernünftigem Streben (Willen) vollzogen werden" (Rhonheimer, 2001: 147). What is characteristic of human beings is that they can act voluntarily, whereby an action is voluntary if man has (perfect

⁷¹ To be more precise, animals have both sensitive and vegetative powers, while plants' souls only have vegetative power.

or imperfect; cf. I^a-IIae q. 6 a. 2 co.) knowledge of the end⁷², means and circumstances⁷³ of the respective act, deliberates about them and moves himself to act (cf. I^a-IIae q. 6 a. 1 co.).

The activity of reason can enter into the powers of the soul in two ways: “In a primary sense, rational activity is the activity of the faculty of reason itself. [...] Second, an activity is called rational not because it is the act of reason as such, but because it comes under the sway of reason even though it is an act of another human faculty. Thus, our emotions can become humanized, rationalized, insofar as they are brought under the sway of reason.” (McInerny, 1993: 203; also cf. I^a-IIae q. 56 a. 4 co.) Therefore, the powers of the soul are the subject of virtue insofar as they are subject to reason – either directly or indirectly. Consequently, the intellectual power of the soul is subject to virtue as it is the power of reason itself. However, the vegetative, sensitive and locomotive powers of the soul are not regulated by rational activity as they depend on (organic) conditions, which are not subject to reason. Thus, there can be no virtues perfecting these powers. The last of the five power-candidates, the appetitive power, is subject to human virtue insofar as it can be habitually subjected and in conformity with rational rule: “Das sinnliche Streben ist in sich nicht vernünftig und strebt auch nicht vernünftig; aber es kann dazu gebracht werden, vernünftig zu streben, indem das Subjekt sein Streben auf jenes Gute ausrichtet, wie es allein der Vernunft gegenständlich ist”

⁷² Stump adds that St. Thomas Aquinas distinguishes between the end of an action and the object of an action, whereas “the object of an action is what the agent tends to accomplish as a direct result of her action, while its end is why she intends to accomplish it” (2003: 78). This distinction is closely related to the Aquinian doctrine of double effect (cf. II^a-IIae q. 64 a. 7).

⁷³ The circumstances are the accidents of an act, namely quis, quid, ubi, quibus auxiliis, cur, quomodo, quando (cf. I^a-IIae q. 7 a. 3 co.), i.e. who, what, where, by what aids, why, how, and when. An action’s circumstances are “obviously not essential features of a type of action; but they are what might be called particularizing characteristics, because any broadly conceived type of action is particularized or recognized as the particular action it is by attending to its circumstances” (Stump, 2003: 79).

(Rhonheimer, 2001: 147). Human virtue shows itself in two forms: as the perfection of the intellectual power of the human soul and as the perfection of the appetitive power of the human soul. In order to gain a better understanding of the virtues perfecting these powers, the next sections elaborate briefly on both the intellectual and the appetitive power.

2.3.3.3.1 Intellectual Power: Intellect, Intelligence, Reason or Mind

The intellect is the cognitive power by which the soul knows, i.e. understands, and is wise (cf. *De Anima*, 429a 10). It is the faculty of truth and falsity as well as intellectual apprehension and intellectual judgement. Although different from sense, the intellect presupposes sensation and operates on the materials supplied by the sensuous faculties (cf. Rhonheimer, 2001: 149 as well as Maher, 1910). Reason includes the activities of attention, conception, judgement, reasoning, reflection as well as self-consciousness (cf. Maher, 1910) and can be distinguished according to its functions into speculative and practical:

- Speculative or theoretical reason (higher reason)
In its theoretical/speculative activities, the adequate object of the intellect is the intelligible, i.e. the knowledge of that which can be known, whereby the intellect abstracts the intelligible from sense perception (cf. Rhonheimer, 2001: 149) and whereas “das Treffen des für den Intellekt Erkennbaren nennen wir eine wahre Erkenntnis” (Rhonheimer, 2001: 148)⁷⁴. The intelligible becomes the truth and life according to reason, life in truth. The object of the intellect is knowledge (‘Erkenntnis’) of truth per se, i.e. to make visible the intelligible truth that is contained in sense experience. Speculative reason “confines itself to the sole contemplation of truth” (Waldron, 1912) and directs what it apprehends, not to operation, but to the consideration of truth (I^a q.

⁷⁴ Accordingly, “veritas est adaequatio rei et intellectus. Sed haec adaequatio non potest esse nisi in intellectu. Ergo nec veritas est nisi in intellectu.” (*De veritate*, q. 1 a. 2 s. c. 2; also cf. I^a q. 16 a. 1 co.)

79 a. 11 co.), whereby truth is “adaequatio rei et intellectus” (St. Thomas Aquinas, *De veritate*, q. 1 a. 1 co.).⁷⁵

- Practical or operative reason (lower reason)
The practical reason is the power of the mind engaged in deciding what should be done. It “considers truth in reference to action” (Waldron, 1912); it is concerned with external action and “reasons about things that can be done by us” (Stump, 2003: 225). In its practical activities, the object of the intellect is good that can be ordered to action and as considered under the aspect of truth (I^a q. 79 a. 11 co.); what the practical reason apprehends is related to operation. As the theoretical, the practical intellect knows truth; but in contrast to it, it directs the known truth to operation (I^a q. 79 a. 11 ad 1 as well as ad 2). Lower reason is ruled by higher reason, in so far as the principles used by lower reason are drawn from and directed by the principles of higher reason (I^a q. 79 a. 9 ad 2).

2.3.3.3.2 *Appetitive Power (‘Strebevermögen’)*

According to St. Thomas Aquinas, an appetite is nothing else than a certain inclination toward something on the part of what has the appetite (cf. I^a-IIae q. 8 a. 1 co.). In man are found the natural or unconscious appetite as well as the conscious appetite (also called ‘appetitus elicitus’). Natural appetite is “the inclination of a thing to that which is in accord with

⁷⁵ According to von Wachter (2007: 7f), a reasonable (‘vernünftig’) person is somebody “der bei der Wahrheitssuche alles richtig gemacht hat und dessen Überzeugungen miteinander und mit allen Informationen, die er hat, im Einklang sind. Fragt man nicht in Bezug auf ein bestimmte Überzeugung einer bestimmten Person, sondern in Bezug auf eine These im allgemeinen, ob sie vernünftig ist, fragt man damit, ob die Dinge, die wir wissen, und unsere Wahrnehmungen diese These wahrscheinlich machen. [...] Durch die Vernunft von etwas überzeugt zu sein, heißt, durch Gründe und Argumente von etwas überzeugt zu sein. [...] Vernunft hat keine Attribute. Es gibt nicht meine Vernunft und deine Vernunft und die Vernunft der Chinesen und die Vernunft der Eskimos, sondern bei jeder Überzeugung, sei sie eine der Chinesen oder eine der Eskimos, ist zu fragen, ob sie vernünftig ist.”

its nature, without any knowledge of the reason why such a thing is appetible” (Dubray, 1907b).⁷⁶ As such, however, it cannot be subject to reason. Therefore, St. Thomas Aquinas excludes this kind of appetite from the appetitive powers, which can be perfected by human virtue; for him, the appetite is that power of the soul, through which one is able to desire what one apprehends and not only that to which one is inclined by one’s natural form (I^a q. 80 a. 1 co.). This description fits the conscious appetite, which in turn is divided into two distinct powers – the rational and the sensory appetite (II^a-IIae q. 18 a. 1 co.):

- Rational, intellective, intellectual or higher appetite: Free Will
According to Rhonheimer, the will is “gewissermaßen die Seele des menschlichen Handelns” (2001: 161). By means of his free will man moves himself to act (I^a q. 83 a. 1 ad 3). The will is an appetite or inclination to, i.e. to be moved towards or orientated by, the universal good, or to be more precise: what has been attributed goodness by reason, i.e. what one considers good. But, the act of producing evaluative judgments and in so doing so determining this good is the job of the intellect. The will thus forms desires for the things that reason perceives to be good and

⁷⁶ By its natural appetite, every form and every hylomorphic thing – even if inanimate – has some sort of inclination associated with it, which determines the thing to its nature: “for example, fire, by its form, is inclined to rise, and to generate its like” (I^a q. 80 a. 1 co.). Any faculty of the soul that is not subject to the will must carry out its operation “by the necessary determination of some natural impulse” (Reichberg, 2002: 133). Such faculties cannot be reinforced by the acquisition of habits; the natural form is therefore followed by a natural appetite to act according to nature. Cf. Kretzmann, 1993: 144: “Animate things that lack cognitive faculties, and even inanimate things, have necessitated, one-track inclinations, sometimes called ‘natural inclinations’ (for example, gravitational attraction). Living beings with merely nutritive (i.e. vegetative) souls have no cognition at all, but they do have natural appetites beyond those associated with inanimate bodies (such as phototropism in green plants). At the level of animal life there is sensory cognition, and with cognition come accidental goals, dependent on what happens to be presented to the animal’s senses as desirable, or good for it. [...] It has not only natural but also sensory appetite.”

which reason presents to the will as a suitable object of desire (cf. I^a-IIae q. 13 a. 1). Once an object has been presented to the will as good, the appetite for the good, which is the will, will, in turn, seek this object. In this sense, reason can be said to direct and move the will – but reason cannot necessitate the will. Reason moves the will as a final, but not an efficient cause⁷⁷: “The intellect presents to the will as good certain things or actions under certain description in particular circumstances, and the will wills them because it is an appetite for the good and they are presented to it as good.” (Stump, 2003: 278) Consequently, choice is primarily an act of will, not intellect, although intellect is a necessary condition for the will to function⁷⁸. Reason does not push the will towards a choice: “intellectus regit voluntatem, non quasi inclinans eam in id in quod tendit, sed sicut ostendens ei quo tendere debeat” (De veritate, q. 22 a. 11 ad 5), i.e. the intellect rules the will, not by inclining it toward where it tends but by showing it where it ought to tend. The prominence of reason can be easily understood if we consider the following example: “If reason were not available to tell the will what is desirable, the will would have no venue in which to operate. The will is ultimately a sort of appetite, and an appetite will not become engaged unless something is presented to it as desirable. If food is placed in front of a person who is full from having just eaten, then the person’s intellect will not see the additional food as falling under the category of things that will satisfy hunger. For this reason, the intellect will not present the food to the will as something that ought to be desired.” (Thero, 2006: 70)

However, while the intellect moves the will by presenting it with something good (i.e. supplies the will with its final cause) and although – absolutely speaking – the will is inferior to the intellect, the will is capable of moving the intellect as efficient cause (cf. I^a

⁷⁷ This is not to say that reason is the final cause; it only supplies the will with an end.

⁷⁸ This is why the Socratic idea that man does evil due to a lack of knowledge is wrong.

q. 82 a. 4 co.). The will is the agent of the intellect and is able to move it: a person considers something with his intellect because he wills to do so. However, while the will can move the intellect to the execution of its act, it cannot lead the intellect to form specific judgments about specific objects.

As Rhonheimer (2001: 158f) points out, the will possesses certain freedoms, too. Although the will cannot will anything apart from what reason presents to it as good, it can oppose and refuse this good and thus reason by saying ‘I do not want’ (*‘curvatio in seipsum’*).

- Sensitive, sensory, lower or irrational⁷⁹ appetites: sensuality (I^a q. 81)

In contrast to the lower forms of life, an animal is able to seek (*‘appetere’*) objects it apprehends (i.e. which appear to the senses) and not only those towards which it is inclined by its natural form (I^a q. 80 a. 1 co.). Sensuality is the appetite of things belonging to the body (I^a q. 81 a. 1 s.c.), which follows sensory cognition (I^a q. 81 a. 1 co.), although it has to be annotated that the sensitive appetite does not always focus on physical items presented through the senses, but also mental images that the mind constructs from prior sense experiences. All movements of the sensitive appetite are called emotions or passions⁸⁰ (also cf. White,

⁷⁹ They are called irrational “because they are also found in non-human animals” (Drefcinski, 1999).

⁸⁰ A passion is always a bodily, physical event (cf. Ia q. 20 a. 1 ad 1). Also cf. Rickaby (1919: 40): “A passion is defined to be: a movement of the irrational part of the soul, affected by a notable alteration of the body, on the apprehension of good or evil. The soul is made up of intellect, will, and sensible appetite. The first two are rational, the third irrational: the third is the seat of the passions.” Those passions which regard good or evil as absolutely belong to the concupiscible power and those passions which regard good or bad under the aspect of difficulty (i.e. good being arduous/difficult to obtain and evil hard to avoid) belong to the irascible faculty (cf. I^a-IIae q. 30 a. 1 co.). Passions are called passions because “in feeling them agents are moved as a result of having been acted upon by some external agency” (Pope, 2002: 33).

2002). The sensitive appetites are divided into the concupiscible and the irascible appetite, the former being for pursuit and flight, the latter for resistance.

- Concupiscible appetite:

Through the concupiscible appetite our soul “*inclinatur ad prosequendum ea quae sunt convenientia secundum sensum, et ad refugiendum nociva*” (I^a q. 81 a. 2 co.), i.e. is inclined to seek those things which are suitable according to the senses and fly from those which are hurtful. It accounts for our desires for various physical pleasures as well as avoidance of pain. In general, the object of the concupiscible appetite is sensible good or sensible evil taken absolutely, i.e. what is pleasurable or painful as such. According to St. Thomas Aquinas, the passions of the concupiscible appetite – “which are moved by goods of sense as such” (Pope, 2002: 33) – are love (inclination toward a good; I^a-IIae q. 26), hatred (inclination away from an evil; I^a-IIae q. 29), concupiscence or desire (motion to a possible future good, craving for pleasure; I^a-IIae q. 30; cf. Rickaby, 1919: 49ff), pleasure (also delight, joy or gladness; possession of a good; I^a-IIae q. 31; cf. Rickaby, 1919: 54ff) and pain or sorrow (possession of an evil; I^a-IIae q. 35). Rickaby (1919: 42) also mentions abhorrence or aversion (motion away from a possible future evil).

- Irascible appetite:

By the irascible appetite our soul “*resistit impugnantibus, quae convenientia impugnant et nocumenta inferunt*” (I^a q. 81 a. 2 co.), i.e. resists those attacks that attack what is suitable and inflict harm. This appetite’s object is sensible good, insofar as it is difficult to attain and sensible evil, insofar as it is difficult to avoid. According to St. Thomas Aquinas, the passions of the irascible appetite – “which are moved by goods of sense which can only be obtained through the overcoming of some kind of resistance” (Pope, 2002: 33) – are hope (inclination toward a difficult future

good qua possible to attain; I^a-IIae q. 40), despair (inclination away from a difficult future good qua impossible to attain; I^a-IIae q. 40), fear (inclination away from a difficult future evil qua impossible to overcome; I^a-IIae q. 41), daring (inclination toward a difficult future evil qua possible to overcome; I^a-IIae q. 45) and anger (reaction to a present or past evil qua something to be avenged; I^a-IIae q. 46; cf. Rickaby, 1919: 61ff)⁸¹.

While in irrational animals which lack a developed faculty of the will movement follows directly from the sensory appetite, human beings can decide whether and how to respond to the sensory appetite's reactions to stimuli from the environment. Thus, our irascible and concupiscible appetites are inferior to the rational appetite (cf. I^a q. 81 a. 3 co.); they are not sufficient to cause movement, i.e. passions, unless the will consents. Accordingly, St. Thomas Aquinas holds that we never act from passion without the consent of or at least not against our will (I^a-IIae q. 17 a. 7).⁸² In the same fashion, St. Augustine says: "Interest autem qualis sit uoluntas hominis; quia si peruersa est, peruersos habebit hos motus; si autem recta est, non solum inculpabiles, uerum etiam laudabiles erunt. Voluntas est quippe in omnibus; immo omnes nihil aliud quam uoluntates sunt." (De Civitate Dei, XIV, 6)⁸³ The will can restrain our passions; but this does not mean that our passions have to be subdued and suppressed: "Because the emotions are part of our creaturely nature and therefore good in

⁸¹ Anger differs from hatred: hatred is a chronic affection, while anger an acute one.

⁸² For an account of the Thomistic position (this is where St. Thomas Aquinas goes one step further than Aristotle) that the will not only rules in the realm of reason, but also passions, cf. Rhonheimer, 2001: 155 as well as 160f.

⁸³ This translates as: "It depends on the quality of the human will; because, if it (the quality) is perverted, these motions (of the soul) will be wrong; but if it is right, they will be not merely blameless, but indeed praiseworthy. For the will is in them all; all are nothing else but will."

themselves, the key moral challenge they present lies in their proper ordering rather than in their repression.” (Pope, 2002: 33)⁸⁴

However, although the irrational appetites and passions are inferior to the will and cannot influence the will directly, they can do so indirectly. (1) Even though the irrational appetites normally obey reason (cf. I^a q. 81 a. 3)⁸⁵, they can also oppose the command of reason (cf. I^a q. 81 a. 3 ad 2) or even influence reason thereby modifying the object of the will. This influence can result in “ein Unterliegen des Vernunfturteils bezüglich des ‘Hier und Jetzt Guten’ unter die Wertung des sinnlichen Antriebs” (Rhonheimer, 2001: 154). Consequently, the rational appetite will follow the influenced and reassessed judgement of reason. This phenomenon is called ‘error electionis’, ‘ignorantia electionis’ or ‘ἀκρασία’ (cf. Rhonheimer, 2001: 154f; I^a-IIae q. 77 a. 2; I^a-IIae q. 9 a. 2; EN, 1145b 21ff). One might possess knowledge of the right conduct in general (e.g. eating sugar is bad), but still choose to act contrary to this knowledge in a particular situation or moment due to the overriding influence of the passions in this situation or moment (e.g. hunger). This is also expressed in Psalm 118, which states that “sometimes we understand [what is right] while desire is slow, or follows not at all” (also cf. I^a-IIae q. 58 a. 2 co.).⁸⁶

⁸⁴ Some, like the Stoics, contended that the model man should be totally devoid of and suppress his passions. But as Rickaby points out: “The fault in this picture is that it is not the picture of a man, but of a spirit. He who being man should try to realize it in himself, would fall short of human perfection. [...] Passion is the natural and in a certain degree the inseparable adjunct of strong volition.” (Rickaby, 1919: 45f)

⁸⁵ Also cf. Rickaby (1919: 48): “In a man of confirmed habits of moral virtue, Passion starts up indeed independently of Reason, but then Reason ordinarily finds little difficulty in regulating the Passion so aroused. In a certain high and extraordinary condition of human nature, not only has Reason entire mastery over Passion wherever she finds it astir, but Passion cannot stir in the first instance, without Reason calling upon it to do so.”

⁸⁶ These correlations have also been seen by ancient writers such as Cicero and Ovid. Cicero writes that “plura enim multo homines iudicant odio aut amore aut cupiditate aut iracundia aut dolore aut laetitia aut spe aut timore aut errore aut aliqua permotione mentis quam veritate aut praescripto aut iuris norma aliqua aut iudici formula aut legibus” (Cicero, *De oratore*, 2, 178). This translates as: Man more often

We can thus act against our better judgement; but this does not mean that in doing so we act involuntarily. (2) But it is also possible that “eine Leidenschaft durch ihre Intensität so viel psychische Energie und affective Aufmerksamkeit beansprucht, daß der Wille als vernunftbestimmter Antrieb gar nicht mehr zum Zuge kommt” (Rhonheimer, 2001: 155; also cf. Thero, 2006: 71). The more emotion is allowed to build, the more difficult it becomes to exercise control; therefore, owing to its suddenness or intensity, the outburst of passion cannot be repressed (cf. Dubray, 1907b; I^a-IIae q. 17 a. 7; De veritate, q. 25 a. 4). But as has been said, voluntary actions are those, which proceed from the will – either directly, i.e. by action, or indirectly, i.e. by inaction (cf. I^a-IIae q. 6 a. 3 ad 1). If a passion overpowers the will, we have to distinguish between whether the passion is accepted voluntarily or involuntarily. Negative passions (such as fear) can override our will without us wanting to and thus cause involuntariness; fear can drive a soldier to flee from the battlefield although he does not will to do so. Abundant positive passions (such as pleasure), however, always override the will voluntarily.

Although much more could be said about the powers of the human soul, their respective activities, their relationship to one another and the order between them, this initial account and overview should suffice for our purposes.

2.3.4 Health as Good Habit

What does all this mean in regard to our search for the essence and nature of health? What we were looking for was an element, which helps us overcome the deficiency of the static theory of health, namely the lack of a dynamic aspect, which can account for changes in health status and

judges based on hatred, love, desire, anger, grief, joy, hope, fear, mistake or some emotion of the mind, rather than truth, precept, norms of law, judgement or laws. In the same fashion, Ovid writes (*Metamorphoses*, 7, 20f): “aliudque cupido,/ mens aliud suadet: video meliora proboque,/ deteriora sequor!” This translates as: Desire urges one thing, reason another: I see and desire the better but follow the worse.

explain how health or unhealth come about. As we have seen, health is not a static given, but rather influenced by and the result of a variety of determinants. Some of these determinants can be influenced and controlled by us directly or indirectly (all micro- and some mid-level determinants), some of them (some mid- and virtually all macro-level determinants) elude our influence. We have furthermore seen that behavioural pathogens and salutogens play a very important role in the genesis as well as the preservation of health. Therefore, when thinking about what an individual can do for his health, we need to focus only on those determinants, which are susceptible to the respective individual's influence and which I have subsumed under the term 'health behaviour'. The reason for this focus is rather simple: as one has no or only negligible influence over external pathogens and salutogens, they have to be treated as a given. While these determinants have to be addressed in the context of public health, they do not play a part when an individual thinks about what he can do to better his health. The external salutogens and pathogens are the given framework in which we can move, but which we cannot alter. To make a long story short: the fact that we can alter and influence some determinants of health means that health – at least to a certain degree – is subject to our choices, actions and behaviour. In addition, if our health is dependent on and determined by our behaviour and acts, then behaviour is a key to obtaining and preserving health. What every individual should start with is optimising his behaviour in a way, which minimises behavioural pathogens and optimises⁸⁷ behavioural salutogens. But what does this have to do with health?

I propose that health is not only the result of (i.e. a state) or a norm for our behaviour, but a perfectant of it. Or as Goethe (1998: Vv 11574-11576) puts it:

⁸⁷ I deliberately use the term 'optimise' instead of 'maximise', which would be the logical opposite of the minimisation required with respect to the behavioural pathogens. A maximisation of behavioural salutogens would require unreasonable amounts of resources, namely all, to be devoted to the quest for health. "So wie die Krankheit untertriebene Gesundheit ist, so gibt es auch übertriebene Gesundheit." (Lütz, 2005)

*“Das ist der Weisheit letzter Schluß: / Nur der verdient sich Freiheit
wie das Leben, / Der täglich sie erobern muß.”⁸⁸*

Health is the quality (‘Eigenschaft’) by which we minimise behavioural pathogens and optimise behavioural salutogens. As such it is meant to perfect those aspects of our behaviour which have an influence on health outcomes. It is the reason we are healthy – at least to the extent we can actually influence our health via directly or indirectly influenceable health determinants. In what follows, I want to outline the position that health is a quality by which we are said to be healthy. This idea basically holds that somebody is healthy not if he manages to live up to a subjective, bio-medical or social norm, but rather if he exhibits the quality which keeps him in this state. Health thus becomes the attitude or disposition, which guides our health behaviour.

As has been said, a habit is a steady quality or disposition, which disposes a substance’s powers to act in certain ways whereas the substance is said to be well- or ill-disposed with respect to its nature and/or with respect to its operation and final end, i.e. some norm. If we apply this understanding to health, we can say that health is the deeply rooted, long-lasting and hard to eradicate disposition, in virtue of which we behave well with respect to a given norm of health and which we can exercise in action at will. As such, health fits the concept of good habits: it is a stable disposition to act in ways, which are good whereas goodness here is measured by a subjective, objective and/or social health norm. Furthermore, as has been shown above and by the studies of Belloc, Breslow and Enstrom, health as habit results from continuous exercise. This is also affirmed by Hesiod who states that “τῆς δ’ ἀρετῆς ἰδρῶτα θεοὶ προπάρουθεν ἔθηκαν ἀθάνατοι” (Works and Days, 289f), i.e. that the immortal gods have placed the sweat of man’s brow before virtue.

While I think that health doubtlessly qualifies as good habit, I am reluctant to call it a virtue (as were Aristotle and St. Thomas Aquinas).

⁸⁸ Following Walter Arndt’s translation, this reads as: Wisdom’s last verdict goes to say: / He only earns both freedom and existence, / Who must reconquer them each day.

Although virtues are good habits and health is a good habit, health differs from the concept of virtue in some crucial aspects. As has been said, virtues are meant to perfect our powers; the measure of this perfection is the “natural finality of the power in question (and, by extension, the finality of the person of whom these powers are functional parts)” (Reichberg, 2002: 132; also cf. I^a-IIae q. 55 a. 1 co.). In particular, virtues are meant to perfect those of our powers, which are subject to truly human acts, where human acts are acts “insofern sie aufgrund von Vernunft und vernünftigem Streben (Willen) vollzogen werden” (Rhonheimer, 2001: 147). Furthermore, St. Thomas Aquinas states that virtue cannot have more than one power as its principal subject (cf. I^a-IIae q. 55 a. 2). Given these two specifications, health cannot be a virtue in the fullest sense of the word. The powers of the soul which are subject to reason and will are the two intellectual powers (the speculative and theoretical intellect) as well as the rational appetite and the two irrational appetites (concupiscible and irascible appetite). A virtue can only address one of these powers. But health – as can be easily seen – addresses more than one of these powers. In order to live up to health as a norm, one would have to perfect all of the aforementioned powers:⁸⁹

⁸⁹ While the moral and intellectual virtues pertain to man’s nature and, if acquired, allow us to reach our natural end, happiness, St. Thomas Aquinas “denied that they are sufficient for the perfect happiness that consists in the vision of God in heaven” (Drefcinski, 1999; cf. I^a-IIae q. 5 a. 5). Supernatural happiness can only be reached with the aid of God. The three theological virtues – faith, hope and charity – are such aids; they surpass man’s unaided nature (cf. I^a-IIae q. 62 a. 1 co.) and are infused virtues “quam Deus in nobis sine nobis operatur” (I^a-IIae q. 55 a. 4 arg. 1), i.e. which God works in us, but without us. Acts produced by an infused habit do not cause, but strengthen a preexisting habit: “actus qui producuntur ex habitu infuso, non causant aliquem habitum, sed confirmant habitum praexistentem” (I^a-IIae q. 51 a. 4 ad 3). As Waldron (1912) points out, these virtues are called theological because “(1) they have God for their immediate and proper object; (2) they are Divinely infused; (3) they are known only through Divine Revelation”.

- Intellectual powers: Theoretical and practical intellect
These powers are meant make visible the intelligible truth that is contained in sense experience (speculative reason) as well as to consider this truth in reference to action (practical reason). According to St. Thomas Aquinas, the virtues of the speculative intellect are wisdom, science and understanding (I^a-IIae q. 57 a. 2), the practical intellectual virtues are art (I^a-IIae q. 57 a. 3) and prudence (I^a-IIae q. 57 a. 4).

In order to possess health as good habit one is required to be able to consider first and true principles, i.e. underived, self-evident and necessary truths “the perception of which requires no discursive process” (Waldron, 1912; also cf. Reichberg, 2002: 137), as well as the highest causes including the First and Supreme Cause of all things as well as man. In doing this, one is able to consider the end and nature of man and therefore the supreme norm that there is to our life. This is what understanding (also called intuition or intuitive insight) and wisdom are all about. Science, which is the ability to draw conclusions by reference to necessary and universal truths (cf. Reichberg, 2002: 137) and “the knowledge of conclusions acquired by demonstration through causes or principles which are final in one class or other” (Waldron, 1912), allows one to gain knowledge of the world surrounding us and is thus a necessary prerequisite for any bio-medical knowledge. By the virtue of science we develop the necessary theoretical and scientific foundation for informed action.

Prudence is the right method of conduct (“*prudentia est recta ratio agibilium*” (II^a-IIae q. 47 a. 8 co.)) and “enables one to know how to act in the midst of the contingencies of a given situation” (Pope, 2002: 40; also cf. II^a-IIae q. 47 a. 5). As such, it “involves good deliberation about the means to a good end, a correct judgment about what is to be done, and the execution of that good choice” (Drefcinski, 1999; also cf. II^a-IIae q. 49 a. 3 co.)). It thus “directs one in the choice of means most apt, under existing circumstances, for the attainment of a due end” (Waldron, 1912). Prudence is closely connected to health as it allows choosing the right means to reach the end of health as norm. Arts, the right reason about

certain works or products to be made (cf. I^a-II^ae q. 57 a. 3 co.; also cf. I^a-II^ae q. 57 a. 5 ad 1), are a mixture of knowledge and skills and “dispose their possessor to produce works that are well done” (Drefcinski, 1999). As such, art is a prerequisite for health as it is a necessary virtue, required e.g. for the preparation of one’s food and cooking.

The good habit health can only be possessed if all these virtues – and accordingly both the theoretical as well as practical intellect – are perfected.

- Appetitive powers: Rational and irrational appetites
The virtues of the appetites (justice, temperance and fortitude), the so-called moral virtues, as well as their subordinate virtues are meant to safeguard the good of reason against the impulse of the appetites and passions (II^a-II^ae q. 136 a. 1 co.; II^a-II^ae q. 161 a. 1 co.). They are a steady bent to choose the mean between two undesirable extremes, namely excess and deficit.⁹⁰

The irrational or sensitive appetite is the appetite of things belonging to the body, expresses itself in the form of emotions or passions and has two facets: the concupiscible and irascible appetite. The former accounts for our desire for various physical pleasures as well as avoidance of pain and has to do with pursuit and flight. The latter has to do with resistance and perseverance; this appetite’s objects are sensible goods insofar as they are difficult to attain and sensible evils, insofar as they are difficult to avoid.

Temperance (or moderation) restrains and perfects the concupiscible appetite, i.e. the desire for sensible pleasure, which is against reason. It should be more than obvious how temperance is relevant for health as habit. Furthermore, several of the virtues subordinate to temperance are important for the possession of health as habit; amongst others these are abstinence (moderation in

⁹⁰ Cf. Nicomachean Ethics, 1106 b 25: “μεσότης τις ἄρα ἐστὶν ἡ ἀρετή, στοχαστική γε οὖσα τοῦ μέσου”, i.e. virtue is a mean state, in the sense that it is able to hit the mean.

the use of food; II^a-IIae q. 146), sobriety (moderation in the use of spirituous liquors; II^a-IIae q. 149) as well as chastity (which regulates the appetite in regard to procreation; II^a-IIae q. 151). If we recall the seven health habits as defined by Belloc, Breslow and Enstrom, we can see that their lion's share is about the moderation of one's desires, such as not overeating or controlling a sweet tooth.

The virtue of fortitude perfects the irascible appetite and is about fear and daring ("circa timores et audacias" (I^a-IIae q. 60 a. 4 s.c.)). It causes man to endure, i.e. to stand brave, immovable and confident in the midst of dangers and difficulties, but also moderates "the excesses of foolhardy audacity" (Rickaby, 1908) and "venturesomeness" (Rickaby, 1919: 96) by the judgement of reason.⁹¹ Fortitude, therefore, is relevant to health for it allows us to weather the hardships connected to the attainment of health or its protection. This is especially true for fortitude's sub-virtues, patience and perseverance. A patient man – the reader is surely aware of the pun – is one "who endures present evils in such a way as not to be inordinately cast down by them" (Waldron, 1912). Applied to health, patience is the virtue, which makes us able or willing to bear and endure the pains and unpleasant consequences of unhealth calmly or without complaint. Perseverance is a virtue "which disposes to continuance in the accomplishment of good works in spite of the difficulties attendant upon them" (Waldron, 1912). This makes perseverance a highly important virtue when it

⁹¹ Waldron (1912) gives a wonderful description of this virtue, which is worthy of being mentioned in an unabridged and undistorted fashioned undistorted and unabridged: "As temperance and its annexed virtues remove from the will hindrances to rational good arising from sensuous pleasure, so fortitude removes from the will those obstacles arising from the difficulties of doing what reason requires. Hence fortitude, which implies a certain moral strength and courage, is the virtue by which one meets and sustains dangers and difficulties, even death itself, and is never through fear of these deterred from the pursuit of good which reason dictates."

comes to health, as it allows one to e.g. stick to a diet, make it through the Lenten season or to exercise regularly.

The virtue of justice – the greatest of all moral virtues (II^a-IIae q. 58 a. 11) – perfects man's rational appetite, i.e. the will. The will moves us or orientates towards what has been attributed goodness by reason, i.e. what one considers good. The will, therefore, forms the desire for things that reason perceives to be good and which reason presents to the will as suitable objects of desire. Choice is primarily an act of will, not intellect, although intellect is a necessary condition for the will to function. Whereas fortitude and temperance regulate man with regard to his own inner passions, the virtue of justice and its sub-virtues regulate man in his dealings with others (II^a-IIae, q. 57 a. 1 co.) and regards rectitude ('right' or 'ius') in his external relations. Possessing the virtue of justice is highly important for the way we treat the people around us and consequently, how we are treated by them.

What holds true for the intellectual powers also holds true for the moral virtues: the good habit health can only be possessed if all these virtues are perfected and thus both the irrational and rational appetite.

Much more could be said about the perfectants of the powers of the soul; it suffices to keep in mind that the attainment of all the above-mentioned virtues is necessary for the possession of health as habit. Health could be said to be a perfectant of both the intellectual and appetitive powers. As such, it does not meet the requirement that a virtue can only perfect one power; the good habit health requires more than one power to be perfected. So, apart from taking it to be a good habit, we could conceive of health as a meta- or cluster-virtue, i.e. a combination of several virtues, which is not a virtue itself.

2.4 A Comprehensive Theory of Health

We are now in a position to formulate a complete theory of health. So, what is health? We set out to find an account of health that signifies its

essence and nature, i.e. those properties by virtue of which health is health and not unhealth and by virtue of which an individual can be said to be healthy. Analysing contemporary theories of health, an initial inquiry has led us to develop a static theory of health, which sees health as both a norm as well as a state. According to the static theory of health, health has a positive as well as a negative side and can be defined in a subjective, objective and/or social fashion. These definitions then function as norms against which the health status of an individual at a certain point in time can be measured and judged. However, contrary to the position that all six resulting options to define health as norm (positive-subjective, positive-objective, positive-social, negative-subjective, negative-objective, negative-social) are on par, it has been argued that the positive-objective norm enjoys primacy. The positive-objective norm is the human natural-biological norm as acknowledged, defined and categorised by objective bio-medical science but also the humanities. It has to be emphasised that this norm is not made up by the bio-medical sciences and the humanities but rather discovered. However, this gradual process of unveiling health as a natural-biological norm for human beings also necessitates that the positive-objective norm of health not be an absolute. It must not deny the worth of the subjective or social norms of health. Rather, these two can function as a corrective and a stimulus for further bio-medical research. These norms serve as a yardstick against which the state of health of an individual is measured. Health as a positive norm is usually understood as perfect state – regrettably, this perfect state is only seldom achieved in reality. Therefore, health as a positive-perfect norm is accompanied by health as a positive-normal norm, i.e. those states of health, which are also considered acceptable. Health as a normal norm ranges from good health to bad health, whereas the latter borders on unhealth. The static concept of health, therefore, features health as norm as well as health as state. The former understands health as norm, which is to be achieved and the degree of realisation of which can be determined as health as state. Health as norm and state is thus determined “by the general nature of the human person modified through its instantiation in particular human subjects” (Donohue-White & Cuddeback, 2002: 182). In a nutshell, the static theory of health holds that health is when that everything functions as it should whereas this norm can be established based on subjective, objective and social

perspectives. The deficiency of this approach is that it conceives of health as merely a state, which can be observed at a certain point in time. But as reality shows health is also determined “by the unique potentialities of the individual (capacities, abilities, characteristics), and, more importantly, by the actions and choices of the individual person” (Donohue-White & Cuddeback, 2002: 182). These actions and choices (along with external pathogens and salutogens) account for the changes in health and unhealth over time – changes which the static theory of health cannot explain. The static theory of health is helpful in providing us with a norm, which can serve as a yardstick, but it only allows for snapshots of our health status at different points in time and cannot explain what happens between these points in time. The changes in health are something of an enigma. This is why we have complemented the static theory of health with a behavioural component – health as good habit.

As the previous chapter has shown, health as good habit is not to be confused with virtue in a strict sense. Like the virtues, health as good habit aims at perfecting the perfectible powers of the human soul, namely the two intellectual and three appetitive powers. But since a virtue can aim at perfecting one power only, health cannot be a virtue because health as good habit requires the perfection of all the powers of the soul. If we do not know what is good for us and what the right end is, we cannot act on this knowledge (theoretical intellect); if we cannot choose the right means to the right end, we do not know how to act (practical intellect); if we know how to act and what to aim at but cannot control our appetites with our will to overcome healthy hardship or forgo unhealthy pleasure, we will not be able to put plans into practice (rational and irrational appetites). Health as good habit disposes all these powers in a way, which serves the end of health as norm.

In order to come up with a complete theory of health, which avoids and overcomes the deficiencies of the static theory of health, we have to combine the just mentioned theory with the theory of health as good habit. We would then be able to say that the essence or nature of health is threefold (cf. Figure 8:):

1. First of all, health is a norm, i.e. a standard. At its core, this standard has to do with the quality of our lives; a healthy life is considered a good life. Health is something we strive for, but this does not tell us anything about the content of the norm. The definition of the content of the norm can be carried out in a positive or negative fashion as well as according to an objective, subjective or social dimension. From the resulting six options, health as objective norm – the human natural-biological norm which is discovered by the bio-medical sciences as well as the humanities – is the *primus inter pares*.
2. Secondly, health is a state. This state is measured against the yardstick of health as norm. Depending on how one does with respect to health as norm, the respective individual is considered to be in perfect health, normal health or unhealth. Health as state and health as norm form the static theory of health, which is deficient, since it cannot explain changes in health between two states of health. In order to account for this weakness, one has to enrich the static theory with a behavioural component.
3. Thirdly and finally, health is a good habit. Health as status is only a snapshot in time. The changes in health status depend on a variety of determinants, some of which can be directly or indirectly influenced and some of which cannot be influenced; all determinants can both be pathogenic or salutogenic. The directly and indirectly influenceable determinants are subsumed under the term behavioural pathogens or salutogens. Health as good habit is an individual's steady disposition according to which he is well disposed with respect to health as norm. Health as habit thus guides our behaviour in a way, which makes the determinants of health, which we can influence directly or indirectly turn out as behavioural salutogens. Health as habit guides our health behaviour, i.e. the behaviour relevant to our health, in ways, which further our health. Health as habit is not the behaviour itself, but the perfection of the powers of the human soul, which expresses itself in healthy acts. Health is the good habit by which we are, remain or become healthy.

I have tried to visualise the findings of this chapter by depicting the complete theory of health that I have developed here graphically, as follows:

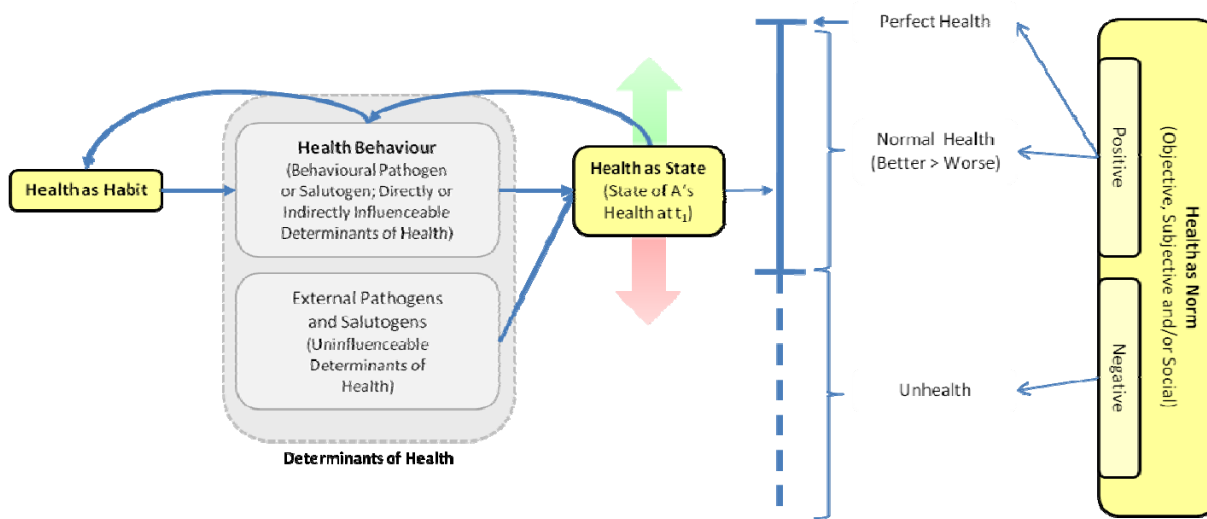


Figure 8: A Comprehensive Theory of Health

It should be added here that there is a feedback loop between health as state and health as habit. So, while health as habit influences health as state, the latter also has an influence on the former. If an individual – for whatever reason – is not content with his health status, he can change his health behaviour (i.e. turn behavioural pathogens into salutogens) hoping that his state of health will move up the scale of health as norm. This of course presupposes that his will is capable of making him do so. If he repeats this kind of salutogenic behaviour, the behaviour will eventually turn into a habit, which then reinforces the salutogenic behaviour.

I think that it should have become clear what a complete theory of health looks like. Given this lengthy discussion and the insights we have gained, I think it is safe to state that the unveiling of the enigma of health is complete.

**III JUSTICE, DIGNITY, RIGHTS AND
DUTIES: THE PHILOSOPHY OF HUMAN
RIGHTS**

“No man is an island, entire of itself;
every man is a piece of the continent, a part of the main.”

*John Donne (Devotions upon Emergent Occasions,
Meditation XVII)*

Now that we have an understanding of what to think of health, we can turn our attention to the concept of human rights. One way to analyse a concept is to look at its elements and the relations between them. One cannot say ‘human right’ without saying both ‘human’ and ‘right’: human rights are rights⁹², i.e. derivative of the concepts of right and duty, and human rights are rights, which have something to do with humans as opposed to non-humans. If we want to analyse the concept of human rights we, therefore, have to deal with its elements, namely ‘human’ and ‘right/duty’. Accordingly, it is my firm opinion that any complete account and justification of the general idea of human rights has to comprise the following two components:

- (1) The concept of human rights used by this account, whereas this concept has to be explained with reference to
 - what we mean by ‘human *rights*’ – and since rights and duties are an inseparable couple – as well as ‘human *duties*’ and
 - what we mean by ‘*human rights*’, i.e. what is so special about the human being that we grant him rights.
- (2) The content of the account, i.e. which human rights are singled out for protection.

In what follows, I shall be mainly concerned with explicating (1), i.e. explaining what we are to understand by rights and duties and what is so special about human beings that we grant them the special class of human

⁹² Cf. Nickel (2007: 9): “[L]est we miss the obvious, human rights are rights”.

rights. I shall, however, only touch upon (2) and shall not provide an allegedly exhaustive or exclusive list of human rights, which are singled out for protection. Rather, I shall only try to answer the question whether health can be singled out for protection, i.e. whether the account of health chiselled out in the preceding chapter is covered by the subsequent account of human rights.

In developing the philosophy of human rights, I shall proceed in several steps: after some remarks about the relation between rights/duties and justice, I shall briefly outline the necessary analytical fundamentals of the concept of human rights, namely ‘duty’ and ‘right’. Based on the premise that there are moral rights and that human rights are a class of moral rights, I shall then deal with the question of the morality of rights and duties, i.e. what it is that makes a right a moral and/or human right. The last part of this chapter shall be devoted to the philosophical foundation of human rights, which shall be based on the concept of human dignity and which also touches upon the question of how dignity gives rise to human rights.

1 Justice, Rights and Duties

Before going in medias res, a few words of a more general nature are in order. Why should we speak of rights and duties at all? Why do we need these concepts? Could we not do without them? When thinking about these questions we must not forget that human rights did and do not appear out of nowhere. Rather, rights and thus also human rights are part and aspects of justice and can only be understood within the framework of justice. Therefore, in order to understand rights and duties in their overall context, one has to shed light on the concept of justice first.

Justice is one of mankind’s most ancient ideals and has been touched upon in the writings of almost all the great philosophers. What gives justice such weight and prominence? The reason could be that justice is about the way human beings ought to live their lives and conduct themselves within a community. It has been common knowledge for thousands of years, that man is a “φύσει πολιτικὸν ζῷον” (Politics, 1253a 2)

or – as St. Thomas Aquinas has put it – that “naturale autem est homini ut sit animal sociale et politicum” (De regno, lib. 1 cap. 1; cf. I^a-IIae q. 72 a. 4 co.; also cf. De Beneficiis, VII, 1, 7), i.e. that man is a social and political animal by nature. Therefore, he requires some form of community for his very survival:

“Aliis enim animalibus natura praeparavit cibum, tegumenta pilorum, defensionem, ut dentes, cornua, ungues, vel saltem velocitatem ad fugam. Homo autem institutus est nullo horum sibi a natura praeparato, sed loco omnium data est ei ratio, per quam sibi haec omnia officio manuum posset praeparare, ad quae omnia praeparanda unus homo non sufficit. Nam unus homo per se sufficienter vitam transigere non posset. Est igitur homini naturale quod in societate multorum vivat.” (St. Thomas Aquinas, De regno, lib. 1 cap. 1)⁹³

According to John Donne, ‘no man is an island’. No man exists without some social bonds. However, if it is natural for man to live in the society of many, there must necessarily exist something, which underlies the organisation of society as well as the relationship and dealings of one man to another (cf. II^a-IIae q. 58 a. 2 s. c.). These relationships or dealings can take the following two basic forms⁹⁴:

⁹³ This translates as: For all other animals, nature has prepared food, hair as a covering, teeth, horns, claws as means of defence or at least speed in flight, while man alone was made without any natural provisions for these things. Instead of all these, man was endowed with reason, by the use of which he could procure all these things for himself by the work of his hands. One man alone is not able to procure all these things by himself, for one man could not sufficiently provide for life, unassisted. It is therefore natural that man should live in the society of many.

⁹⁴ The term ‘individual’ not only comprises single individuals, but also groups of individuals, which are considered as an individual, e.g. a company or a family. However, for the purposes of this thesis I use individual in its literal sense, as a single human being. Furthermore, the term ‘community’ not only applies to a society or state but also to communities such as families, the military, schools, etc.. The characteristic of communities is that they exhibit some form of hierarchy (‘Unterordnungsverhältnis’).

Individual ↔ Individual

Individual ↔ Community

The ordering of these dealings is the job of justice: it is “*qua societas hominum inter ipsos et vitae quasi communitas continetur*” (De Officiis, Liber 1, 20), i.e. whereby the society of man amongst others as well as quasi the community of life is based on and contained. Understood like this, the true governor of a society is not some ruler (which depending on the form of government can be called e.g. king, president, chancellor or ‘Landsgemeinde’), but the principle of justice: whoever rules should do so by and according to justice. Indeed, our ability to live in community and the way we understand our relations with one another seem to largely rest on the shoulders of justice and depend on the accuracy of her scales. But, what are the scales of justice?

For Aristotle as well as St. Thomas Aquinas, justice is not some rule, but a virtue whose subject is the rational appetite (will) (cf. II^a-IIae q. 58 a. 4).⁹⁵ To be more precise: it is not a virtue amongst others, but rather the foremost virtue amongst all intellectual as well as moral virtues. This is so because justice is not concerned with man’s own state (unlike the rest of the virtues), but requires him to carefully consider others in his dealings with them, including God (“*iustitia sola videtur esse virtus per quam*

⁹⁵ I am well aware of the fact that this understanding of justice, which tends to reduce justice to a set of rules or procedures, has not gone uncontested by modern philosophers. However, it is my firm opinion that justice is and applies to more than a mere rule for distribution, a measure of outcomes or a regulative principle of order. Justice does not make the rules and rights; it is what makes us respect them and act in accordance with them. It is what makes us give others what we owe them; what we owe them, however, has to be justified without reference to justice (understood like this, justice is ideologically neutral). Unfortunately, this is not the place nor is there space to defend the superiority of this thesis’ understanding of justice (unfortunately, I cannot refer the reader to an article or book that has solved this for me because I have not found any). Therefore, the reader, who thinks differently, is kindly asked to accept this thesis’ understanding of justice as a premise of its general argument.

ordinamur ad alterum” (II^a-IIae q. 122 a. 1 s. c.)).⁹⁶ But: how are we to consider others according to justice? As St. Thomas Aquinas points out, justice necessarily implies equality (cf. II^a-IIae q. 58 a. 2 co.) whereas the principle of equality is simply “suum unicuique tribuere” (II^a-IIae q. 58 a. 11 arg. 1) or “reddere unicuique quod suum est” (II^a-IIae q. 58 a. 11 co.; also cf. II^a-IIae q. 122 a. 1 co.; Republic, 433e; De Officiis I, 15; De Legibus I, 19).⁹⁷ Combining these strands of thought, we can say that justice is man’s constant disposition of will to render each one his due.

“To be concerned about justice is to be concerned about treating other people in the way they are entitled to. Requirements of justice are identified not by reflecting on one’s own character but by considering what will establish or preserve a reasonable relationship of proportionate equality between us, in relation to some act, forbearance, arrangement, or other subject-matter which is external, other-regarding (other-affecting). [...] When will everyone, some people, or someone, be entitled to some action or forbearance of mine, or to some thing which I should provide, respect, or restore?” (Finnis, 1998: 187f)

But, this is just a step out of the frying pan into the fire because we still do not know what is meant by ‘due’. St. Thomas Aquinas offers an explanation when he writes that “iustus dicitur quia ius custodit” (II^a-IIae q. 58 a. 1 co.), i.e. a man is said to be just because he respects the law and the rights⁹⁸ of others. So, if a man who gives everybody his due is just and if a man who respects the rights of others is just, then giving everybody

⁹⁶ As a consequence, all virtues that are directed to another can be considered annexes to justice (cf. II^a-IIae q. 80 a. 1 co.). But even particular acts that are usually instances of other virtues can become acts of justice if they are done for the common good: “a particular act of fortitude may be referred to the common good as its object and thus become an act of justice as well” (Koritansky, 2007).

⁹⁷ Also cf. “dicitur esse suum uniuscuiusque personae quod ei secundum proportionis aequalitatem debetur” (II^a-IIae q. 58 a. 11 co.), which translates as: It is said that what is due to every person is that which is owed to him according to equality or proportion.

⁹⁸ As far as the translation of the Latin word ‘ius’ is concerned, Finnis (1998: 133f) tells us that St. Thomas Aquinas’ use of the term ‘ius’ can be translated as ‘rights’ without difficulty.

their due amounts to respecting their rights. This deduction is also endorsed by St. Thomas Aquinas when he writes that a just man is one “*ius suum unicuique tribuens*” (II^a-IIae q. 58 a. 1 co.), i.e. who renders to each one his rights. So, the full definition of justice reads as follows: “*iustitia est habitus secundum quem aliquis constanti et perpetua voluntate ius suum unicuique tribuit*” (II^a-IIae q. 58 a. 1 co.), i.e. justice is a habit according to which somebody renders to each one his rights by a constant and perpetual will. In the end, what justice is all about and what it secures is “the right of some other person or persons – what is due to them, what they are entitled to, what is rightfully theirs” (Finnis, 1998: 133). Rights and duties are, therefore, a constitutive part and the object of justice; they are how justice does its work.

Following Aristotle (EN, 1130b 30), St. Thomas Aquinas distinguishes between two parts or species of justice: “*una est directiva in distributionibus, alia in commutationibus*” (II^a-IIae q. 61 a. 1 s. c.), i.e. one directing distributions, the other commutations.⁹⁹ These two parts are

⁹⁹ Actually, this dichotomy is only characteristic and a subspect of what Aristotle (cf. EN, 1130b 30) and Aquinas (cf. II^a-IIae q. 58 a. 7) call ‘particular justice’. They also distinguish between the aforesaid particular justice and general justice (cf. II^a-IIae q. 58 a. 5f) which is “an inner disposition of the human will by which those possessing it refer all their actions to the common good” (Koritansky, 2007; also cf. Lutz-Bachmann, 2000: 8). General justice is also called legal justice (cf. II^a-IIae q. 58 a. 5 co.) because “the law, too, has the common good as its proper object” (Koritansky, 2007; als cf. I^a-IIae q. 90 a. 3) and because it “can only perform its assigned task of directing all virtues and external actstoward the common good, as required by practical reason, by making use of ‘laws’ (leges)” (Lutz-Bachmann, 2000: 9). In a general sense, general justice is concerned with the common good and particular justice with the good of other individuals: “Unlike general justice, particular justice directs us not to the good of the community but to the good of individual neighbors, colleagues, and other people with whom we interact regularly.” (Floyd, 2006) Particular justice could be said to be about what is due to the individual from other individuals as well as society (individual ↔ individual; society → individual; cf. II^a-IIae q. 61 a. 1 co.). General justice, on the other hand, orders a man to others in that they make up the many (cf. II^a-IIae q. 58 a. 7 arg. 2) and is about what is due to society from the individual (individual → society), namely e.g. a morally good private life as well as social acts which aim at the bonum commune. In other words,

generally called ‘distributive justice’ and ‘commutative justice’ (sometimes also called ‘exchange justice’). Whereas the latter deals with the relations between individuals within a given community, the former is about the order of that which belongs to the community in relation to each single person (cf. II^a-IIae q. 61 a. 1 co.), i.e. what is “owed to a person by the community as a whole” (Koritansky, 2007). What both distributive and commutative justice have in common, is that both seek to preserve equality and the individual good between persons by giving individuals their dues and rights; their focus is the individual. They differ, however, in regard to the perspective from which the individual is looked at: in commutative justice, the individual is standing vis-à-vis another individual; in distributive justice, the individual is not standing vis-à-vis another individual or a group of individuals, but the whole community (‘dem sozialen Ganzen’). Commutative justice is concerned with what is due to the individual from other individuals and distributive justice is concerned with what is due to the individual member of a given community from that community¹⁰⁰:

Commutative Justice: Individual ↔ Individual

Distributive Justice: Community → Individual

as St. Thomas Aquinas puts it, particular justice is about the “bonum singulare unius personae” (II^a-IIae q. 58 a. 7 ad 2) and general justice about the “bonum commune civitatis” (II^a-IIae q. 58 a. 7 ad 2). Therefore, justice is both a general and a particular virtue. It is a general virtue since it is directed to the common good and can comprise any virtuous act of an individual directed to the common good as well as a particular virtue, since it is directed to the individual good. As this thesis is about health as an individual right, I shall neglect this distinction and concentrate on particular justice.

¹⁰⁰ According to St. Thomas Aquinas, there also is the justice of God, i.e. divine justice, which is meant to order the relation between God and man (cf. I^a q. 21). As commutative justice cannot belong to God (for “Who hath first given to Him, and recompense shall be made him?” (Romans 11, 35)), divine justice only consists in distributive justice (I^a q. 58 a. 1 co.), but is “profoundly different from its human counterpart” (Pope Benedict XVI., 2009).

Given the parties and the levels of power held by the parties involved, commutative justice could be said to be horizontal while distributive justice could be said to be vertical (to be more precise: top-down, in contrast to general justice which is bottom-up). Furthermore, both kinds of justice also differ with respect to the identification of the ‘due’. Commutative justice is about preserving quantitative equality in all mutual dealings, agreements, contracts and exchanges between two individuals, especially in matters of trade. Most of us experience commutative justice in our daily activities: buying food or other goods, receiving a salary for a service rendered, et cetera. Its primary objective is to make sure that A receives something of equal value (neither more nor less) to what A has given B or B taken from A. Therefore, what is due when it comes to commutative justice is that “the one person should pay back to the other just so much as he has become richer out of that which belonged to the other” (Floyd, 2006; II^a-IIae q. 58 a. 2 co.). The ‘ius’ of commutative justice is, therefore, calculated according to an arithmetical proportion (cf. II^a-IIae q. 58 a. 2 ad 2), the equality is a quantitative one where “the good or service provided must be proportional to the value of the currency or commodity for which it is exchanged” (Koritansky, 2007). The equality or ‘ius’ of distributive justice, on the other hand, is one of geometrical proportion (cf. II^a-IIae q. 58 a. 2 ad 2) by which St. Thomas Aquinas simply means that “more should be given to those who deserve more and less to those who deserve less” (Koritansky, 2007). Distributive justice thus tells us to treat equals equally and unequals unequally – for there is nothing more unequal than the equal treatment of unequals. This means that when it comes to distributive justice, not all member of a community necessarily have the same rights or the same duties. Rather, “consistit enim aequalitas distributivae iustitiae in hoc quod diversis personis diversa tribuuntur secundum proportionem ad dignitates personarum” (II^a-IIae q. 63 a. 1 co.), i.e. the equality of distributive justice consists in allotting different things to different persons in proportion to their personal dignity.

To sum up: Justice is a virtue, which is necessary because we live in communities and depend on each other. If this were not the case, we would not have any duties and rights towards others and our community: “Nullus debet aliquid alteri nisi per hoc quod aliquo modo dependet ab ipso, vel

aliquid accipit ab eo vel ab altero, ratione cuius alteri debet.” (ScG, lib. 2 cap. 28 n. 4)¹⁰¹ However, because it would be against our nature to live solitary lives, we cannot do without rights and duties – and consequently, justice, which is about compliance with our duties and others’ rights. As a virtue concerned with the good of the individual (particular justice), justice can be broken down into two parts: commutative and distributive justice. Commutative justice is the virtue that regulates those actions which involve the rights and duties between one individual and another individual; its measure of equality is equality of quantity: what you give is what you get. Distributive justice is the virtue which regulates those actions which involve the rights that an individual may claim from his community and the duties the community owes him; its measure of equality is the maxim to treat equals equally and unequals unequally: ‘Gleiches ist nach Maßgabe seiner Gleichheit gleich, Ungleiches nach Maßgabe seiner Ungleichheit ungleich zu behandeln’. Understood like this, justice becomes something reactive; it is the answer to a premise according to which something has been made somebody’s right or duty: “actum iustitiae praecedit actus quo aliquid alicuius suum efficitur” (ScG, lib. 2 cap. 28 n. 3). So, justice is not something, which establishes rights and duties, but only cares about their observation. It presupposes some sort of law from which rights and duties can be derived. In the end, we have to deal with and cannot do without rights and duties, since they are the language of justice, which is the minimal precondition for a peaceful social life: “the object of justice is always someone’s right” (Finnis, 1998: 176). If we strive for peace, we cannot do without justice and consequently rights and duties.¹⁰²

¹⁰¹ This translates as: Nobody owes anything to another except inasmuch as he in some way depends on him, receives something from him or somebody else according to whose opinion he owes another.

¹⁰² This, however, does not amount to saying that the language of rights and duties covers all there is to the relations between human beings and within a community. The language of rights and duties only captures the minimum of what is important in our (moral) relationships with each other, especially in the context of love or family.

Having embedded rights and duties within a broader context, we are now in a position to turn to the task of learning how to use the language of justice correctly; in doing so, we will have to find an answer to the question what rights and duties are and why we have them.

2 Analytical Fundamentals: The Concepts of 'Right' and 'Duty'

Rights shape the social world around us. Despite the fact that there have been and still are worlds without rights (cf. Jones, 1994: 1), they are at least integral to our – i.e. at least Western European – legal system as well as central to our moral and political thinking. We, therefore, constantly encounter a great variety of assertions of rights. In order to make sense of such a plethora of statements and avoid confusion, an understanding of the concept of a right is 'de rigueur'. Developing such an understanding is what the following sections are meant to do.

2.1 The Concept of 'Rights'

When thinking about rights we normally think of a special form of relation “between those who hold them (their subjects) and those against whom they are held (their objects)” (Steiner, 2006: 461). Basically, to assert a right is to assert “a three-term relation between one person, one act-description, and one other person” (Finnis, 1982: 199; also cf. 201). A systematic incorporation of the features of such entitlements into an analytical scheme – a scheme which has become “by far the most widely accepted analysis of the logical structure of rights, and [...] is used by the

Subscribing to rights and duties does not mean that other values and virtues (such as love, friendship, kindness, solidarity, cooperation etc.) are rendered superfluous.

majority of contemporary rights theorists” (Wenar, 2008: 253) – is due to Wesley N. Hohfeld (1913, 1917).

2.1.1 The Hohfeldian Instances of Rights

Hohfeld (1913) distinguishes four subclasses of entitlements, which can be held by right-holders: the claim-right, the liberty, the power and the immunity. These formal distinctions between the instances of rights are of paramount importance in any rights-related discussion. Although distinct rights, the four original entitlements are not on par: the claim-right and the liberty form the so-called Hohfeldian ‘first-order’ incidents (cf. Wenar, 2007a), i.e. rules entailing that people perform or abstain from certain actions. In contrast, the ‘second-order’ incidents power and immunity are rules about how agents can alter (i.e. introduce, change or annul) first-order incidents; they are rights over first-order rights.

2.1.1.1 Claim-Rights

As Dunne & Wheeler state, the idea of a claim-right (originally called ‘right *stricto sensu*’ by Hohfeld) rests on and “has embodied two foundational claims. First, that there is an identifiable subject who has entitlements; and secondly, that to possess a right presupposes the existence of a duty-bearer against whom the right is claimed.” (Dunne & Wheeler, 1999: 3) Thus, having a claim-right is to be owed a duty¹⁰³ by

¹⁰³ I do not distinguish – as e.g. Brandt (1964) suggests – between ‘duty’ and ‘obligation’, but use the terms interchangeably. As Frazier (1998) points out, “according to most modern use, obligation and duty are taken to be coextensive, if not identical”. It is has to be noted, however, that ‘duty’ and ‘responsibility’ are not completely congruent and can therefore not be used interchangeably without qualification. The reason is that there are two basic kinds of responsibility: prospective responsibility and retrospective responsibility or as Birnbacher calls them ‘ex post responsibility’ and ‘ex ante responsibility’ (Birnbacher, 2001). To have an ex ante responsibility, i.e. to be prospectively responsible, “means to have an obligation of some sort. [...] Responsibility in this sense is akin to duty, other-

another or others. If A has a claim-right that B give him a certain item, then this claim entails that B has the duty to give A this item. A claim-right, therefore, is a “right of recipience” (Raphael, 1967a: 56). This pairing can be expressed in a more formal way as:

A has a claim-right that B should ϕ ¹⁰⁴ “if and only if B has a duty to A to ϕ .” (Wenar, 2007a)

Thus, having a claim-right equals being owed a corresponding duty by another person or persons (cf. Jones, 1994). This implies that the attribution of claim-rights is meaningless without the possibility of a correlative duty resting somewhere. A Hohfeldian claim-right must thus be specified “by reference to the actions of the people who bear the correlative duties – rather than to the actions of the people who hold the

ascribed or self-ascribed, and often talk of responsibility in this sense is just a linguistic variant of talk of duties and obligations.” (Birnbacher, 2001: 10) The case of retrospective responsibility is more complex. Although the terminology varies, philosophers generally think of ex post responsibility as having two aspects and draw a distinction between responsibility understood as attributability and responsibility as accountability, whereby being responsible for an action in the sense of being accountable (or ‘appraisable’ according to the terminology of some) presupposes responsibility in the sense of attributability. Ex post responsibility as attributability is about whether a person can be said to be causally responsible for an action or state of affairs. Ex post responsibility as accountability is concerned with whether the person who has been identified as being causally responsible is properly and justifiably subject to a particular kind of response (praise, blame, or something akin to these). Much more could be said about ex post responsibility and its exempting conditions; but this is not the place to do so. For our purposes, it is sufficient to note that only a prospective, ex ante responsibility is a duty; a retrospective, ex post responsibility is not.

¹⁰⁴ Where ϕ (‘phi’) is the content or “behavioural substance” (Pogge, 2009: 123) of the claim-right and stands for a description signifying some behaviour but can also refer to the occurrence of certain states of affairs. For example: “If I promise the dentist that my child will arrive on time, then the dentist holds a claim not simply that I perform certain actions attempting to make my child arrive on time, but rather a claim to the occurrence of the state of affairs in which my child arrives on time.” (Cruft, 2004: 350; also cf. Thomson, 1990: 301)

rights” (Kramer, 1998: 13). When it comes to claim-rights, ‘right’ and ‘duty’ are just different names for the same relation, depending on the point of view. Without a duty, there is no claim-right (although there can be a duty without a correlative claim-right (cf. chapter I. 2.2.1)).

2.1.1.2 Liberty-Rights

In contrast, a liberty-right¹⁰⁵ is a “right of action” (Raphael, 1967a: 56). This means that if the subject-matter of one’s claim of right is one’s own act(s), forbearance(s) or omission(s), that claim cannot be to a claim-right, but only to a liberty.¹⁰⁶ As such, a liberty-right states, what its bearer does not have a duty not to do and gives him a choice (i.e. the liberty) to either φ or not to φ ; liberty-rights are the things one may do without being prevented by a duty to the contrary. Having such right “is to be free of any duty to the contrary” (Jones, 1994: 17). Liberty-rights “consist of those actions one is not prohibited from performing” (Fagan, 2006). Expressed more formally:

“A has a privilege to φ if and only if A has no duty not to φ .” (Wenar, 2007a)

Although not wrong, the problem with Wenar’s formulation is that it is coined in the language of a two-term rights talk. Consequently, it forgets the second party necessary for a complete three-term rights talk and is thus underdetermined. But this deficiency can be easily remedied if we remember that a duty is always owed to somebody. The moral significance of A’s having a privilege thus is that A is not under a duty toward B to refrain from φ ; A’s behaviour is not being constrained by a claim-right of B with respect to φ . As a consequence, liberties are paired with no-claims: A’s having a privilege, i.e. a no-duty towards B, implies B’s having a no-

¹⁰⁵ As such, a liberty-right is sometimes also referred to as privilege (according to the original Hohfeldian notation), license, or permission.

¹⁰⁶ This, strictly speaking, is also true for a power-right (see below).

claim towards A. This aspect is emphasised by Finnis' definition of a liberty-right:

"A has a liberty (relative to B) to ϕ , if and only if B has no-claim-right ('a no-right') that A should not ϕ . [...]"

A has a liberty (relative to B) not to ϕ , if and only if B has no-claim-right ('a no-right') that A should ϕ ." (Finnis, 1982: 199)

For example: If A has no duty to vacuum-clean B's flat, i.e. if B has no claim-right towards A obliging A to vacuum-clean B's flat, A is at liberty and has the liberty-right to not vacuum-clean. However, while liberty-rights provide protection for an individual's actions, it would be wrong to conclude that B's having no claim to A's not ϕ -ing necessarily means that B has no liberty-right (i.e. has a duty not) to prevent A's ϕ -ing. A's privilege does not entail the duty on the part of anyone to not interfere with A's action with respect to ϕ (cf. Kamm, 2002: 479). Jones (1994: 19) illustrates this thought by referring to the rules of soccer: each team is at liberty to score, i.e. under no duty not to score, but no team is under a duty to let the other team actually do so. On the contrary, each team has the liberty-right to prevent this from happening. Another example illustrating the concept of a liberty-right would be to consider a billionaire and a beggar: both have a liberty-right to buy an Aston Martin or to holiday in a luxury resort in the Swiss mountains.

These examples highlight the crucial difference between liberty-rights and claim-rights: liberty rights are concerned with the right-holder himself, i.e. what he is entitled to do or not to do; claim-rights with what others are obliged to do or not to do with respect to the right holder (cf. Jones, 1994: 21; also cf. Rainbolt, 2006: 6ff). Claim-rights are specified by reference to the actions of the people who bear the correlative duties, liberty-rights by reference to the actions of the people who hold the rights. In other words, claim-rights are correlative to duties and liberties are limited by duties.

2.1.1.3 Power-Rights

Having a power-right is the "ability to cause by an act of one's own, an alteration in a person's rights, either one's own rights or those of another

person, or both” (Thomson, 1990: 57). An agent’s power-right can therefore make another person or himself have, cease or alter a liberty-right or a claim-right (and thereby create, change and if necessary enforce or abolish a duty). A democratic parliament enacting a new tax law is a classic example of a power-right, since the parliament imposes on the citizens the duty to pay the kind and amount of taxes that have been enacted. Furthermore, powers can also put somebody in a position to not only be able to alter first-order, but also second-order incidents. A chain of command, as e.g. found in the military, would be an example of such a power. A higher-ranking officer has the power to relieve a lower-ranking one from his duties and thereby annul the powers of the latter. Therefore, “A has a power (relative to B) to ϕ , if and only if B has a liability to have his legal position changed by A’s ϕ -ing” (Finnis, 1982: 199). Cruft (2004: 351) explains this as follows:

“X holds a power if and only if X holds the ability to create or to remove some claim, duty or privilege (a claim, duty or privilege which might be held by X himself or herself, or by someone else), or X holds the ability to create or to remove some power, liability, disability, or immunity (a power, liability, disability or immunity which might be held by X himself or herself, or by someone else).”

2.1.1.4 Immunity-Rights

In contrast to having a power, “for X to have an immunity against Y is for Y to lack a power as regards X” (Thomson, 1990: 59). An immunity-right protects from the power of others to alter one’s rights or duties. If there are inalienable rights then we all lack power against ourselves and thus have immunities with respect to these rights. An immunity-right can be said to exist if the rights-holder is not liable to have his rights-status changed (e.g. by means of a prohibition to exercise an existing power-right or by means of a prohibition to actually create power-rights) by the action of another person utilising a power-right. Therefore, “B has an immunity (relative to A’s ϕ -ing), if and only if A has no power (i.e. a disability) to change B’s legal position by ϕ -ing” (Finnis, 1982: 199).

2.1.2 Molecular or Cluster-Rights

Although all assertions or ascriptions of rights can be understood in terms of these four instances, i.e. can be reduced without remainder to ascriptions of one of these categories, it would be wrong to suppose that every right must exist in one and only one pure Hohfeldian form (cf. Jones, 1994: 14; Thomson, 1990: 285; Wenar, 2005: 225; 2007). As reality shows, many rights assertions are covered by a number of these instances at the same time. The right to freedom of movement, for instance, is a liberty (I am under no duty not to move and thus free to move), a power-right (to alter my legal status as a citizen) as well as an immunity (against anyone trying to introduce laws hindering my travelling). Another example would be simply the property right in e.g. a car (cf. Jones, 1994: 14; Wenar, 2007a). Consequently, we have to add a fifth instance: the “molecular right” (Wenar, 2005: 225; 2007) or “cluster-right” (Thomson, 1990), which is a combination of two or more of the four basic (or as Wenar calls them “atomic” (Wenar, 2005: 225; 2007)) Hohfeldian incidents of rights. So, while – conceptually speaking – there are only four pure categories of rights, reality shows that there is actually a fifth one.

2.1.3 Further Analytical Characteristics of Rights

Obviously, the content of rights can vary a great deal. These further properties, not covered by the Hohfeldian scheme of analysis, have been captured by the following further distinctions:

The first distinction – which “maps neatly onto the Hohfeldian incidents” (Wenar, 2007a) – is between active and passive rights, i.e. rights to do things and rights to have things done for or to one (Almond, 1991: 262).¹⁰⁷ Active rights allow the right-bearer to take a certain action or

¹⁰⁷ Stepanians calls active rights “ausübbar” (2007: 10) and passive rights “nicht-ausübbar” (2007: 10): “Ein Recht ist aktiv genau dann, wenn sein Inhalt eine Handlung (im Sinne eines Tuns oder Unterlassens) des Rechtsträgers ist. Aktive Rechte haben die Form: „A hat ein Recht darauf, (selbst) zu ϕ n“. Ein Recht ist

behave in a certain way, whereas passive rights oblige another party or parties. There are two fundamental forms of right-assertions: ‘A has a right to ϕ ’ and ‘A has a right that B ϕ ’ (cf. Wenar, 2005: 225). According to this classification, the liberty and the power are active rights, which the right-bearer exercises, in contrast to the claim and the immunity which are passive rights enjoyed by the right-bearer.

A second distinction answers the question, ‘Against whom is a right held?’. This distinction can be derived from the “exceptionless logical point that where anyone is to have a right there must be identifiable others (either all others or specified others) with accurately corresponding obligations” (O’Neil, 2007: 431) – there is no such thing as a claim-right against no one. The distinction is, therefore, one between ‘rights in personam’¹⁰⁸ and ‘rights in rem’ (cf. Jones, 1994: 15; also cf. Austin, 1885: 369ff), whereby in personam rights are held exclusively against “some specifically identified duty holder” (Fagan, 2006), i.e. a specific person or persons, and the latter against people at large. Rights in rem are held against “no one in particular, but apply to everyone” (Fagan, 2006); the term ‘in rem’ does not denote the subject of the right, but the compass: “it denotes that the right in question avails against persons generally; and not that the right in question is a right over a thing” (Austin, 1885: 370).¹⁰⁹ To

passiv genau dann, wenn es eine Handlung des Rechtsadressaten zum Inhalt hat: „A hat ein Recht bezüglich B’s ϕ en“. Nur aktive Rechte, z.B. das Recht auf freie Meinungsäußerung, können durch ihre Träger ausgeübt werden. Hingegen ist der Besitzer eines passiven Rechts – etwa eines Rechts, nicht gefoltert zu werden – bestenfalls der (intendierte) Begünstigte eines Tuns oder Unterlassens des Rechtsadressaten. Passive Rechte können genossen, aber nicht ausgeübt werden.” (Stepanians, 2007: 10)

¹⁰⁸ As Austin (1885: 369f) notes, the term ‘in personam’ “is an elliptical or abridged expression for ‘in personam certam sive determinatam’”. Pogge (2009: 123) calls a right in personam a right “conceived in personal terms” and, consequently, a right in rem a right conceived in impersonal terms.

¹⁰⁹ In order to avoid this confusion, Hohfeld calls in personam rights ‘paucital rights’ and in rem rights ‘multital rights’ (cf. Hohfeld, 1917: 718) and Salmond (1920: 202) uses the term ‘real rights’ for rights in rem and ‘personal rights’ for rights in personam.

use other terms, we could state that rights in rem are absolute right, which are universally claimable, while rights in personam are relative rights, which are only held relative to a specifically identified person or group of persons: “Rechte in personam haben nur wenige (mindestens einen) bestimmte Adressaten, während Rechte in rem sich unbestimmt gegen alle (nicht mit dem Rechtsträger identischen) Individuen richten.” (Stepanians, 2007: 12) In the end, rights in rem can be conceived of as packages of rights in personam.

A third distinction discerns ‘individual rights’ and ‘group rights’ (or collective rights). Group rights are held by a group rather than severally by its members, whereas individual rights – as the term implies – are held by a single individual (cf. Jones, 1999 as well as 2008).

A fourth distinction, which is only applicable to the class of claim-rights is the one between positive¹¹⁰ and negative rights, where a positive claim-right corresponds to a positive duty and a negative claim-right to a negative duty (cf. Salmond, 1920: 201). The former requires the respective agent’s performance and the latter the agent’s forbearance: “A claim-right is always either, positively, a right to be given something (or assisted in a certain way) by someone else, or negatively, a right not to be interfered with or dealt with or treated in a certain way, by someone else.” (Finnis, 1982: 200) According to this distinction, negative claim-rights imply a duty to non-interference or “negative action” (Jones, 1994: 15). They give the claim-right-holder the right to keep something, which he already possesses (‘Unterlassungspflichten’), whereas positive claim-rights as claims to something (e.g. good, service, result) imply a duty to undertake a specific positive action and give the claim-right-holder a right to something he does not yet possess or to enable him:

¹¹⁰ The term ‘positive’ is not to be confused with the term ‘positive’ in ‘positive law’. Whereas the former is meant to express that the corresponding duty is one of commission (and therefore contrary to negative rights, which are about duties of forbearance), the latter signifies codified law as contrasted with conventional or moral law (cf. chapter I. 3.1).

“A positive right is a claim to something – a share of material goods, or some particular good like the attention of a lawyer or a doctor, or perhaps the claim to a result like health or enlightenment – while a negative right is a right that something not be done to one, that some particular imposition be withheld. Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim. Negative rights, however, the rights not to be interfered with in forbidden ways, do not appear to have such natural, such inevitable limitation.” (Fried, 1978: 110)

2.2 The Concept of ‘Duty’

According to Thomson, the moral significance of A’s having a claim-right against B consists in B’s correlative duties towards A (1990: 43). In the same fashion Jones (1994: 16) states that the “definition of its correlative duty is [...] essential to the definition of a claim-right”. So, claim-rights cannot be had without duties; the latter are somehow the muscle by which the former accomplish their work. But, how are we to understand the concept of ‘duty’?

Essentially, a duty (or as Birnbacher (2001) calls it: ‘ex ante responsibility’) is a behavioural constraint: “to have a duty is, above all, to be subject to a binding, normative requirement” (Frazier, 1998). To put it differently: “A duty is the absence of liberty” (Salmond, 1920: 195). A duty-bearer is not free to act or behave as he pleases; rather, his liberty is constrained by his duty to ϕ . As such, it is independent of the duty-bearer’s motivation. If B is bound by a duty, he cannot evade it by altering his motivational disposition, i.e. preferences or desires. A duty consists in that it ought to be respected; to say that B has a duty to ϕ against A is to say that B does not have a choice as to how he should behave towards A. This is because A cannot only ask or plea for B to ϕ , but demand that B ϕ . Duties are “not just good or adequate reasons to do things; they tell us what we must do, not what it would be good, reasonable, or rational of us to do” (Eddy, 2008: 463). It is this aspect of all duties, which justifies a response in case a duty is transgressed, such as a penalty, (self-) blame or resentment: “unless there are exculpatory reasons, someone who has a duty

is required satisfy it, and can be justifiably criticized for not doing so” (Frazier, 1998).

Furthermore, B’s duty to ϕ does not necessarily imply that ϕ in any way includes A; B’s duty towards A to ϕ could mean to benefit a third party (C) in a certain kind of way. The content of the duty is, therefore, not restricted to the relation between A and B (cf. Kamm, 2002: 477). Thus, whereas it holds true that (1) A’s right against B implies a duty of B to A, it does not necessarily that (2) B’s duty to A is a duty concerning A; for, the duty of B could be to A, but concerning C. When thinking about duties we have to distinguish between four aspects:

- the content of the duty (duty to ϕ)
- the bearer of the duty (duty of ...)
- the holder of the corresponding claim-right (duty (owed) to ...)
- the beneficiary of the duty (duty concerning ...)

To sum up: a complete formulation of the concept of ‘duty’ has to thus orientate by the following pattern: ‘duty to ϕ of A to B concerning C’.

2.2.1 Analytical Characteristics of Duties

Like the concept of right, the concept of duty can be further specified and analysed. So far, the concept of duty has only been treated as an appendix of the concept of a claim-right, but this view is reductive: ‘duty’ is a category in its own right, which can be correlative to claim-rights, but does not have to be by necessity. It is true that a claim-right always comes with a corresponding duty: if A has a claim-right, there must some identifiable duty bearer who has the duty to behave or forebear as A’s claim-right requires. Otherwise, the assertion of a claim-right is illogical and we should be suspicious as to whether the alleged claim-right really exists. This insight has been captured by the idea of the correlativity between claim-right and duty introduced above, which states that a claim-right implies a correlative duty by definition.

We should not be misled by the term ‘correlativity’, because while it is true that a claim-right is correlative to a duty, we must not believe that duty

and claim-right are correlative in general: “it does not follow, however, that a Hohfeldian claim exists whenever any duty exists” (Cruft, 2004: 354). When a duty is postulated, we cannot always find someone who possesses a corresponding claim-right; a duty does not always have to come in combination with a claim-right. Whereas the full statement of a claim-right requires a correlative duty, the full statement of a duty does not logically require a corresponding claim-right. We could thus state that although claim-right and duty are correlative, they are not perfectly or reciprocally correlative; the necessary logical relation between claim-right and duty is only one-way, namely from claim-right to duty. In order to avoid confusion, we could also speak of claim-rights and their corresponding rather than correlational duties, as the term ‘corresponding’ does not imply a two-way relation. A duty is a category in its own right, not only the appendix of a claim-right. Consequently,

“duties have been traditionally divided into duties of perfect obligation, which do imply correlative rights, and duties of imperfect obligation which do not. An example of the former would be my duty to keep a promise: the person to whom the promise was made has a right to my fulfilment of it. An example of the latter is my duty to perform acts of charity, or to devote myself to promoting disarmament; in neither case are there any specific persons who have rights against me.”
(Raphael & Mayo, 1965: 226)

The perfect duty/imperfect duty distinction differentiates between duties, which imply a correlative claim-right and duties, which do not imply such a right.¹¹¹ Duties of perfect obligation (or simply: perfect duties) are those for which a corresponding claim-right resides in some other person. An example of a perfect duty would be a promise which specifies what one must do to whom as well as when (i.e. the extent, content and timing of the duty) and who can claim the fulfilment of the promise. In contrast, duties of imperfect obligation (or simply: imperfect duties) differ from perfect duties, as the former involve allowing leeway with respect to the occasion

¹¹¹ Rainbolt (2000: 233) lists several other ways in which this distinction has also been drawn. Kant, for example, takes perfect duties to be those, which allow no exceptions in the interest of inclination and imperfect duties to be those, which do.

(when and how) of their fulfilment as well as towards which individuals the duty is performed. This means that they are duties with no corresponding claim-right residing in some other person; or as Frazier (1998) puts it: imperfect duties are “not owed to anyone, but merely concern someone. [...] If we have a duty that is not to anyone, then that duty does not involve a right against us”.¹¹²

To make things a bit more complicated, we have to concretise these findings a bit more. In contrast to what has been said, a duty logically and always implies one certain claim-right: if one is under a duty, one always and necessarily has the right to do what is necessary to fulfil one's duty. This is what Frazier (1998) means when he writes that the fact “that something is required by duty provides some justifying reason for doing it”. The claim-right one has when being under a duty is a negative one, i.e. one of non-interference, but not a positive claim-right. So, we can note that being under a duty always implies the negative claim-right on part of the duty-bearer to fulfil his duty, but does not necessarily imply a claim-right on part of somebody else.¹¹³

¹¹² This view is also supported by Gosepath (2007: 219): “Ein spezifisches Merkmal unvollkommener Pflichten ist, dass sie niemandem im Besonderen geschuldet sind. [...] Deshalb entspricht einer unvollkommenen Pflicht kein Anspruchsrecht eines bestimmten Rechtsanspruchshalters.” The distinction between perfect and imperfect duties closely resembles Wellman's distinction between relative and non-relative duties. According to Wellman (1999: 209), relative duties are “duties owed to someone or some thing” while non-relative duties are “duties concerning or regarding, but not owed to, anyone or anything”. Wellman also states that a “relative duty is best conceived of as a duty to the party with the moral power to claim performance of that duty” (1999: 209). A relative duty, therefore, is one which corresponds to a claim-right – for, the moral power to claim performance is nothing else than a paraphrase of the term ‘claim-right’.

¹¹³ The close relationship between duties and claim-rights has led philosophers to think about the question whether duties are prior to claim-rights or vice versa. I think the question is posed incorrectly. Neither duty nor claim-right are appendices or by-products of each other; rather they are concepts in their own right. There is, therefore, no logical reason to think of any of these terms as conceptually favoured. This position can be corroborated by looking at different cultures: citing

Another important distinction parallels – or could be said to be a direct consequence of – the distinction between positive and negative claim-rights. As has been said, positive claim-rights correspond to positive duties and negative claim-rights to negative duties. Consequently, the former require the respective duty-bearer’s performance and the latter the duty-bearer’s forbearance. A positive duty implies a duty to undertake a specific positive action, namely to give the claim-right-holder something he does not yet possess (e.g. goods, services, results), to enable or assist him in a certain way. A negative duty, on the other hand, is a duty of non-interference or negative action, which prescribes not to interfere with, deal with or treat in a certain way someone else (‘*Unterlassungspflicht*’); it is a prohibition (mostly against harming others and wrongful action) and restricts action. The distinction between positive and negative duties is, therefore, one between acting and refraining from acting: “positive duties concern what we are required to do, while negative duties concern what we are required to refrain from doing” (Frazier, 1998).¹¹⁴

2.2.2 Ought Implies Can

When speaking about duties, one more characteristics-related remark is necessary. This remark is based on the thought that a right to e.g. drinkable water only makes sense in relation to pollution caused by human agency and would be meaningless in the face of polluting factors beyond human

anthropological studies, Finnis (1982: 209) states that in the indigenous language of certain African tribes the English terms ‘right’ and ‘duty’ are covered by a single word, which is best translated as ‘due’. ‘Due’ looks both ways, both to what one is due from someone and what is due to someone.

¹¹⁴ As Frazier (1998) points out, consequentialist theories do not think that the distinction between positive and negative duties has any significance: “Such theories are concerned with the promoting of values, and it does not matter whether the values are promoted by acting or refraining from acting.” For example, if a consequentialist values life, then this value can be promoted equally well by refraining from killing (negative duty) and by saving lives (positive duty, e.g. to provide food).

control. It would be ironic to grant someone a right in circumstances in which he does not have a chance of getting what he supposedly has a right to. This example directly points us to the generally accepted and intuitively plausible principle that a duty has to be satisfiable, i.e. that 'ought implies can'¹¹⁵: an agent is only under a duty to ϕ (not to ϕ) if he can perform ϕ (forbear ϕ) (cf. Balzer, 2004: 87). It is pointless to speak of a duty if it is impossible to obey the duty. The 'ought implies can'-principle thus is a condition for the existence of a duty.

This principle can be interpreted in several ways. A duty-bearer can only be under a duty if (a) his behaviour is relevant to securing the duty (Almond, 1991: 265), i.e. if he can causally contribute to fulfilling it, (b) he has the necessary capabilities and competences (or can realistically acquire them) and (c) the duty does not require a general impossibility (e.g. the use of non-existing resources). In the first case, the 'ought implies can'-principle is not met because – although the duty can generally be fulfilled – no action or forbearance on part of the duty-bearer can contribute to the fulfilment of his duty. In the second case the principle is not met because the duty-bearer is not capable of performing the relevant action due to a lack of e.g. knowledge; but this does not necessarily hinder the existence of the duty as it can be expected that the duty-bearer undergoes reasonable efforts and at least tries to make up for this lack. In the third case the duty itself cannot be performed in general, i.e. "under normal circumstances in the world in which we happen to find it" (Eddy, 2008: 468). So, even if a duty cannot be completely realised under present circumstances, this does not mean that it does not meet the 'ought implies can'-criterion as it might be realisable under normal circumstances.¹¹⁶ The measure of whether a

¹¹⁵ The Romans expressed it as follows: *ultra posse nemo obligatur* (this translates as: no one is obligated beyond what he is able to do) or *'ad impossibilia nemo tenetur'* (this translates as: no one is obliged to do the impossible, or more literally: no one is held to impossible things).

¹¹⁶ Despite the usefulness of this qualification, we should be cautious with the interpretation of the term 'under normal circumstances' as un-normal circumstances could have been caused by previous wrongdoings. The term, therefore, is not merely "a strictly empirical claim about the probability of a right's permissible realisation"

duty is performable or not should not be whether it is, at present, possible to realise it, but whether, under normal conditions, it would be possible to realise it. This train of thought also poses the background against which we have to read the following statement by Sen:

“Why should complete feasibility be a condition of cogency of human rights when the objective is to work towards enhancing their actual realization, if necessary through expanding their feasibility? The understanding that some rights are not fully realized, and may not even be fully realizable under present circumstances, does not, in itself, entail anything like the conclusion that these are, therefore, not rights at all. Rather, that understanding suggests the need to work towards changing the prevailing circumstances to make the unrealized rights realizable, and ultimately, realized.” (Sen, 2004: 348; also cf. 2006: 2924)

Sen writes on the assumption and premise that there are reasons justifying the existence of the rights he is talking about (which – as has been shown above – must necessarily be claim-rights).¹¹⁷ According to the ‘ought implies can’-criterion such justification must satisfy the condition that the respective claim-right or duty must not be impossible to realise under normal circumstances. In such cases it would indeed be wrong to argue that infeasibility or unrealisability under some set of present circumstances are decisive for the existence or non-existence of a claim-right or duty; for, the present circumstances may not be normal circumstances. A well-justified claim-right or duty, which cannot be met under present circumstances, but can be met under normal circumstances still exists.

I am well aware of the fact that these remarks are rather broad and in need of concretisation; what would be needed is a discussion of how to exactly define normal circumstances or what is realistic. However, this is not the place to do so. Far from offering a solution to these questions, this

(Eddy, 2008: 469), but one that excludes “those instances of infeasibility that arise from prior breaches of rights” (Eddy, 2008: 469).

¹¹⁷ Chapters I. 3.1 and I. 3.5 will deal with the question of how to justify rights and duties.

paragraph is only meant to point out that there is a limit to what can reasonably be ascertained by duties and claim-rights. While we surely have the liberty-right and the negative claim-right to walk on the moon, it would be unreasonable to grant everyone a positive claim-right to walk on the moon. The ‘ought implies can’-principle, therefore, marks the boundary of the content that a duty and its corresponding claim-right can reasonably have.

Despite their broadness, the above remarks allow us to draw the following conceptual conclusion: a right to health cannot mean or imply a positive claim-right to be healthy. Such a right can never be realised, since an individual’s state of health – as the preceding chapter should have shown – is significantly determined and influenced by factors which are beyond the potential duty-bearer’s as well as the respective individual’s control. Consequently, the duty corresponding to the claim-right to be healthy cannot be performed in general or under normal circumstances. Thus, a right to health always has to mean less than a right to be healthy.¹¹⁸

3 The Morality of Rights and Duties

In the previous sections, we carved out what makes a moral *right* or *duty*. But what makes a right or duty *moral*? As intuition and experience tells us, some of our rights have both legal and non-legal sources. Take for example, the right not to be murdered. This right is usually assigned by a legal system, but would exist even if no legal system would establish it.

¹¹⁸ This is why the right to health is often translated as the ‘right to the highest attainable state of health’. As a consequence, however, the “substance of this right is thus necessarily relative: the highest attainable state of health obviously varies in time and place” (Tomaševski, 1995: 125). This implies that such a right might not exist if the circumstances are unfavourable; the highest attainable state of health might be zero and in fact, not exist. Whether this is compatible with the idea of human rights that the same thinkers take to be as equal, undeniable and inalienable is highly questionable at best.

This distinction between moral and legal rights, i.e. the fact that there is something that goes beyond the realm of legal rights, has been understood and recorded since the earliest history of mankind and is also acknowledged by the contemporary distinction of rights/duties in moral, legal and customary rights/duties (cf. Wenar, 2007a). Consequently, history and literature hold significant examples of resistance to the unjust commands of those in authority:¹¹⁹

- In the Old Testament, Hebrew midwives refused the Pharaoh's order to kill all newborn males because they feared God: "Timuerunt autem obstetrices Deum et non fecerunt iuxta praeceptum regis Aegypti, sed conservabant mares." (Exodus 1, 17)
- In Sophocles' tragedy of the same title (premiered 442 BC), Antigone is driven to transgress the king of Thebes', Creon's, command not to bury her slain brother in order for her to obey a higher, unwritten and unchangeable law (Sophocles, *Antigone*, Vv. 453ff):

*“οὐδὲ σθένειν τοσοῦτον ὥομην τὰ σὰ
κηρύγμαθ', ὥστ' ἀγραπτα κάσφαλῆ θεῶν
νόμιμα δύνασθαι θνητὸν ὄνθ' ὑπερδραμεῖν.
οὐ γάρ τι νῦν γε κάχθές, ἀλλ' αἰεί ποτε
ζῆ ταῦτα, κούδεις οἶδεν ἐξ ὄτου φάνη.”¹²⁰*

- Heraclitus emphasises the divine source of all human laws:

¹¹⁹ For further examples of such norms in the context of Roman law cf. Waldstein (2009: 11ff).

¹²⁰ Following Sir George Young's translation of the above, these verses read as: Nor did I deem/ Your ordinance of so much binding force./ As that a mortal man could overbear/ The unchangeable unwritten code of Heaven;/ This is not of today or yesterday,/ But lives forever, having origin/ Whence no man knows.

“τρέφονται γὰρ πάντες οἱ ἀνθρώπειοι νόμοι ὑπὸ ἑνὸς τοῦ θεοῦ· κρατεῖ γὰρ τοσοῦτον ὀκόσον ἐθέλει καὶ ἐξαρκεῖ πᾶσι καὶ περιγίνεται.” (Heraclitus, Fragments: Fragment 114)¹²¹,

- Aristotle distinguishes two kinds of political justice, a conventional (i.e. legal) and a natural (i.e. pre-positive one):
“τοῦ δὲ πολιτικοῦ δικαίου τὸ μὲν φυσικόν ἐστὶ τὸ δὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τὴν αὐτὴν ἔχον δύναμιν, καὶ οὐ τῷ δοκεῖν ἢ μή.” (Aristotle, Nicomachean Ethics 5, 10; 1134b; also cf. Aristotle, Rhetoric, 1373b)¹²²
- According to Cicero, neither a senatorial nor democratic decree can absolve anyone from the eternal and unchanging law of nature. Denying this law would violating the very nature of man:

“Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterreat; quae tamen neque probos frustra iubet aut vetat nec improbos iubendo aut vetando movet. Huic legi nec obrogari fas est neque derogari ex hac aliquid licet neque tota abrogari potest, nec vero aut per senatum aut per populum solvi hac lege possumus, neque est quaerendus explanator aut interpres eius alius, nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium deus, ille legis huius inventor, disceptator, lator; cui qui non parebit, ipse se fugiet ac naturam hominis aspernatus hoc ipso luet maximas poenas, etiamsi cetera supplicia, quae putantur, effugerit.” (De Re Publica, 3, 33)¹²³

¹²¹ This translates as: All human laws are nourished by the one divine law; it rules as it will, suffices for all and is more than enough.

¹²² According to H. Rackham, this translates as: Political justice is of two kinds, one natural, the other conventional. A rule of justice is natural that has the same validity everywhere, and does not depend on our accepting it or not.

¹²³ This translates as: “True law is right reason conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions

- In his ‘De Beneficiis’, Seneca tells us that he who denies that it is possible that a slave can accord to his master a good deed “ignarus est iuris humani” (III, 18, 2), i.e. is ignorant of the law which as a bond connects all humans. For why should the person diminish the value of a good deed, instead of the good deed ennobling the person?¹²⁴ So, even if the positive law states that slaves are unfree and of lower societal status, no man is morally nobler than another man, unless he stands out due to his upright attitude and excellent characteristics: “Eadem omnibus principia eademque origo; nemo altero nobilior, nisi cui rectius ingenium et artibus bonis aptius.” (De beneficiis, III, 18, 1)¹²⁵ Such an upright attitude can be found in every man, be he a slave, a free man or a nobleman.¹²⁶ The

restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any other law, and is not liable either, to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our own conscience. It is not one thing at Rome, and another at Athens; one thing to-day, and another to-morrow; but in all times and nations this universal law must forever reign, eternal and imperishable. It is the sovereign master and emperor of all beings. God himself is its author, its promulgator, its enforcer. And he who does not obey it flies from himself, and does violence to the very nature of man. And by so doing he will endure the severest penalties even if he avoids the other evils which are usually accounted punishments.” (Translation C. D. Yonge)

¹²⁴ Also cf.: “Quare potius persona rem minuat, quam personam re ipsa cohonestet?” (Seneca, De Beneficiis, III, 18, 1),

¹²⁵ This translates as: “All humans have the same beginning and origin; no one is nobler than another man unless he has a character which is more upright and better through good conduct.”

¹²⁶ Also cf. Seneca, Epistolae Morales ad Lucilium (Liber IV, Epistola 31, 11): “Quaerendum est quod non fiat in dies peius, cui non possit obstari. Quid hoc est? animus, sed hic rectus, bonus, magnus. Quid aliud voces hunc quam deum in corpore humano hospitantem? Hic animus tam in equitem Romanum quam in libertinum, quam in servum potest cadere. Quid est enim eques Romanus aut libertinus aut servus? nomina ex ambitione aut iniuria nata. Subsilire in caelum ex angulo licet: exsurge modo

realms of moral perfection and of positive law are, therefore, distinct. Furthermore, in one of his ‘*Epistolae Morales*’ Seneca states that “*aliquid esse commune ius generis humani*” (Liber V, Epistola 48, 3), i.e. that there is a common law of human kind. As Waldstein has shown “natural rights have been known in ancient times and taken for granted by the Roman jurists” (Waldstein, 1992: 129).

- In his play *Wilhelm Tell*, Friedrich Schiller lets one of the countrymen from the canton Schwyz appeal to pre-positive rights from heaven (Schiller, 2000: Akt II, Szene II):

*“Nein, eine Grenze hat Tyrannenmacht,
Wenn der Gedrückte nirgends Recht kann finden,
Wenn unerträglich wird die Last – greift er
Hinauf getrosten Mutes in den Himmel,
Und holt herunter seine ew’gen Rechte,
Die droben hangen unveräusserlich
Und unzerbrechlich wie die Sterne selbst –”¹²⁷*

- And even the devil in Johann Wolfgang von Goethe’s play ‘*Faust*’ acknowledges rights which are born with us and are thus independent of any legislation or development within the field of jurisprudence (Goethe, 1998: Vv. 1968ff):

*“Mephistopheles:
Doch wählt mir eine Fakultät!
Student:
Zur Rechtsgelehrsamkeit kann ich mich nicht bequemen.
Mephistopheles:*

[...] et te quoque dignum
finge deo.

Finges autem non auro vel argento: non potest ex hac materia imago deo exprimi
similis;”

¹²⁷ In the translation of Theodore Martin these verses read as: Yes! there’s a limit to the despot’s power!/ When the oppressed looks round in vain for justice,/ When his sore burden may no more be borne./ With fearless heart he makes appeal to Heaven,/ And thence brings down his everlasting rights,/ Which there abide, inalienably his,/ And indestructible as are the stars.

Ich kann es euch so sehr nicht übelnehmen.
 Ich weiß, wie es um diese Lehre steht.
 Es erben sich Gesetz' und Rechte
 Wie eine ew'ge Krankheit fort;
 Sie schleppen von Geschlecht sich zum Geschlechte,
 Und rücken sacht von Ort zu Ort.
 Vernunft wird Unsinn, Wohltat Plage;
 Weh' dir, dass du ein Enkel bist!
 Vom Rechte, das mit uns geboren ist,
 von dem ist, leider! nie die Frage.”¹²⁸

- In his famous *Letter from Birmingham Jail*, Dr. Martin Luther King Jr. wrote in 1963:

“A just law is a man-made code that squares with the moral law or the law of God. An unjust law is out of harmony with the moral law. Any law that uplifts the human personality is just. Any law that degrades the human personality is unjust.”

There are myriads of further examples and this list could be prolonged virtually ad infinitum. But I think that the message should have become clear: there is something that goes beyond the realm of legal and conventional rights as well as duties – something “even all governments together cannot legislate [...] out of existence” (Pogge, 2005a: 718) – and this something is usually called moral right or moral duty. At one point or another, a system of legal or conventional rules must appeal to something outside itself – and this is the realm of morality. Moral rights/duties are about what is right or just from a moral perspective; legal or conventional rights/duties are merely about what is right or just according to either

¹²⁸ In the translation of Taylor Bayard these verses read as:

“Mephistopheles: Yet choose thyself a faculty!

Student: I cannot reconcile myself to Jurisprudence.

Mephistopheles: Nor can I therefore greatly blame you students:/ I know what science this has come to be./ All rights and laws are still transmitted/ Like an eternal sickness of the race, -/From generation unto generation fitted,/ And shifted round from place to place./ Reason becomes a sham, Beneficence a worry:/ Thou art a grandchild, therefore woe to thee!/ The right born with us, ours in verity,/ This to consider, there's, alas! no hurry.”

codification or public agreement. The best path towards gaining an understanding of the concept of *moral* rights/duties and of its conceptual differences with respect to the above-mentioned legal and customary rights/duties is to ask why we have rights, i.e. to enquire into the sources of rights and duties.

3.1 Legal, Conventional and Moral Rights/Duties

On an abstract level, rights and duties can either be conventional, i.e. formed by customs, agreement or compact, non-conventional, i.e. formed by authoritarian decree, or pre-conventional, i.e. independent of agreement or authority. Furthermore, the same right or duty can either be positive, i.e. existent only because of some form of legislation or codification, or pre-positive, i.e. existent independent of and prior to any legislation. Following these initial distinctions allows us to distinguish between the following – as far as I can tell: exhaustive – three categories of rights/duties.¹²⁹ As we shall see, although all three categories of rights and duties can have the same content (e.g. the right to not be murdered), there is a difference in the way they are constituted and validated – a difference which results in an opportunity for logical prioritisation.

- **Positive rights and duties**

These rights/duties are called ‘positive’ because they derive from the laws of the society and have been posited by human will institutionalized in some form of government – whose power is usually limited to a certain geographical area. A positive right or duty cannot be said to exist prior to its inclusion in a legal code, i.e. its existence, validity and applicability is dependent upon

¹²⁹ The inspiration for this classificatory scheme is taken from the usual distinction between legal, customary and moral rights and duties (cf. Wenar, 2007a). I have taken the liberty of adapting this distinction and introducing my own nomenclature and categories, which in my opinion, are better suited to carve out the different essential features of the three categories on a more abstract level.

codification by some form of legislature ('Legiferierung'). Furthermore, positive rights and duties are necessarily backed by some form of jurisdiction in relation with institutionalised penal or rectifying actions for non-compliance.

Positive rights/duties can either be conventional (e.g. democratic positive law), i.e. emanating from social conventional efforts or non-conventional (e.g. the positive law of a tyrant not requiring any conventional agreement, but rather the capacity to enforce it). Positive law and its derivative rights/duties is authoritarian law, i.e. imposed from the top – with varying degrees of consent from the bottom. The rationale for its existence is political and thus contingent upon the balance of power within a state. It could thus be enacted and enforced by a powerful minority against the will of a less powerful majority, by a powerful majority against the common will of less powerful minorities or, in an ideal case, by complete societal consent. Given these scenarios as well as our historical experience, there is regrettably no guarantee that positive rights and duties are right, i.e. good rights and duties.¹³⁰

Based on these comments, it is easy to see that all legal rights/duties are positive rights/duties; therefore, both expressions can be used synonymously. Because of their positive nature, positive rights and duties are culturally and politically relative because they are contingent upon local laws, customs or beliefs.

- **Pre-positive conventional rights and duties**

The category of pre-positive conventional rights/duties is congruent with what are commonly called customary rights/duties ('Gewohnheitsrecht'). They are aspects of local customs, based on widespread acceptance and reciprocity and thus rooted in shared behavioural patterns. This means that they are necessarily

¹³⁰ Whereby the goodness of a positive right and duty has to be judged by reference to and in the light of a justified moral theory (cf. chapter I. 3.5).

conventional in nature. In contrast to the authoritarian positive law, customary law can be described as bottom-up law.

As far as their existence and validity is concerned, they are pre-positive, i.e. not dependent on inclusion in a society's legal code. Positive law acknowledges the existence of customary rights and duties and generally accepts them if they are repeated for a long time (*'longa consuetudo'*) and if they have acquired the force of tacit and common consent (*'opinio juris'*).

Given their combined pre-positive and conventional nature, customary rights/duties are – just as legal ones – also culturally and politically relative; there is also no guarantee that customary rights/duties (e.g. the custom of anthropophagy in certain parts of the worlds) are right, i.e. good rights/duties.¹³¹ Given their relativity, I am inclined to call customary rights/duties the weak form of pre-positive rights and duties.

- **Pre-positive pre-conventional rights and duties**

This category is equal to the one of moral rights and duties. Pre-positive pre-conventional rights and duties exist independently of any legal code and are not contingent upon the laws of a society nor rooted in or constituted by a set of rules of a given society – which sets them apart from mere positive rights/duties. They exist, regardless of their reproduction in positive law. Rather, positive law or social institutions, which fail to protect them, are defective. Conversely, this means that positive law is required to protect and promote them. Furthermore, pre-positive pre-conventional rights/duties are not the result of customs, agreement or compacts, – which makes them distinct from pre-positive conventional rights/duties. They exist, regardless of their reproduction in

¹³¹ Whereby the goodness of a pre-positive conventional right and duty has to be judged by reference to and in the light of a justified moral theory (cf. chapter I. 3.5). Also cf. the preceding footnote.

customary law. If this were not the case, they would be mere “revozierbare Toleranzedikte” (Spaemann, 1987: 295).

We could say that moral rights and duties are not only pre-positive, but also pre-conventional and therefore logically prior to customary rights. Because they are not posited and not conventional, they lack the relativity inherent to the two categories of rights/duties above and can also be said to constitute the strong form of pre-positive rights/duties.

However, if moral rights and duties do not gain their power from a legal code or from being conventional in nature, they need another source of validation. This source is that they are being derived from moral reasons or better: a moral theory. One characteristic of a genuine moral right, therefore, is the requirement that it has to be “validated as such by correct moral principles” (Feinberg, 1992: 166).

In a nutshell, a moral right/duty can be understood as a right/duty, “which is not the product of community legislation or social practice, which persists even in the face of contrary legislation or practice, and which prescribes the boundary beyond which neither individuals nor the community may go in pursuit of their overall ends” (Frey, 1980: 7).¹³²

¹³² This view contrasts with Sumner’s position, who holds that a moral right is a “morally justified conventional right” (Sumner, 1987: 163). For Sumner, moral rights are a set of special legal rights and having a moral right means that the possession of the corresponding conventional right is morally justified (Sumner, 1987: 142). One establishes the existence of a moral right by showing that the conventional right is justified, not the other way round (Sumner, 1987: 149). However, I can see no reason to adopt the idea that moral rights should be conventional in nature. This might be the case, but not necessarily. Moral rights can exist independent of legal rights or merely overlap with them. However, it is not correct to say that either of these two classes always includes the other. It would be more reasonable to understand moral rights as separate from conventional ones. Moral rights are morally justified rights which establish “what it would be morally

These findings can be summarised in the following matrix (cf. Figure 9:):

Pre-Positive		Customary Rights/Duties	Moral Rights/Duties
Positive (Codified)	Legal Rights/Duties	Legal Rights/Duties	Legal Rights/Duties
	Non-Conventional (Authoritarian)	Conventional	Pre-Conventional (Derivative of moral theory)

Figure 9: Categories of Rights and Duties

These finding puts us in a position to establish the following ranking: pre-positive pre-conventional rights/duties are prior to pre-positive conventional rights/duties, which are prior to positive rights/duties. Or in a more comprehensible version: moral rights/duties are prior to customary rights/duties, which are prior to legal rights/duties. Or in the most comprehensible version: moral rights/duties override all other categories of rights/duties. They are necessarily universal. Given this universality, both customary as well as legal rights/duties should ideally be mere expressions of pre-positive law.

justified [...] to adopt as a conventional right in case it is not a conventional right already” (Feinberg, 1992: 164).

3.2 Bentham's Fallacy: If Legal Rights are a 'Child of Law', then whose Child is Law?

Whereas the above inquiries into the distinctiveness and features of moral rights might be conceptually sound and coherent, legal rights, however, are not subject to disputes as to their existence and validity in quite the same way moral rights are. Although no one would doubt the existence of positive law (since he can go to a library and look up the legal codes effective in his society), there are those who state that there are no rights and duties other than legal ones. Before continuing, therefore, I shall discuss and refute the position that positive law is the only answer to the question of why somebody has a right/duty, as set forth by one of its proponents.

According to the utilitarian and legal positivist Jeremy Bentham, he states in his "Anarchical Fallacies" (1987a)¹³³, there are "no such things as

¹³³ In this text—written between 1791 and 1795, but not published until 1816 in French (*Tactiques de assemblée législatives, suivi d'un traité des sophismes politiques*, 1816 (ed. E. Dumont, transl. *Anarchical Fallacies*)) – Bentham examines the *Declaration of the Rights of Man and Citizen* (*Déclaration des droits de l'Homme et du citoyen*) issued in France at the beginning of the French Revolution in 1789. For Bentham, a fallacy is "any argument employed, or topic suggested, for the purpose, or with a probability, of producing the effect of deception, – of causing some erroneous opinion to be entertained by any person to whose mind such argument may have been presented" (1824: 1 (Introduction, Section 1)).

Bedau (2000: 264ff) points out that it is not completely clear whether Bentham's definition of fallacy is actually applicable to natural rights to begin with. For Bentham (as pointed out in the preceding footnote), a fallacy is any argument employed for the purpose of deceit; yet, rights, Bedau argues, are not an argument but a "manifesto" (2000: 265). And, even if we agree on fallacy to mean something "roughly synonymous with 'erroneous belief' or 'mistaken claim' or 'objectionable principle'" (Bedau, 2000: 265), it would be still hard to prove that the idea of natural rights is an idea employed with the purpose of deceit. In this respect, it is also interesting to note that Bentham does not mention the anarchical fallacy of natural rights in his later and longer work, 'Book of Fallacies' – which "appears to be a major oversight and a bewildering omission on his part" (Bedau, 2000: 266) unless we assume that he changed his mind.

rights anterior to the establishment of government” (1987a: 52) – therefore, there are no other rights other than legal ones. For him, the notion of “natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts” (1987a: 53). Instead, “right, the substantive right, is the child of law: from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters, ‘gorgons and chimaeras dire’” (1987a: 69). Bentham continues:

“Of a natural right who has any idea? I, for my part, I have none: a natural right is a round square, – an incorporeal body. What a legal right is I know. I know how it was made. I know what it means when made. To me a right and a legal right are the same thing, for I know no other. Right and law are correlative terms: as much so as son and father. Right is with me the child of law: from different operations of the law result different sorts of rights.” (Bentham, 1987b: 72f)

What Bentham formulates here is the idea that there are no rights existing prior to or independently from legal codification, i.e. that for a right to exist, it must derive from positive law and thereby originate within a legal code. A right can only be had if conferred by means of positive legislation, i.e. if enacted, decreed and enforced by some legitimate government. There cannot be any rights antecedent to and independent of human positive law, since there are no commonly agreed upon tests to establish and settle the existence of a non-legal right, such as a reference to a court of law. Bentham’s criticism of the idea of natural law starts with a legal positivist stipulation, namely that the only properly called rights are positive rights and that thus there cannot be rights, which exist prior to the establishment of government: real rights are fundamentally legal rights. He sets up the following equation: the only rights that exist are positive rights; consequently, there can be no pre-positive rights. Given the formative influence of this idea of legal positivism on Bentham, it is clear that Bentham has to reject the idea any pre-positive right or duty:

“It is easy to see that Bentham’s rejection of the idea of natural ‘rights of man’ depends substantially on the rhetoric of privileged use of the term of ‘rights’, seeing it in its specifically legal interpretation. However, insofar as human rights are taken to be significant ethical claims, the pointer to the fact that they do not necessarily have legal or institutional force – at least not yet – is obvious enough, but altogether irrelevant.” (Sen, 2006: 2917)

Bentham’s rejection of the idea of natural rights depends substantially on his specific, but unfounded rhetoric stipulation and privileged legal interpretation of the term ‘right’. However, merely stipulating that rights are legal rights does not mean that natural law does not exist. Bentham is just begging the question: why should we adhere to his legal positivism? How does Bentham support his claim?

As mentioned above, Bentham wrote ‘Anarchical Fallacies’ as an examination of the French ‘Declaration of the Rights of Man and Citizen’ issued in 1789. Having to observe the gross contrast between the bloody and violent reality of the French revolution (1789-1799) and its high ideals expressed in the ‘Declaration of the Rights of Man and Citizen’, it becomes fully understandable that pre-positive rights were an idea, which Bentham considered “seeds of anarchy broadcast” (1987a: 47). In his opinion, the Declaration had a dangerous message, which essentially was a call to revolution and to overthrowing the legal order. Bentham described this message as: “‘People, behold your rights! If a single article of them be violated, insurrection is not your right only, but the most sacred of your duties.’” (1987a: 47) According to Bentham, not only the ‘Declaration of the Rights of Man and Citizen’ but the very idea of a natural right is anarchical. If pre-positive rights existed, they would be anterior to and could not be limited by positive law; and since – this is Bentham’s idea of human nature – human beings are motivated by self-interest¹³⁴ and would

¹³⁴ In his ‘Introduction to the Principles of Morals and Legislation’ (first published 1789), Bentham states: “Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand, the standard of right and wrong, on the other the chain of causes and effects, are fastened to their

thus make use of this freedom, the existence of a natural law would result in a state of pure anarchy.

“The belief in natural rights as the source and ideal of government and as the inalienable property of individuals gives rise to expectations that no government could fulfil. Every government will fall short and, when it does so, its subjects, thinking in terms of their individual due rather than the good of society, befuddled by the deceptive language of rights and motivated by their absolute, romantic promise, will be inspired to revolt rather than to engage in careful debate and reform.”
(Alexander, 2002)

This line of reasoning, however, fails to prove his point. As Bedau (2000) and Twining (1975) argue, there is nothing encouraging insurrection in the ‘Declaration of the Rights of Man and Citizen’, except for the right to resist oppression. However, such a right is not an integral part of the idea of natural rights (since it cannot be found e.g. in other declarations). In addition, it “need not be taken (as Bentham no doubt took it to be) as a right of violent individual and collective resistance to government officials” (Bedau, 2000: 268) – Bentham simply overlooked the possibility of nonviolent resistance to government oppression.¹³⁵

“Whatever political actions have been engendered by belief in these (i.e. natural) rights, there is little or no evidence that their chief effect

throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words man may pretend to abjure their empire: but in reality he will remain subject to it all the while.” (Bentham, 1907: ch. I, sec. I) Since we cannot escape their iron rule, pain and pleasure unavoidably are the determining factors of our actions and we are forced to strive for happiness, i.e. a state which is characterized by the enjoyment of pleasure and the avoidance of pain (cf. Bentham, 1907: ch. VII, sec. I). Also cf. Bentham 1824: 392f (Part V, Chapter IX): “In every human breast [...] self-regarding interest is predominant over social interest; each person’s own individual interest over the interests of all other persons taken together.”

¹³⁵ Mahatma Gandhi used non-violence as a means to realise what he considered pre-positive rights – maybe he was aware that history has shown that revolutions (as Saturn) tend to devour their own children and therefore lead to a cycle of violence.

has been to nourish seeds of insurrection and anarchy where prior to such declarations no such inclinations existed.” (Bedau, 2000: 268f)

While Bentham is right – and history also proves him partly right – in observing that pre-positive rights can be dangerous as they can indeed fuel revolution, he is wrong in abandoning the idea of pre-positive rights altogether. If pre-positive rights are taken to be ends, revolution is a (bad and unsustainable) means to achieve them – but pre-positive rights do not inherently or logically require or sanction their implementation to be violent. Bentham does not develop a proof for the non-existence of natural rights, but rather a moral postulate that there should be no pre-positive rights, since they can result in anarchy. His reasoning is merely probabilistic and not able to support his conclusion. A knife can be used to good and bad ends; describing an act of murder committed with a knife and concluding that the knife does (instead of should) not exist would, however, be an obviously wrong conclusion and therefore unacceptable. So, why should Bentham’s argument be? Thus, Bentham has not shown that there is no such thing as a pre-positive right. At most, Bentham’s argument could lead us to conclude that the French Declaration’s emphasis on pre-positive *rights* was one-sided¹³⁶ and the result of a misled philosophical tradition or that the particular rights catalogue of the French Declaration was ill-conceived. While it is responding to a specific set or notion of natural rights as featuring in the ideology of the French Revolution, it cannot lead us to dismiss the idea of pre-positive rights or law altogether. What Bentham, however, can teach us is that we must not take pre-positive law lightly and that we must be careful in compiling lists of natural rights and as well as in thinking about rights and especially their relation to duties.

Where does that leave us? Although Bentham’s specific critique of the French Declaration’s natural rights cannot be taken to refute the existence or possibility of pre-positive rights, the general problem posed by

¹³⁶ All modern declarations somehow – and in contrast to classical natural law thinking – seem to be lopsided and favouring rights at the expense of duties (also cf. chapter I. 3.2.1).

Bentham's attack, namely that of legal positivism, is not yet solved. So, what about the general position, which separates the realm of positive law from that of morality and denies "an ethical justification for the content of the law" (Himma, 2005)? Given the fact that legal rights and duties are contingent upon local laws, customs or beliefs (legal positivists agree that legal rights are "socially constructed" (Himma, 2005)), the legal positivist position would deny the possibility of condemning the violation of people's right to life as declared legal in such systems as e.g. the 'Third Reich', the 'Union of Soviet Socialist Republics', the 'German Democratic Republic' or the South African 'Apartheid regime'. If the only rights or duties would be those laid down in the respective legal codes, there would not have been and be any instrument by which to even criticise these regimes. But as St. Augustine¹³⁷ and St. Thomas Aquinas¹³⁸ have argued, an immoral law is not a law at all, but rather a perversion of law. Apart from the fact that the existence of a state as well as the very authority necessary to enact laws require a pre-positive justification (cf. Seifert, 1998b: 79), we see that positive law must orientate by some form of pre-positive law. There has to be some measure by which to decide not only what a right is, but rather what is right:

"(42) Iam vero illud stultissimum, existimare omnia iusta esse, quae sita sint in populorum institutis aut legibus. Etiamne si quae leges sint tyrannorum? Si triginta illi Athenis leges imponere voluissent, aut si omnes Athenienses delectarentur tyrannicis legibus, num idcirco eae leges iustae haberentur? Nihilo, credo, magis illa, quam interrex noster tulit, ut dictator, quem vellet civium, aut indicta causa impune posset occidere. Est enim unum ius, quo devincta est hominum societas et quod lex constituit una; quae lex est recta ratio imperandi atque prohibendi; quam qui ignorat, is est iniustus, sive est illa scripta uspiam sive nusquam. [...(43)...] Quodsi populorum iussis, si principum decretis, si sententiis iudicum iura constituerentur, ius esset latrocinari, ius adulterare, ius testamenta falsa supponere, si haec suffragiis aut scitis multitudinis probarentur. (44) Quodsi populorum iussis, si principum

¹³⁷ "Non videtur esse lex, quae iusta non fuerit." (De Libero Arbitrio, I, 5, 11)

¹³⁸ "Si vero in aliquo, a lege naturali discordet, iam non erit lex sed legis corruptio." (I^a-IIae, q. 95, a. 2)

decretis, si sententiis iudicum iuraconstituerentur, ius esset latrocinari, ius adulterare, ius testamenta falsasupponere, si haec suffragiis aut scitis multitudinis probarentur. Quodsi tantapotestas est stultorum sententiis atque iussis, ut eorum suffragiis rerum naturavertatur, cur non sanciant, ut, quae mala perniciosaque sunt, habeantur pro bonis et salutaribus? An vero ius ex iniuria lex facere possit, bonum eadem facere nonpossit ex malo? Atqui nos legem bonam a mala nulla alia nisi naturae normadividere possumus.” (De Legibus, 1, 42ff)¹³⁹

In a world emancipated from pre-positive and pre-conventional law, the only thing left is the law which man gives himself by virtue of his autonomy. Cause, measure and last instance would only be the human will.¹⁴⁰ But if not anything should be permitted, there must be universally

¹³⁹ This translates as: “But the most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations. Would that be true, even if these laws had been enacted by tyrants? If the well-known Thirty had desired to enact a set of laws at Athens, or if the Athenians without exception were delighted by the tyrants’ laws, that would not entitle such laws to be regarded as just, would it? No more, in my opinion, should that law be considered just which our ‘Interrex’ proposed, to the effect that a dictator might put to death with impunity any citizen he wished, even without a trial. For Justice is one; it binds all human society, and is based on one Law, which is right reason applied to command and prohibition. Whoever knows not this law, whether it has been recorded in writing anywhere or not, is without Justice. [...] But if the principles of Justice were founded on the decrees of peoples, the edicts of princes, or decisions of judges, the Justice would sanction robbery and adultery and forgery of wills, in case these acts were approved by the votes or decrees of the populace. But if so great a power belongs to the decisions and decrees of fools that the Laws of Nature can be changed by their votes, then why do they not ordain that what is bad and baneful shall be considered good and salutary? Or, if a law can make Justice out of Injustice, can it not also make good out of bad? But in fact we can perceive the difference between good laws and bad by referring them to no other standard than Nature.”

¹⁴⁰ A position already couched by Protagoras in his ‘homo-mensura’ (man-measure) statement, the only surviving sentence (DK80b1) from his book ‘*Ἀλήθεια*’ (‘On Truth’): “Πάντων χρημάτων μέτρον ἐστὶν ἄνθρωπος, τῶν μὲν ὄντων ὡς ἔστιν, τῶν δὲ οὐκ ὄντων ὡς οὐκ ἔστιν.” (‘Of all things the measure is man, of the things that are, that they are, and of the things that are not, that they are not.’) (cf. Capelle, 1968: 327)

binding norms in our lives, which exist independently of our customs and legal codes.

I do not think, however, that this consequentialist argument is decisive. The decisive argument is the fact that any form of legal positivism still requires pre-positivist principles such as ‘humaneness’, ‘dignity of man’, ‘neutrality/impartiality’, ‘reason’ or some ‘just procedure’ to make its point. This is also supported by Bydlinski (1988) and Waldstein (1967) who show that pre-positive law serves as an implicit or explicit, but in any case self-contradictory pre-positive element of order (‘Ordnungselement’) in positive legal codes.¹⁴¹ This element of order cannot be retraced or explained by some form of human creationary will (‘Kreationswille’ or ‘Setzungswille’ (Bydlinski, 1988: 4, 7)) but is just there. Accordingly, Seifert points out that it is an “impossible, even paradoxical undertaking” (Seifert, 1998b: 79) to ground all rights in positive law respectively the will of some human legislator. To use Bentham’s own wording: If legal

¹⁴¹ I also take this argument to refute the modern liberal idea that the right is prior to the good, i.e. the liberal idea that the political framework has to be neutral with respect to the question of what constitutes a good life, thereby giving every individual the chance to pursue and realise his respective idea of good. Although this demand has a nice ring to it (especially in light of the fact that intolerable cruelties have been committed in the name of some good or that some person’s or group’s view of good has been imposed on everyone else (one must not, however, ignore the possibility that these deeds were not actually covered by the respective idea of good, or a misinterpretation of it)), we must be cautious not to lose sight of the fact that this position is grounded in a certain understanding of a reasonable and thereby good life. This liberal idea, therefore, is self-contradictory and ultimately self-defeating. In the end, we have to accept that “there is no such thing as a political justification that does not privilege – that does not presuppose the authority or superiority of – at least one and possibly more conceptions of human good relative to one or more other such conceptions” (Perry, 1989: 480). The reason for this was intuitively understood by Aristotle who states that “πᾶσαν κοινωνίαν ἀγαθοῦ τινος ἕνεκεν συνεστηκυῖαν (τοῦ γὰρ εἶναι δοκοῦντος ἀγαθοῦ χάριν πάντα πράττουσι πάντες)” (1252a), i.e. that every community is formed for the sake of (one could also translate: with a view to) some good (because people do everything for the sake of what they think to be good).

rights are a ‘child of law’, then whose child is law?¹⁴² I say that the parents of both legal and customary law are moral rights and duties, i.e. moral law. And like in a family, the children must obey their parents and let themselves be guided by them.

I take it to be evident that there is a class of moral rights/duties, which is prior to both customary and legal rights/duties. The fact that pre-positive rights have entered the realm of legal rights only after they have been violated might be due to the curious fact that man only tends to value what he has lost or as Hegel has put it in the preface to his ‘Grundlinien der Philosophie des Rechts’: “Die Eule der Minerva beginnt erst mit der einbrechenden Dämmerung ihren Flug.”¹⁴³

¹⁴² Interestingly and somewhat self-contradictory, Bentham – though probably unconsciously – advances an aprioristic legal positivism when he introduces a pre-positive criterion for the worth of positive law, which he believes depends on its utility (cf. Bentham (1987a: 53f): “What is the language of reason and plain sense upon this same subject? That in proportion as it is right or proper, i.e. advantageous to the society in question, that this or that right – a right to this or that effect – should be established and maintained, in that same proportion it is wrong that it should be abrogated: but that as there is no right, which ought not to be maintained so long as it is upon the whole advantageous to the society that it should be maintained, so there is no right which, when the abolition of it is advantageous to society, should not be abolished.”). In the end, Bentham argues that “our rights are determined by the lawmaker’s judgment as to whether it is more or less advantageous to society as a whole that an individual, or a class of individuals, or all persons, have a legal right to (or to do) the thing in question” (Bedau, 2000: 272). It somehow escaped Bentham’s notice that this implicitly introduces a pre-positive element into his theory and somehow determines a parent for his thitherto allegedly parentless positive law.

¹⁴³ This translates as: “The owl of Minerva spreads its wings only with the falling of the dusk.” (T. M. Knox) An alternative translation by S. W. Dyde reads: “The owl of Minerva, takes its flight only when the shades of night are gathering.”

3.3 The Analytics of Moral Rights and Duties

Having established the existence of moral rights and duties¹⁴⁴, the next question we have to deal with is whether we can apply the Hohfeldian analytical framework as introduced above to this category of rights and duties as well or whether we have to make some modifications to it. For, a weakness of this scheme is that it has been developed aimed at incorporating *legal* rights and duties.

Some writers (such as Thomson, 1990: 74) have suggested adopting the Hohfeldian incidents for moral rights as well.¹⁴⁵ But as Jones (1994: 47f) has shown, the Hohfeldian typology, though applicable, is less central to the concept of a moral right than it is for a legal right – at least if considered in its wholeness. This can be easily seen in the case of power-rights: although I might have the freedom to enter into promises (which is a liberty-right), I certainly do not have the power to establish that promises do not have to be kept in general. This would be contrary to the pre-positive and pre-conventional nature of moral rights and duties. Consequently, it would be true to state that when it comes to moral rights/duties everyone has an immunity-right, since no one is in a position to change someone's moral position. It is a characteristic of moral rights/duties that they are inaccessible to changes by either authoritarian or conventional human will. Powers and immunities can be derivative of moral rights/duties, but a power-right cannot introduce, change or annul a moral right or duty.

In order to keep things simple and avoid confusion, I propose to exclude both power- and immunity-rights, i.e. 'second-order' incidents, from the

¹⁴⁴ Strictly speaking, the existence of the class of moral rights and duties cannot be proven (nor disproven) in an empirical sense – there are, however, more reasons speaking in favour of its existence than there are arguments against it. Those few who do not consider the arguments presented in the preceding chapter a sufficient reason to accept that there is a class of rights and duties that transcend time, culture, and government (which would, however, make talking about human rights pointless), should – for argument's sake – accept it as a premise.

¹⁴⁵ Hart (1984: 79) argues for an "intimate connection between the two".

category of moral rights and duties. Where there is no general power over one's moral rights/duties, there is no need for a general immunity-right. For the purpose of this thesis, moral rights/duties are instances of either claim-rights or liberty-rights, i.e. 'first-order' incidents of rights (whereas their further characteristics, as outlined in chapter III I. 2.1.3, are valid as well). This is also in line with Dworkin (1977: 188ff) who differentiates between moral rights 'in a weak sense' and moral rights 'in a strong sense': a moral right in the weak sense would be what has been described above as a liberty-right, a moral right in the strong sense is a claim-right, which imposes duties on others.

If moral rights cannot be 'second-order', but only 'first-order' incidents, this leaves three options for a philosophical understanding of moral rights: a moral right can either be

1. a moral claim-right (which necessarily implies a corresponding duty):
A has a moral claim-right that B should φ if and only if B has a moral duty to A to φ ,
2. a moral liberty-right:
A has a moral liberty-right to φ if and only if A has no moral duty not to φ , or
3. a moral molecular right/cluster-right, i.e. a combination of a moral claim-right and a moral liberty-right

We also know that rights can be divided into active and passive, rights in personam and rights in rem, individual and group rights as well as positive and negative rights. To recapitulate briefly: the classes of active (A has a right to φ) and passive rights (A has a right that B φ) correspond to the distinction between liberty-right and claim-right; liberty-rights are active rights and claim-rights are passive rights. Rights in personam are held against a specific person or persons, while rights in rem are held against people at large. The distinction between individual rights and group rights answers the question of who actually holds rights: an individual right is held by an individual, group rights are held by a group rather than by its

members severally.¹⁴⁶ Negative rights imply a negative duty to non-interference or forbearance on the part of the duty-bearer (negative action), positive rights as claims to be given something or assisted in a certain way obligate the duty-bearer to undertake a specific positive action. Given the necessity of a duty-bearer, negative and positive rights can only be claim-rights. If we apply these distinctions to the three options for a philosophical understanding of human rights listed above, we are led to think that there are – in theory – four moral claim-rights (moral positive claim-right in rem, moral negative claim-right in rem, moral positive claim-right in personam and moral negative claim-right in personam), two moral liberty-rights (moral liberty-right in rem, moral liberty-right in personam) and one moral cluster-right. But this does not correspond with reality and overestimates the possibilities we have in conceptualising moral rights.

For, the distinction between rights in rem and rights in personam has certain implications for the definition of a right as positive or negative or as Salmond (1920: 203) formulates it: “is closely connected with that between positive and negative rights”.¹⁴⁷ The connection between rights in rem/rights in personam and positive rights/negative rights basically is that “the duties which correlate with rights in rem are always negative: that is to say they are duties to forbear or abstain” (Austin, 1885: 371). Therefore, conceptually speaking, there is no such thing as a positive claim-right in rem. That claim-rights in rem can only be negative is an almost necessary consequence of the nature of a right in rem. As has been said, rights in rem are universally claimable and held against persons universally. Now, if rights in rem involved positive duties, then every such duty would either set the whole world in motion or involve universal liability for non-compliance. This would be absurd because overly demanding – especially in a world with scarce resources as the one we live in.¹⁴⁸ Thus, a claim-

¹⁴⁶ Since this thesis is about health as an individual right, the distinction between individual and group rights are of no further interest for the purpose of this thesis.

¹⁴⁷ Given the fact that the positive/negative distinction can only apply to claim-rights, this implication and connection only concerns claim-rights.

¹⁴⁸ Besides the problem of scarce resources, Wellman mentions a second problem of positive claim-rights in rem, which he calls the “problem of pointless duplication”

right in rem is always negative, i.e. the only corresponding duty of a claim-right in rem is the negative duty resting upon all men not to interfere with the right: rights “available against all other persons, can be nothing more than a right to be left alone by those persons [...] The only duties, therefore, that can be of general incidence are negative.” (Salmond, 1920: 203) A claim-right in rem can only constitute a duty requiring forbearance or omissions on the duty-bearer’s part; or put differently: positive claim-rights can only be in personam while negative claim-rights can either be in rem or in personam.

This line of reasoning, however, might not be a completely convincing attempt to disprove the conceptual possibility of positive claim-rights in rem. We should, therefore, take this thought one step further and ask whether there are moral positive claim-rights at all; if there is no such thing as a moral positive claim-right, then neither are there moral positive claim-rights in rem nor in personam. In trying to find an answer to this question, it is interesting to note that while there is unanimity concerning the existence of negative moral claim-rights, there is considerable disagreement with regard to the validity of ascriptions of moral positive claim-rights. Some, such as Cranston (1983: 12) or Pogge (2005a: 720), hold that human (and thus, as will be shown later, moral) rights cannot ground positive duties, but only impose negative duties. Cranston holds that the ascription of positive rights leads to a reduction of moral rights to “the status of ideals” (1983: 12) and that their realisation is not possible: “for a government to enforce them, it would need to have access to great wealth, wealth that most governments of the world have no means of

(1982: 163; also cf. 181): “If every person, private organisation, and state government acted simultaneously to sustain the life of any individual claimant, their actions would largely duplicate one another. [...] To avoid this pointless duplication, one must fix the responsibility for sustaining the life of any individual much more narrowly than upon everyone [...] Once more our conclusion must be that a significant ethical claim-right to have one’s life sustained will be some sort of special right, not a general human right.” (1982: 163) While Wellman applies this argument to one narrowly defined right, the problem of pointless duplication arises for every positive claim-right in rem.

acquiring” (1983: 13). Pogge (2005a, 2005b, 2005c) furthermore holds that many of the states of affairs that lead philosophers and politicians to argue for positive duties of assistance are in fact the result of severe violations of negative duties.¹⁴⁹ As it seems, the concept of moral positive claim-rights is either theoretically unsound or not needed, since an adherence to the prescriptions of moral negative claim-rights would do the trick. In what follows, I want to present an argument for the position that there are no moral positive claim-rights – be it *in rem* or *in personam*.

3.3.1 Is there such a Thing as a Moral Positive Claim-Right?

As has been said above, moral positive claim-rights are rights to goods, services, assistance, aid or some state of affairs on the part of others. Some call them welfare rights, others subsistence rights and sometimes – but seldom – they are called Samaritan rights. When it comes to the question of their existence, Melden rightly pointed out that “there is a decided tendency among philosophers to offer views without adequate discussion or argument” (Melden, 2002: 121). And indeed, while there are lots of stipulations and views on this topic, writers often neglect or conveniently overlook the need for an argumentative foundation of their view and instead deal with its consequences (i.e. who should bear the costs, etc.). As it takes more than one swallow to make a summer, so the declaration that there are moral positive claim-rights is a mere assertion or claim that does not establish or prove its existence. So, can there be such a thing as a moral positive claim-right, conceptually speaking?

¹⁴⁹ It has to be pointed out that Pogge argues on the basis of what can be called an ‘institutional’ account of human rights, which differs from the standard account with respect to the question of on who do claim-rights impose their corresponding duties. According to the standard view, they do so on individuals (either *in rem* or *in personam*); according to Pogge’s institutional version, claim-rights impose duties on institutions and only derivatively on individuals to not support institutions that do not attend to their duties. Be this as it may, this thesis is not concerned with the institutional, but rather the standard account.

An obvious way to answer this question is to consider and weigh the arguments for and against the existence of a moral positive claim-right. A first argument against moral positive claim-rights can be derived from the fact that such rights clash and conflict with each other in reality. For example, if I have a moral positive claim-right to work, health and education for my children, this means that somebody is under a duty to provide me with these goods, in case I do not have them.¹⁵⁰ Regardless of whom the corresponding moral duty rests with, the implication relevant for us is the following: taking moral positive claim-rights seriously will necessarily lead to a prioritisation and weighing of such rights and will inevitably result in an unavoidable clash of these claim-rights. The reason is rather simple: “only positive rights, not negative rights, are necessarily limited by scarcity.” (Fried, 1978: 113) Because of this scarcity restriction, it is not logically possible to respect any number of positive claim-rights “without necessarily landing in an impossible and contradictory situation” (Fried, 1978: 113). If the duties corresponding to moral positive claim-rights to work, health and education for my children cannot be financed, which of these rights enjoys priority? Which one is to be met first? One could answer that the solution would simply be to spend more in order to meet the corresponding duties, but this would avoid the crux of the problem. Sooner or later, positive claim-rights necessarily involve competing claims, which have to be resolved by elaborate and highly controversial philosophical prioritisation mechanisms. Moral negative claim-rights do not exhibit this downside:

“Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim. Negative rights,

¹⁵⁰ As individuals cannot guarantee complete performance of the duties, the job usually falls on the state. This has an important and for some undesirable implication: the state sector, state intervention and, along with it, levels of taxation grow in proportion to the moral positive claim-rights asserted. The equation is rather simple: more positive claim-rights = more state + more taxes. Consequently, Goodman (2005) explains that a right to health care “would portend a dramatic expansion of government control over health care, with negative consequences for efficiency and patient welfare”.

however, the rights not to be interfered with in forbidden ways, do not appear to have such natural, such inevitable limitations. If I am let alone, the commodity I obtain does appear of its nature to be a scarce or limited one. How can we run out of people not harming each other, not lying to each other, leaving each other alone?" (Fried, 1978: 110)

The problem of scarce resources is aggravated if one deals with chronic problems instead of acute ones. Saving one starving individual is different from overcoming chronic hunger, which produces starvation on a daily basis. Given this insight, it is highly likely that certain moral positive claim-rights do not meet the ought-implies-can-criterion as established above. Given the fact that we operate in a world of scarce resources, the fulfilment of moral positive claim-rights becomes doubtful. Why should one adhere to claim-rights whose corresponding duties cannot be fulfilled under normal circumstances? Doing so would be cynical.

While – strictly speaking – this argument presents a serious conceptual problem of moral positive claim-rights, it does not and cannot establish that there are no moral positive claim-rights, only that their number has to be restricted and few. The actual argument against the existence of moral positive claim-rights is that they clash with many critical moral negative claim-rights, especially the right to freedom and property. This argument has been expressed well by Griffin who – although basically arguing for welfare rights – states:

"Welfare rights would require substantial transfers of goods. [...] But there is the familiar point that, by and large, goods do not appear on the scene like manna from heaven. For the most part, there is no wealth to transfer, unless it has first been created. It therefore comes into the world already owned. And it comes into the world, to some extent, because it can be owned. To put it in a rough, intuitive way, there is something odd, even at times morally wrong, in ignoring ownership." (Griffin, 2000: 37)

At their very bottom, moral positive claim-rights imply that one has an undeniable right to take from or to be given by another that which is not his and which one has not earned; they are rights of recipience. But what is claimed is not lying around like manna from heaven, but resources, which are necessarily already owned: "Things come into the world already

attached to people having entitlements over them.” (Nozick, 1974: 160)¹⁵¹
 Understood like this, moral positive claim-rights are a positive form of

¹⁵¹ Moral positive claim-rights, therefore, are necessarily claims on the possession of others and constitute an interference with other people’s entitlements – entitlements whose history must, however, be taken into consideration. When thinking about property we must not merely take – what Nozick calls – a “current time-slice”, “end-result” or “end-state” (cf. Nozick, 1974: 154f), but rather a historical perspective. In order for a property-right (which is a moral negative claim-right) to be justified, it is not sufficient to point at a current state of affairs; rather, it must (also) be shown that the property in question has been justly acquired (if the thing has not been previously possessed by someone; the so-called “principle of justice in holdings” (Nozick, 1974: 150)) or justly transferred (if it has been previously possessed by somebody else; the so-called “principle of justice in transfer” (Nozick, 1974: 150)). According to Nozick, no one is entitled to a holding except by (repeated) applications of these two principles (cf. 1974:151). Consequently, if one of these historical principles has been violated, the resulting state of affairs has to be rectified by means of a “principle of rectification” (Nozick, 1974: 152). A big problem of this principle, however, is its practical application (in the face of which Nozick eventually capitulates (“I do not know of a thorough or theoretically sophisticated treatment of such issues.” (Nozick, 1974: 152)) and which is usually seen as the biggest weakness in his theories. For example, if A has illegitimately worsened B’s situation and if rectification is taken to consist in A bringing it about that B is no worse off than B would have been had the injustice not occurred in the first place, then rectifying all past injustices and thus bringing about a just state in holdings is an impossible task. Unfortunately, Nozick did not fill these principles with much content; his theory is merely a sketch with many important details that have not been worked out.

Therefore, we have to turn elsewhere to find out about the difficult question “how any one should ever come to have a property in any thing” (Locke, 1690a: Book II, Chapter V, Section 25). Locke’s answer to the appropriation problem is rather straightforward and simple: it is man’s labour, which grounds private property rights: “it is allowed to be his goods, who hath bestowed his labour upon it, though before it was the common right of every one.” (Locke, 1690a: Book II, Chapter V, Section 30) Acquiring private property, then, is nothing more than enjoying the fruits of one’s (honest) labour. According to Locke, this is the “original law of nature, for the beginning of property” (Locke, 1690a: Book II, Chapter V, Section 30). However, the fruits of our labour (e.g. bread) have the tendency to perish if not used in time; for Locke, this law of nature led him to the conclusion that man is only

property right – the right to be given some form of resources and thus property. However, they are not only a form of a positive property right, but also presuppose the notion of private property; for, if everything were common, such a right would be utterly unnecessary. The right to be given something by somebody else only makes sense if the counterpart has dominion over the ‘something’ in question, i.e. is in a position to give it. If there were no private property, no one would have the power to give the claimant what he has a moral positive claim-right to, since everything would be owned by no one. Now, the institution of private property only makes sense if there is such a thing as a moral negative claim-right with

allowed to own more than he can use for his convenience: “As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others.” (Locke, 1690a: Book II, Chapter V, Section 31) No man, therefore, can hold private property in anything he has not put some industry in or in more than he can make use of (cf. Locke, 1690a: Book II, Chapter V, Section 37, 46). The latter condition has, however, been rescinded by the invention of money, “some lasting thing that men might keep without spoiling, and that by mutual consent men would take in exchange for the truly useful, but perishable supports of life.” (Locke, 1690: Book II, Chapter V, Section 47). Therefore, while industry is apt to give an individual possessions in different proportions, the institute of money allows him to rightfully continue and enlarge them in excess of what he can use – although, as Mill (cf. 1848: Book II, Chapter 1) has rightly pointed out, industry (though undoubtedly being the source of the production of wealth) has not been the guiding principle for the acquisition and distribution of wealth (but this is only points to a social defect in practice, rather than theory; it “is not of the essence of the institution (of private property), but a mere incidental consequence” (Mill, 1848: Bok II, Chapter 17)). Given the fact that the introduction of money can be seen as the starting point for injustice in holdings, due to the unrestricted accumulation of wealth, this consequence has to rather be attributed to a certain interpretation of the concept of money, which forgets about the fact that in a natural state all goods spoil if merely accumulated. In order to overcome this deficit, thinkers such as Silvio Gesell (1958) – remembering the Aristotelian insight that money is not so much an asset, i.e. an instrument to accumulate wealth, but rather the foundation of barter and therefore community (NE: 1133b 15f as well as 19f) – have suggested a form of money which loses value if accumulated. But elaborating on this would be opening up another and totally different bottle...

respect to property. Understood like this, every moral positive claim-right presupposes a right not to be deprived of one's property. But, if this is so we are stuck with an unsolvable conundrum: if A has the right to enjoy his property and B has the right to some share of A's property, which claim should be given priority? Regardless of one's choice, one always violates the rights of somebody else. This leaves only two options: one has to either abandon the moral negative claim-right to freedom, which includes the free use of one's property or the concept of private property altogether, or one has to give up the idea that there is such a thing as a moral positive claim-right. The first option is not a viable one: firstly, there has been a long philosophical tradition asserting the existence of a moral negative claim-right to freedom and property; and secondly, such a negative right can be easily derived from the account of moral rights/duties offered below. This only leaves the second option. There is something at odds with the whole idea of moral positive claim-rights, i.e. the moral claim that I should be given something without having done anything to deserve it. Arguing for moral positive claim-rights would be defending involuntary charity. Unless there are strong arguments for the existence of moral positive claim-rights, we should therefore abandon the notion that such moral rights exist.

So, what about the arguments that speak in favour of the existence of a moral positive claim-right? One argument in favour of the existence of this class of rights is advanced by reference to an alleged indistinguishability between moral negative and moral positive claim-rights and reads as follows: 'We agree that there are no moral positive claim-rights. This, however, does not change anything. For, moral negative claim-rights generate secondary moral positive claim-rights.' So, it is argued that although there are no moral positive claim-rights, they sneak in through the backdoor, since they are immediately derivative of moral negative claim-rights. This position is e.g. held by Griffin: "Many of the negative duties correlated with human rights (for example, not denying autonomy) themselves involve positive duties (for example, ensuring conditions for the exercise of autonomy)." (Griffin, 2000: 43) Shue also subscribes to this argument: "If everyone has a right to y, and the enjoyment of x is

necessary for the enjoyment of y, then everyone also has a right to x.” (Shue, 1996: 32)¹⁵² Applied to our terminology, the argument – which has been termed “precondition argument (PCA)” by Smith (1992), but could also be called ‘indistinguishability thesis’ – thus states that moral positive claim-rights derive from or are directly implied by existing moral negative claim-rights:

“The PCA revolves around a simple but powerful claim: without welfare rights, all other rights are rendered worthless. [...] Having rights without having the means necessary to utilize those rights does a person no good. It is little comfort to the poor to be reminded that their freedom is intact; without food, their freedom is of negligible value.”
(Smith, 1992: 219)

Proponents of this line of reasoning hold that the effective enjoyment of moral negative claim-rights necessarily presupposes and hinges on the possession of certain sets of basic goods. Consequently, so it is argued, a

¹⁵² Shue (1996) holds that basic rights, i.e. those rights whose enjoyment “is essential to the enjoyment of all other rights” (Shue, 1996: 19), necessarily imply both positive as well as negative duties and that this thesis about basic rights applies to any given moral claim-right as well (cf. Shue, 1996: 54f). Such a basic right would, for example, be the claim-right to physical security, which he considers “not normally a demand simply to be left alone, but a demand to be protected against harm. It is a demand for positive action, or, in the words of our initial account of a right, a demand for social guarantees against at least the standard threats” (Shue, 1996: 38f). According to Shue, three types of duties correlate with a moral claim-right: “I. Duties to avoid depriving II. Duties to protect from deprivation III. Duties to aid the deprived” (1996: 52). These duties are usually taken to be the duties to respect, to protect and to fulfil, whereas the first is taken to be a negative and the latter two to be positive duties. According to van Hoof (1984: 106; also cf. Toebes, 1999a: 677 as well as Eide, 1998: 4) the duty to fulfil can be subdivided into the duties to ensure and promote. Shue’s idea, however, fails because as Pogge (2009: 117ff) has shown, Shue’s conception of basic rights is not tenable because there are no rights which are essential to the enjoyment of all other rights: “it is possible fully to enjoy some rights even while one lacks the substance of the right that Shue deems basic” (2009: 121). Pogge therefore concludes that “Shue’s definition of basic rights [...] fails to support a plausible identification of the most important moral rights” (2009: 122).

moral negative claim-right automatically implies the moral positive claim-right to the possession of these sets of basic goods: “rather than appealing to separate grounds to justify welfare rights, this argument maintains that the very same grounds that support rights to freedom also support rights to goods. One would be inconsistent in accepting liberty rights¹⁵³ while rejecting welfare rights.” (Smith, 1992: 218)¹⁵⁴ Therefore, it is argued that moral positive claim-rights are not different in kind from moral negative claim-rights, but “simply logical outgrowths” (Smith, 1992: 220).

But, despite the prominence of this argument, it fails – as has been clearly shown by Smith (1992) and Fabre (2000). Smith holds that the PCA, “despite its superficial appeal, [...] rests on an erroneous notion of what it means to possess a right” (Smith, 1992: 217). The PCA wrongly assumes that in order to have a right one must be able to enjoy it: “If a person is not in a position to make use of her right, she cannot fairly be said to have it.” (Smith, 1992: 222) However, this is overshooting the mark: “Such derivations confuse the freedom to seek and obtain goods with either the ability to obtain goods or the entitlement to possess goods.” (Smith, 1992: 217) A person can possess rights even if he is unable to exercise them: “an inability to exercise a right does not constitute a failure to have it” (Smith, 1992: 226f). Consider the following example: some individual A has the moral negative claim-right to travel, i.e. the moral right to be left alone if he wants to travel. Does A’s being poor and not being able to exercise his right to be left alone when travelling establish

¹⁵³ Unfortunately, Smith’s use of terminology is not perfectly clear. For, it does not make any sense to try to derive moral positive claim-rights (i.e. welfare rights) from a liberty-right. The reason is rather simple: a liberty-right asserts that A has the liberty to φ if and only if A has no duty not to φ (cf. chapter I. 2.1.1.2). A liberty-right is thus exercised the moment it is asserted and is not in need of any welfare or positive claim-rights to make its enjoyment possible. Smith seems to mistake liberty-rights for negative claim-rights – a rather common mistake, which could be grounded in the fact that negative claim-rights could be said to be concerned with liberties as they assert a claim to be left alone and free to φ .

¹⁵⁴ Besides the already mentioned Griffin (2000) and Shue (1996), proponents of this type of argument also include Sterba (1985) and Buchanan (1981).

that he does not possess that right to begin with? I do not think so. Lack of goods may hinder one from exercising a right, but it does not deprive one of having it, because “not having the means to exercise a particular right is morally different from not having the right itself” (Smith, 1992: 227). While this criticism is surely valid, I think that it does not address the PCA’s real problem, which is rooted in a lack of conceptual rigour.

This is the criticism levelled by Fabre (2000: 51ff), who argues that the indistinguishability thesis rests on a conceptual confusion and an unwarranted overextension of the commonly accepted concept of a moral negative claim-right:

“Shue argues that rights ordinarily thought of as negative rights in fact impose positive duties as well as negative duties. Take, for example, the right to physical security: it is respected if one refrains from assaulting people and if steps are taken by the state so as to protect people from assault. [...] It will not do, in his view, to argue that there is a distinction between a so-called negative right to physical security, requiring others not to assault us, and a so-called positive right to be protected against assaults upon physical security. [...] Shue’s point derives / some of its force from the fact that we do indeed think that we cannot enjoy physical security if steps are not taken by the state to enforce it. However, he cannot infer from this ‘demand’, as he puts it, the claim that the right to physical security itself imposes a duty on the part of the state to take those steps. He has to explain why we cannot argue that we can make two demands, each encapsulated by a different right: a demand that we not be assaulted, encapsulated by a negative right not to be assaulted, and a demand that we be protected against assaults, encapsulated by a positive right that the state take steps to protect us from potential attackers. [...] / Shue fails convincingly to explain why a right to x imposes both negative and positive duties. The fundamental difficulty with his argument is that, assuming that he is right to say that we have one multifaceted demand for x, this can only apply to very general rights, such a right to physical security and a right to subsistence; it cannot account for the conceptual possibility of talking of the more specific rights in which these general rights can be broken down, such as the right not to be assaulted and the right to be given food, and for the widely held view that we do indeed have such specific rights.” (Fabre, 2000: 51ff)

In the end, the indistinguishability thesis cannot be upheld as it confuses cluster-rights with specific rights. While it might be conceptually possible that a moral cluster-right comprises both a moral negative as well as positive right/duty, there is no convincing reason to support the thesis that all moral claim-rights imply both positive and negative duties. As has been established above (cf. chapter I. 2.1.3) and as is common sense in the field of legal philosophy, a negative claim-right implies a duty to non-interference or negative action and gives the claim-right-holder the right to keep something, which he already possesses. A moral negative claim-right, therefore, is not about giving; it is about not taking. Given this insight, it is hard to get one's head around the basic implication of the indistinguishability thesis, namely that in order for B to fulfil his duty of not taking something, which A possesses, B has to give something to A. This would seem to imply that giving is the same as not taking – a statement, which is clearly contradictory and false.¹⁵⁵ However, such a contradiction is what Griffin (2000: 43) argues for when he states that the duty to not deny autonomy involves the duty to ensure conditions for the exercise of autonomy. Analytically speaking, a moral negative claim-right does not imply a moral positive claim-right to the resources necessary to actually make use of the respective moral negative claim-right. This argument could be shrugged aside as overly sophisticated semantics, but doing so would be questioning the very possibility of science, which is necessarily dependent on a common understanding and usage of words and concepts. Otherwise, science is reduced to mere arbitrariness. I am afraid that deriving moral positive claim-rights from moral negative claim-rights has a slight touch of such arbitrariness. In the end, moral positive claim-rights cannot be justified with mere reference to moral negative claim-rights; a moral positive claim-right can only be an outgrowth of a moral negative claim-right if the former is a remedy to violation of the latter.

¹⁵⁵ To put it differently: if a negative claim-right forbids the duty-bearer to act against the right-holder and if a positive claim-right obligates the duty-bearer to act with respect to the right-holder, then saying that positive claim-rights derive from negative claim-right would be on par with saying that the duty to act automatically included the duty not to act – which would be highly paradoxical.

Another line of argument seeks to defend the existence of moral positive claim-rights by grounding in an individual's need. The standard justificatory attempt is as follows: Some person A needs certain goods for subsistence; therefore, A has a moral positive claim-right to them. However, grounding rights in the concept of need is a consequentialist justification, which – as shall be pointed out later (cf. chapter I. 3.5) – is not able to ground any moral rights or duties. If a moral right, such as a moral positive claim-right is grounded on a failing theory, the right collapses together with the theory. So, since needs or vulnerability alone are not able to ground moral rights, there are no arguments in favour of their general existence in the realm of morality; at least none that I can think of or have come across.¹⁵⁶

We can conclude that moral claim-rights are always negative in nature. They protect people against being treated in certain ways, but do not entitle them to the support of others – although, as will be shown, there is an exception to this rule. Generally, positive rights do not exist as pre-positive and pre-conventional rights; but they can exist as conventional and/or positive (in the sense of legal) rights. This means they do not exist, until they have been agreed to exist, promised, contracted, enacted (i.e. arise from voluntary and free actions, transactions or commitments)¹⁵⁷, arise as remedy for a former rights violation ('restitutio', i.e. an act of commutative justice) or come into existence as the result of special relations or situations

¹⁵⁶ A consequentialist should also be open to the consequences of his proposals. He should therefore take into account the fact that – historically speaking – the acknowledgment of moral positive claim-rights, frequently in the form of welfare rights, has had detrimental results. As Bartholomew (2006) points out, the number of people dependent on the welfare state has risen since its inception, despite the fact that the overall levels of welfare have risen. Welfare states, therefore, tend to create dependencies, which are due to the counterproductive incentives that come with them. Why bother to work hard to earn money for something, if you can just work less hard, and get someone else to buy it for you? For an overview of further negative consequences of the introduction of welfare claim-rights (such as e.g. the dramatically increased number of children born out of wedlock) cf. Bartholomew (2006).

¹⁵⁷ This also includes the establishment of a social contract.

(e.g. an infant has undertaken no voluntary or free act in order to being conceived and borne, but shares in the same positive rights as any other member of the family and – on a higher level – the community he is part of). It should be emphasised that defending this view is not to advocate, speak in favour of or be motivated by a spirit of stinginess. Stating that there are no moral positive claim-rights is just saying that there cannot be a moral right to be given something, nothing more and nothing less. However, the results of this chapter do not and cannot establish in any way that there is no such thing as a moral positive duty, i.e. a duty to help and give something to somebody (sometimes also called ‘duty of charity’). They only establish that such a duty would have to be an imperfect one, i.e. one with no claim-right corresponding to it, and that such a duty cannot be rooted in or the result of a moral positive claim-right.

If we think back to the analytics of rights and duties, the non-existence of moral positive claim-rights has an interesting consequence: it lets the distinction between perfect and imperfect duties as well as the distinction between positive and negative duties coincide. If there is no such thing as a moral positive claim-right, this means that moral positive duties must be imperfect, since there is nothing that can correspond to them. When it comes to moral rights and duties, we can thus put on record: (1) there are no moral positive claim-rights and (2) moral positive duties can only be imperfect, whereas moral negative duties can be both imperfect as well as perfect.¹⁵⁸

¹⁵⁸ Having said this, the reader might think that I am defending a libertarian position, which usually argues against the existence of welfare rights, as well. But this impression is deceptive. The liberal position is basically an individual one, favours the play of market forces in every aspect of our life and operates on the assumption that the cumulative pursuit of individual interests automatically – or to be more precise: by means of Adam Smith’s ‘invisible hand of the market’ – leads to the common good. But as experience has taught us, this is just not the case. The common and individual good are two related, but essentially distinct things.

3.3.2 The Exception to the Rule: The Principle of Extreme Necessity

“Caeli, caeli sunt Domino, terram autem dedit filiis hominum.”
(The heavens, the heavens are the Lord’s,
but the earth he has given to the children of men.)
Psalmus 115, 16

Some may see this result as implying that there are no reasons (other than violating the moral negative claim-rights of others) for interfering with other people’s resources. This conclusion, however, is not completely true. As often, there is an exception, which proves the rule. This exception dates back to 12th century canon law (cf. Swanson, 1997: 404ff) and has subsequently been adopted in civil law as well as reaffirmed throughout the history of moral and legal philosophy¹⁵⁹. It is condensed in the statements that “necessitas legem non habet” (Decretum Gratiani: pars 3, d. 1, c. 11), “necessitas non subditur legi” (I^a-IIae q. 96 a. 6 co.) and “necessitas dispensationem habet annexam” (I^a-IIae q. 96 a. 6 co.; also cf. II^a-IIae q. 66 a. 7).¹⁶⁰ These statements are not meant to establish that necessity renders the illicit licit in general (i.e. that necessity creates its own law) or that necessity does not acknowledge any law. Rather, they mean that there is something special about situations of and actions taken out of (extreme) necessity which allows for an exception to the rule that there are no moral positive claim-rights: “The theory of necessity is none other than a theory of the exception (‘dispensatio’) by virtue of which a

¹⁵⁹ To be more precise, it appeared in the writings of early modern civil lawyers like Grotius, von Pufendorf, Barbeyrac and Vattel as well as of diverse political philosophers such as Hobbes, Locke, Hutcheson, Carmichael, Rousseau, Kant, Fichte, Hegel and arguably even Hume and Smith (cf. Van Duffel & Yap, 2009: 3).

¹⁶⁰ The entire passage by St. Thomas Aquinas is: “Si vero sit subitum periculum, non patiens tantam moram ut ad superiorem recurri possit, ipsa necessitas dispensationem habet annexam, quia necessitas non subditur legi.” (I^a-IIae q. 96 a. 6 co.) This translates as: But if there is a sudden danger, which does not suffer delay for recourse to a higher authority, the very necessity brings a dispensation with it, for necessity is not subject to the law.

particular case is released from the obligation to observe the law. Necessity is not the source of law, nor does it properly suspend the law; it merely releases a particular case from the literal application of the norm.” (Agamben, 2005: 25) This exception is the so-called principle of extreme necessity, which gives rise to a moral positive claim-right of extreme necessity. In order to understand why and what human beings suffering from extreme necessity have a moral positive claim-right to, one has to first understand its underlying concept of property. This concept has been described in an exemplary fashion by St. Thomas Aquinas:

“Res exterior potest dupliciter considerari. Uno modo, quantum ad eius naturam, quae non subiacet humanae potestati, sed solum divinae, cui omnia ad nutum obediunt. Alio modo, quantum ad usum ipsius rei. Et sic habet homo naturale dominium exteriorum rerum, quia per rationem et voluntatem potest uti rebus exterioribus ad suam utilitatem, quasi propter se factis; [...] possessio rerum exteriorum est homini naturalis.” (II^a-IIae q. 66 a. 1 co.)¹⁶¹

According to St. Thomas Aquinas, one has to distinguish two aspects respectively relations when thinking about property: (1) the relation between God and man as well as (2) the relation between men.¹⁶² As far as

¹⁶¹ This translates as: An external thing can be considered in two ways. First, as regards its nature, which is not subject to the power of man but only to the power of God whom everything obeys instantly. Secondly, as regards the use of the things. And in this way, man has a natural dominion over external things, because he is able to use exterior things for his own benefit by means of his reason and will, as if they were made for him; [...] the possession of external things is natural to man.

¹⁶² It has to be emphasised that the principle of extreme necessity is a logically imperative exception to the rule that there are no moral positive claim-rights only if one subscribes to the idea of a creationary force, i.e. God. That one can reasonably argue in favour of such a force, has been shown by, amongst others, Seifert (2010), Swinburne (2004) as well as St. Thomas Aquinas (I^a q. 2). Adherents of a creatorless, merely evolutionary position – which, unfortunately, is not able to answer the question of the ‘whence’ of life – will of course doubt the principle’s very foundation. This is, however, not to state that they necessarily also doubt its existence; they just offer different justificatory reasons (e.g. need or interest, right to life, contractarian considerations) – reasons, which of course have to stand up to the

the first relation is concerned, man can appropriate external things only as possessions ('Besitz'), but never as ownership ('Eigentum'); he can possess something ('Besitzer'), but never be its owner ('Eigentümer') of any external thing. Having made the external world for man, God has ceded man the right to utilise all external things (right of utilization; 'Nutzungsrecht') as well as the right to appropriate the external world as possession; but as their creator, only he holds ownership of the external world:



Man's dominion over the external world is thus limited; he is allowed to possess as well as use it and enjoy the fruits of his utilisation. He is the external world's steward – nothing more, but also nothing less. As its steward, man's possession and utilisation of the external world consequently has to orientate and abide by the end its creator has envisioned for it. As St. Thomas Aquinas points out, the external world has been made for and because of man, i.e. mankind as a whole, not only selected men. From the viewpoint of God, men possess all external things in common: the external world is meant to serve all men and all men are its steward: "Common possession reflects the divine intent that material nature serves mankind as a whole." (Forde, 2009: 439f; also cf. Locke, 1690a: Book II, Chapter V, Section 25f) This is God's intention and the end, which has to govern the possession and utilisation of the external world. In order to clarify this thought it would be better to not speak of 'holding in common', but rather say that men possess external resources as 'common from God'. And this amounts to saying that "reason's principles do not identify anyone as having a prior claim to them other than under some customary or other socially posited scheme for division and appropriation of such resources" (Finnis, 2005).

As far as the second relation – the relation between and amongst men – is concerned, we must thus not forget, that when it comes to the

test of whether they are actually capable of grounding a moral right (cf. chapter I. 3.5).

appropriation of external resources mankind is a community of stewards who do not own the resources, but hold them in common. But this does not mean that God is a communist, i.e. that it is against God's intention that human beings possess external things as their own. What it does mean, however, is that every man can possess external resources as his own, but has to orientate their utilisation by their nature as commons. The appropriation of external resources "to the ownership (or lesser property rights) of particular individuals or groups is appropriate and even necessary" (Finnis, 1998: 190); man is by all means competent to possess something as his own (cf. II^a-IIae q. 66 a. 2 co.) and this for three reasons:

"Where something is held in common, or by many people, it tends to be neglected, and the work involved in managing it tends to be shirked; its management tends to be relatively confused, misdirected, and inefficient; and the whole situation tends to provoke discord, quarrelling, and resentment." (Finnis, 1998: 190; also cf II^a-IIae q. 66 a. 2 co.)¹⁶³

¹⁶³ The disadvantages of common property have also been described by Hardin (1968) in his influential essay 'The Tragedy of the Commons' and von Pufendorf (2005: Book IV, Ch. IV, 6f). But they have also already been observed by Thucydides in his "The Peloponnesian War" ("χρόνιοί τε ξυνιόντες ἐν βραχεῖ μὲν μορίῳ σκοποῦσι τι τῶν κοινῶν, τῷ δὲ πλέονι τὰ οἰκεῖα πράσσουσι, καὶ ἕκαστος οὐ παρὰ τὴν ἑαυτοῦ ἀμέλειαν οἴεται βλάψειν, μέλειν δὲ τινι καὶ ἄλλῳ ὑπὲρ ἑαυτοῦ τι προῖδεῖν, ὥστε τῷ αὐτῷ ὑπὸ ἀπάντων ἰδίᾳ δοξάσματος λαυθάνειν τὸ κοινὸν ἀθρόον φθειρόμενον.") (Book 1, Ch. 141, Sec. 7) Following the translation of Benjamin Jowett, this reads in English as: "The members of such a confederacy are slow to meet, and when they do meet, they give little time to the consideration of any common interest, and a great deal to schemes which further the interest of their particular state. Every one fancies that his own neglect will do no harm, but that it is somebody else's business to keep a lookout for him, and this idea, cherished alike by each, is the secret ruin of all.") and emphasized by Aristotle ("ἤκιστα γὰρ ἐπιμελείας τυγχάνει τὸ πλείστων κοινόν: τῶν γὰρ ἰδίων μάλιστα φροντίζουσιν, τῶν δὲ κοινῶν ἥττον, ἢ ὅσον ἐκάστῳ ἐπιβάλλει: πρὸς γὰρ τοῖς ἄλλοις ὡς ἐτέρου φροντίζοντος ὀλιγωροῦσι μᾶλλον, ὥσπερ ἐν ταῖς οἰκετικαῖς διακονίαις οἱ πολλοὶ θεράποντες ἐνίοτε χειρὸν ὑπηρετοῦσι τῶν ἐλαττόνων. γίνονται δ' ἐκάστῳ χίλιοι τῶν πολιτῶν υἱοί, καὶ οὗτοι οὐχ ὡς ἐκάστου, ἀλλὰ τοῦ τυχόντος ὁ τυχῶν ὁμοίως ἐστὶν υἱός: ὥστε πάντες ὁμοίως ὀλιγορήσουσιν.") (Politics, 1261b 32)

So, the institute of private property, i.e. division and legal regulation of the appropriation and holding of external resources, is reasonable and brings great benefits to a community (cf. I^a-IIae q. 105 a. 2 co. and ad 3) and is a guarantee for a peaceful and harmonious social life (cf. Mäkinen, 2006b: 45 (fn 27)).¹⁶⁴ Von Pufendorf adds that stable rights of private property are vital to the prevention of conflict and also serve as the precondition of commerce (2005: Book II, Ch. 6, 5ff as well as Book IV, Ch. 4, 6f); “they are essential in lifting the race above its primitive origins to the level of civilization we see today” (Forde, 2009: 442). However, although it is necessary to divide the external resources into private property, every appropriation is always subject to the restriction that all external resources are common from God. Since it was God, who originally bequeathed to man a common earth, all resources on earth have to serve all. All titles of ownership and possession, which hold between men, are conditional on the utilisation of the external resources, which has to be in accord with the end God has envisioned for it – namely the sustenance of all mankind. Man can and should establish property rights and thus invoke rights of ownership and possession in his mutual dealings,

Rackham’s translation reads as: “Property that is common to the greatest number of owners receives the least attention; men care most for their private possessions, and for what they own in common less, or only so far as it falls to their own individual share for in addition to the other reasons, they think less of it on the ground that someone else is thinking about it, just as in household service a large number of domestics sometimes give worse attendance than a smaller number. And it results in each citizen's having a thousand sons, and these do not belong to them as individuals but any child is equally the son of anyone, so that all alike will regard them with indifference.”) That these disadvantages of common property are not mere abstract constructs, but something that has been observed throughout the history of mankind, can be seen by the failed communist experiments in the German Democratic Republic and the Union of Soviet Socialist Republics.

¹⁶⁴ For St. Thomas Aquinas it is therefore only natural that human beings possess external, i.e. material things in private. Others such as St. Bonaventura (1221-1274) held that private property was not an ideal state or reflecting on human nature, but rather a consequence of the fallen state of man and a concession to his weakness (cf. Mäkinen, 2006b: 39).

but the ownership, which obtains between men is only relative in the eyes of God and counts for nothing as far as the relationship with him is concerned. Although in a very condensed and abridged version, this is the reasoning underlying the principle of extreme necessity. All external things have been made by God for all of mankind. God as their owner has given man possession and the right of utilisation over all external things, on condition that the utilisation is to be in accord with the end envisioned for them by God (which is, that it serve all men and their survival). Although holding the external world in common from God does not preclude the appropriation of private property (it is even necessary), such appropriation has to be effected on condition that God's intentions are respected. Consequently, because of the resources' nature as commons, the appropriation of the external world as private property has its limits.

Given these premises, it follows that the right of ownership and possession cannot be absolute and valid under all circumstances or every instance (also cf. Stump, 2003: 324). It cannot give the respective right-holder the right to exclude others from vitally important resources in times of extreme need – doing so would be against God's, i.e. the true owner's, intent. And this is what the principle of necessity is all about; it holds that “by natural law all things are common, which means that in times of necessity they must be shared with those who need them” (van Duffel & Yap, 2009: 3). Individual claims of private ownership and possession are overridden if and when confronted with someone in extreme need:

“People who find themselves or their dependants in such life-threatening need are morally entitled to take anything which will relieve that need, and this entitlement overrides anyone else's otherwise legitimate title or property right.” (Finnis, 1998: 191f)

The principle of necessity could, therefore, be said to put a constraint on the ownership and possession rights pertaining to the relations between men: it makes it “morally obligatory for people who have property in abundance to consider the needs of the poor in general in deciding how to use the property they own.” (Stump, 2003: 325) But this is not all; it also gives rise to a right on part of the extremely poor: “In cases of need [...] there is a diffuse duty to share, on the part of those with plenty. If this fails, it is lawful for those in need to take the possessions of another without

consent.” (Forde, 2009: 440; also cf. II^a-IIae q. 66 a. 7) As van Duffel and Yap point out, taking something that belongs to someone else in a case of extreme necessity is treated with special consideration: “in case it was the only course open to survive, it did not amount to theft because in times of extreme necessity all things are common” (2009: 3). This means that “a person in extreme need did not steal in taking another’s property, because what he took was common possession under the law of nature” (Mäkinen, 2006b: 43). Finnis adds: “such people are morally entitled to use force or stealth to get what they need” (Finnis, 1998: 192).¹⁶⁵ Extreme need, therefore, does not only give rise to the duty to share, but also to a moral positive claim-right, which is independent of and overrides positive law and conventions.¹⁶⁶

It is interesting to note, however, that the basic justification of the principle of extreme necessity is not the need or interest of the extremely

¹⁶⁵ In the same fashion, St. Thomas Aquinas holds that the person in extreme need only steals, what is his and is therefore excused (cf. II^a-IIae q. 66 a. 7). Also cf. II^a-IIae q. 32 a. 7 ad 3: “in casu extremae necessitatis omnia sunt communia. Unde licet ei qui talem necessitatem patitur accipere de alieno ad sui sustentationem, si non inveniatur qui sibi dare velit. Et eadem ratione licet habere aliquid de alieno et de hoc eleemosynam dare, quinimmo et accipere, si aliter subveniri non possit necessitatem patienti.” This translates as: In case of extreme necessity, all things are common property. Hence, he who suffers such necessity is allowed to take from another for his sustenance if he can find no one who is willing to give him something. For the same reason, it is allowed to keep what belongs to another and give alms thereof; or even take something if the necessity of the person suffering cannot be helped in any other way. Also cf. II^a-IIae q. 187 a. 4 co..

¹⁶⁶ Although St. Thomas Aquinas and his predecessors did not explicitly speak of a claim-right on part of extremely needy, Tierney (1997: 73, 75) points out that later writers (such as Alanus (1208 -1238), Hostiensis (1190/1200 - 1271), Godfrey of Fontaines (c. 1250 - 1309), William of Ockham (c. 1287 - 1347) and Francisco de Vitoria(c. 1492-1546) were quite explicit in asserting the extremely needy’s claim-right to assistance emphasising that all things are common in case of extreme necessity. Canonical law even institutionalised a process called “evangelical denunciation” (Tierney, 1997: 74), which allowed the extremely needy to appeal to their local bishop who could then “compel an intransigent rich man to give alms from his excess, by excommunication if necessary” (Mäkinen, 2006b: 46).

needy or their right to life. It is rather the common humanity and ‘Geschöpflichkeit’ of man, the fact that earth has been given to mankind and not individuals as well as the resulting common possession of the external world. Extreme need might be the necessary circumstance (‘Tatbestand’) for the application of the principle of extreme necessity, but not its justification. The principle is also not seen as resulting from an obligation of charity, but taken to be one of justice:

“Ea quae sunt iuris humani non possunt derogare iuri naturali vel iuri divino. Secundum autem naturalem ordinem ex divina providentia institutum, res inferiores sunt ordinatae ad hoc quod ex his subveniatur hominum necessitati. Et ideo per rerum divisionem et appropriationem, de iure humano procedentem, non impeditur quin hominis necessitati sit subveniendum ex huiusmodi rebus. Et ideo res quas aliqui superabundanter habent, ex naturali iure debentur pauperum sustentationi.” (II^a-IIae q. 66 a. 7 co.)¹⁶⁷

It is because God has given the world to all men that a share of this world is due to every single man; every man is thus entitled “to some (small) share in basic material goods” (Van Duffel & Yap, 2009: 5). And as all of the external resources have been appropriated, that share in goods and resources can only be claimed against those who have them in superabundance. While the principle should be clear in theory, it still needs to be elaborated and qualified further. Without doing so, the principle would invite Aesop’s grasshopper to use the cover of necessity to take from Aesop’s ant and determine the size of the share due to him. But “not only would this be unjust, it would jeopardize the progress that comes from honest industry” (Forde, 2009: 443). So, what is due to the extremely needy and under which conditions?

¹⁶⁷ This translates as: Things which are of human law cannot derogate from natural or Divine law. However, according to the natural order established by Divine Providence, inferior things are ordained for the purpose of helping man’s needs by their means. For this reason, the division and appropriation of things according to human law does not preclude the fact that man’s needs have to be remedied by means of these very things. Therefore, whatever certain people have in superabundance is to be used, by natural law, for the sustenance of the poor.

As far as the latter question is concerned, we have to bear in mind that the thinkers cited so far were – either explicitly or implicitly – talking about cases of extreme necessity. The claim-right could only be invoked “in extreme circumstances when an individual’s basic needs could not be met by her own resources, family or society” (Mäkinen, 2006b: 40). It is about the poor not merely in need but in “extreme, evident, and urgent need” (Finnis, 1998: 192), i.e. “life-threatening need” (Finnis, 1998: 191); only in cases of extreme necessity is the principle able to override private holdings (“in casu extremae necessitatis omnia sunt communia” (II^a-IIae q. 32 a. 7 ad 3)). This is why the principle is usually only applied to cases of famine, war, natural catastrophes or selected individual cases (e.g. accidents). However, despite the fact that the benchmark for the principle of extreme necessity is rather high, it does not establish that one has to wait until one is at death’s door or incapable of helping himself (cf. Finnis, 1998: 191 (Fn 21)). As the just cited statement by Mäkinen furthermore implies, the principle of necessity is one of last resort and must only be applied if there is no other choice. In addition, the extremely needy are only entitled to take what they need after having asked for the owner’s consent or attempted to persuade him (if this is possible without danger) and only if the necessity of the person suffering cannot be helped in any other way (cf. II^a-IIae q. 32 a. 7 ad 3). In addition, “reparations should be made when possible for goods thus seized” (Forde, 2009: 442; cf. also von Pufendorf, 2005: Book II, Ch. 6, 5ff). Last but not least, the situation of extreme necessity must not be brought about through voluntary action or neglect; the extremely needy must not be in need due to laziness or other fault of their own.

As far as the question of the extent of the entitlement of those in extreme need is concerned, it should be self-evident that the principle requires the rich to share “res quas aliqui superabundanter habent” (II^a-IIae q. 66 a. 7 co.) for the sustenance of the poor. The fact that St. Thomas Aquinas chose the word ‘superabundance’ is an indicator of what is due to the extremely needy. For, the word superabundance implies more than abundance and thus seems to aim at the very top of what people can have in abundance. What we should understand by ‘superabundance’ has been spelled out by

Finnis (1998) who distinguishes three kinds of property (also cf. II^a-IIae q. 32 a. 6 co.):

“(a) resources one needs for the very survival of oneself and one's dependants, (b) resources one needs in order to fulfil one's responsibilities for the support and education of one's relatives and household, for maintaining one's business or profession or other vocation, for launching one's children in such ways of life, for paying one's debts, and other such genuine responsibilities, and(c) resources which are left over (superflua) after one has made reasonable provision for both type (a) 'absolute necessity' and type (b) 'relative necessity'.”
(Finnis, 1998: 191)

Man's private property can thus be subdivided into these three categories. However, which of these are the extremely needy entitled to? The case of type (a) resources is the most straightforward one. The needy and even the extremely needy cannot have a claim-right to type (a) resources, since these are necessary to their holder in an absolute sense, i.e. for his very and his dependants' sustenance; having such a claim would be a claim to somebody throwing away his life and that of his dependants. While one extremely needy individual might be helped, another or several extremely needy individuals would be created. So, there can be no claim-right to type (a) resources validated by the principle of extreme necessity – a position also shared by Locke when he states that one is to preserve the rest of mankind only “when his own preservation comes not in competition” (Locke, 1690a: Book II, Chapter II, Section 6). How about type (b) resources? As Finnis states, “in situations where no one confronts extreme necessity, the right of owners and other property-holders to keep their property extends just as far as their type (b) need to maintain themselves (with their dependants) in the form of life which they have reasonably adopted.” (Finnis, 1998: 193) In reverse, this means that it is type (b) resources, which are at the heart of the principle of extreme necessity. When one encounters an extremely needy individual, the needy individual has the claim-right, not only to one's type (c), but also one's type (b) resources. If type (b) and type (c) resources are held as common in cases of extreme necessity, this seems to imply that type (c) resources are held in common in cases of need that are less than extreme. And indeed, Finnis states that “all these resources should be made available to those

who, though not in extreme necessity, lack the resources to satisfy their type (b) needs” (Finnis, 1998: 193). While this might be a noble thing to do, we must be careful to stay within the limits of what the principle of extreme necessity can actually cover. It is only concerned with extreme need and cannot be used to justify theft in case of less than extreme need. If somebody lacks some type (b) resources, he is not entitled to take from a rich man his type (c) resources. The principle of extreme necessity does not cover the alleviation of those who are not in extreme need. Such action is an act of supererogation or charity, but the needy have no claim-right to it.

So, how should one go about realising the principle of extreme necessity? Not a day, nor even a minute passes by, in which one does not see an extremely needy somewhere on this planet. How are we to behave in the face of the extreme need in parts of the world?

“If I am aware of another person’s extreme, evident, and urgent need and there is no one else to give relief in time, I have a duty of strict justice (not merely ‘charity’) to relieve that need by handing over resources that I own even though they are not superflua but rather are needed in a type (b) sense, i.e. for fulfilling my proper responsibilities to myself and others.” (Finnis, 1998: 192)

This statement is in need of explication in order to be understood correctly. Finnis writes about awareness of need. This does not mean that one has to go throughout the world looking for the extremely needy to help them; it is enough if one deals with the extreme needs of those one meets (cf. II^a-IIae q. 71 a. 1 co.). Awareness has to be restricted in another respect as well. Even if I am aware of the extremely needy in Africa, I do not have to render assistance if it seems likely that they can be assisted by others more closely connected to them or who have more resources (cf. II^a-IIae q. 32 a. 5 ad 3 as well as II^a-IIae q. 71 a. 1 co.) – although it can be praiseworthy to do so.¹⁶⁸ As far as the temporal dimension of extreme need

¹⁶⁸ This insight has also been covered by Wenar’s ‘least-cost principle’ (LCP), which applies to cases where our well-being is at stake and which holds that harm should

is concerned, we need only be concerned with present conditions, not with those that might arise or are probable in the future; it is enough if one relieves present need (cf. II^a-IIae q. 71 a. 1 co.). Despite these clarifications, I do not deem it possible to come up with exact specifications or a formula as to how much a person in superabundance should give to an extremely needy or as to how much a person in extreme need is entitled to receive or take. These levels of resources must be rather indeterminate. As Finnis rightly states, “the true measure of one’s need is not the emotionally motivated expectations and patterns of consumption conventional amongst one’s class, nor exaggerated fears about possible future penury, but the bona fide judgement of a practical reasonableness which includes [...] general justice and love of neighbour as oneself” (Finnis, 1998: 193f). In the end, the claim-rights of the extremely needy and the duties of the rich have to orientate by and even are a deduction from the principle of love of neighbour as oneself (cf. I^a-IIae q. 99 a. 2 ad 2 as well as Finnis, 1998: 138). The principle of extreme necessity is about what we can be reasonably said to owe each other as a matter of rights and duties and thus justice. It is, therefore, not about stinginess, but philosophical clarity and preventing unjustifiable wishful thinking. Whether we have a (necessarily imperfect) duty of charity to help those in less than extreme need (which we do) is a different question.

To conclude, situations of extreme necessity give rise to rights and duties, which override conventions as well as positive law (cf. Agamben, 2005: 25) and are thus moral ones. Such situations cause “a temporary suspension of otherwise valid property rights, which were constituted by human law, and a relapse into the state of nature where everything was common in the sense of open for everyone’s use – not in the sense of common property.” (Van Duffel & Yap, 2009: 3) This means, that although the extremely needy are allowed to use the property of the rich, they are not allowed to appropriate it (cf. Stump, 2003: 324). Extreme need grants only the right of utilisation of appropriated property (and

be relieved by those who can most easily and with the least cost do so (cf. Wenar, 2007b).

consequently a duty on the part of the rich to allow this use). This moral right can be properly characterised as a moral positive claim-right, because it entitles the extremely needy to some share of resources. However, it is not only a right of recipience, but also a right of action, since it allows the extremely needy to – if necessary and under the conditions mentioned above – take the share, which is refused them. At the same time, it is also a liberty-right, as the extremely needy are not under a duty not to steal. The right of extreme necessity could, therefore, be best described as a moral molecular right comprised of a moral liberty-right, a moral positive claim-right as well as a moral negative claim-right.

3.3.3 The Kinds of Moral Rights and Duties

In light of these qualifications, our initial list of seven moral rights (four moral claim-rights (moral positive claim-right in rem, moral negative claim-right in rem, moral positive claim-right in personam, moral negative claim-right in personam), two moral liberty-rights (moral liberty-right in rem, moral liberty-right in personam), one moral cluster-right) has to be narrowed down. Given the arguments introduced above, we can confidently strike both the moral positive claim-right in rem as well as the moral positive claim-right in personam off the list. Although we have found an exception to the fact that there are no moral positive claim-rights, namely the moral positive claim-right of extreme necessity, I shall not add it to the list of possible moral rights, since it is just an exception and does not form a class of its own. Conceptually speaking, moral rights can thus take one of the following forms:

1. Passive right: Moral claim-right/duty
 - a. Moral negative claim-right in rem
A moral claim-right not to be interfered with or dealt with or treated in a certain way with the corresponding duty resting with everybody
 - b. Moral negative claim-right in personam

A moral claim-right not to be interfered with or dealt with or treated in a certain way with the corresponding duty resting with a specifically identified person or group

2. Active right: Moral liberty-right

a. Moral liberty-right in rem

A moral no-duty with the corresponding no-claim-right resting with everybody

b. Moral liberty-right in personam

A moral no-duty with the corresponding no-claim-right resting with a specifically identified person or group

3. Moral cluster-right

A combination of one or more of the above-mentioned moral claim-rights and moral liberty-rights

We have now arrived at a conceptually and logically sound list of moral rights and duties. Any moral right can only be an instance of one of the above-mentioned classes. By implication, this means that a right, which does not fit one of the classes, cannot be asserted as a moral right – regardless of its desirability.

3.4 Human Rights and Duties as a Special Class of Moral Rights and Duties

So far, we have only been speaking about legal, conventional and moral rights. But this thesis is not about health as a legal, conventional or moral right, but as a human right¹⁶⁹. So, how do human rights fit into this triad of rights? What does the addition of ‘human’ to ‘rights’ or ‘duties’ signify? What kind of right is a human right? Is it a legal, conventional or moral right?

¹⁶⁹ For reasons of readability, I use the term ‘human right’ to denote both ‘human right’ and ‘human duty’. The reader should thus bear in mind that right and duty are inextricably linked.

When we think about human rights, what comes to our mind first might be the United Nation's Human Rights Declaration or the European Convention on Human Rights (ECHR). Therefore, human rights are often taken to be legal rights. However, as Fagan rightly points out, equating human rights with legal rights would be "philosophically naïve" (Fagan, 2006). As is commonly agreed upon in the philosophical and political community, human rights are generally thought of as a subclass of moral rights: "human rights are a form of moral rights" (Cranston, 1973: 21). In the same fashion, Nickel and Orend state that human rights are "characterized as moral rights" (Nickel, 2007: 46) and "high priority moral rights" (Orend, 2002: 67).¹⁷⁰ As such, they are independent from convention and legal confirmation and "exist independently of acceptance or enactment as law" (Nickel, 2007: 45). They establish values that positive and conventional law should adhere to and limits beyond which they cannot go. But, the moral nature of human rights does not exclude, of course, the possibility of codification. Human rights can also be positive or conventional rights where they are buttressed by positive or conventional law – but their existence is not dependent on their acknowledgement by law, government or society. Rather, they serve as a yardstick for any codified or conventional right, which is labelled 'human right' and as an ideal by which the latter should orientate itself. Having a human right then means that this human right ought to be recognised or at least protected by positive or conventional law as well; not doing so means committing a moral wrong: "The space protected by human rights is what it is right that people should enjoy." (Vincent, 1986: 11) Human rights are above the level of any kind of positive law or conventions and combine (the noun) rights and (the adjective) right. So, first of all human rights are a special class of moral rights (although they are not the only moral rights that exist).

When we think about human right, what also comes to our mind, might be the textbook definition of human rights, which takes human rights to be

¹⁷⁰ Also cf. Sen (2001: 229): "It is best to see human rights as a set of ethical claims, which must not be identified with legislated legal rights."

the rights inherent to all human beings; this is, for example, how the United Nation's Office of the High Commission for Human Rights defines human rights. Contrary to what seems to be customary, I do not want to just copy this definition; the reason for my reluctance is that introducing such a restriction would forestall a (I deliberately use the article 'a' and not 'the') result of a thorough discussion of the philosophical foundation of the concept of human rights. Why should only those rights be human rights, which are inherent to all human beings? This is not what the term 'human rights' actually denotes; it might be the meaning, which most people connect with the term, but it is a reductive meaning from a philosophical point of view. As we will see, inherent or inalienable rights are a subclass of human rights, but it would be wrong to equate all the rights of human beings with this aspect. Rather, I propose to understand the term 'human rights' as equivalent to the term 'rights of human beings'. Human rights are those rights, which can only be possessed by human beings – and by human beings only. By implication, this means that every human can have them, but a non-human cannot. The concept of human rights is an exclusive one as it abstracts away from non-humans. Therefore, the basic qualification for holding human rights is to be human and to belong to the species 'homo sapiens sapiens'. However, being human does not imply that one automatically possesses the whole range of rights, which a human being can possess. This might be true for some human rights, but generally this must be considered a 'non sequitur'. Being human is a necessary condition for the possession of human rights, but it is not a sufficient condition for the whole range of human rights. Without knowledge of the foundation of human rights, it would be highly objectionable to restrict the definition of human rights to those rights, which are inherent to man, i.e. for which being human is a necessary and sufficient condition. If the enquiry into the foundation of human rights should lead to this result, that is fine; but an *ex ante* restriction would be bad philosophical craftsmanship. I ask the reader to accept this statement as it stands for the moment; having read the complete second chapter of this thesis, the reader will understand what I mean. The often alleged universality of human rights is a mere stipulation, which has to first be verified by reference to a philosophical argument; without such argument universality is only a claim and uncorroborated reductionism. If human rights are the moral rights of

human beings, this means that there are moral rights, which are not human rights. Animal rights are moral rights, but not human rights. Therefore, all human rights are moral rights, but not all moral rights are human rights. Human rights are a special class of moral rights, namely those moral rights, which are applicable to humans as opposed to non-humans.¹⁷¹ In its broadest sense, human rights are the moral rights of human beings.

3.5 The Foundation of Moral Rights and Duties

We now have a basic understanding of what we are talking about when we talk about a moral right or duty. Positive rights/duties spring from the will of a legislator, conventional rights/duties spring from customs and socially institutionalised behaviour. But where do moral rights/duties come from? Why do we have them? We know how to identify legal rights and duties: we can review the applicable legal code; if a rule appears in one of its books, then it is a law that defines a legal duty or right. However, how do we identify moral rights and duties? As Gewirth puts the problem: “If for a moral or human right to exist is for it to satisfy valid moral criteria which justify or ground the right, where do we look for such criteria? What is the moral analogue of the statute books?” (Gewirth, 1982: 182)

In their full sense, moral rights/duties are pre-positive and pre-conventional rights/duties, which are justified and validated by reference to a justified moral theory, or as Eshleman (2009) puts it “an interpersonal normative standard of conduct that creates expectations between members of a shared community”. Nagel (2002: 33) puts it like this (also cf. Feinberg, 1992):

¹⁷¹ Furthermore, it is sometimes said that human rights are ‘rights in rem’, i.e. rights to some ‘thing’; they therefore hold in relation to all who come into a position to infringe the rights and thereby against the world at large. However, this position has been challenged. It has been argued by Raphael, for example, (cf. Raphael, 1967a: 64f; Raphael, 1967b: 112-115) that there are universal human rights in a weak sense, i.e. which are held against a particular section of humanity, and a strong sense, i.e. which are held against everybody else.

“The existence of moral rights does not depend on their political recognition or enforcement but rather on the moral question whether there is a decisive justification for including these forms of inviolability in the status of every member of the moral community. The reality of moral rights is purely normative rather than institutional – though of course institutions may be designed to enforce them.”

The existence of a moral right/duty is determined by and draws its power from a “justified morality” (Nickel, 2007: 46) and thus “moral reasoning, not by whatever institutional factors happen to obtain” (Tasioulas, 2007: 76). It has to be pointed out that it has to exist within a justified, i.e. one that is well supported by appropriate reasons, rather than an accepted, institutionalised or practised morality. The purpose of adding this point of reference is to explain, which moral rights/duties there are and why they should be respected. Moral rights and duties must be morally justifiable. In general, to justify a moral right or duty means, “to show adequate grounds, or sufficient reasons, [...] why people should adjust their conduct” (Orend, 2002: 67). Wenar (2007) states that there are two¹⁷² basic forms of moral

¹⁷² In contrast to this position, Sumner (1987) offers three accounts of interpersonal normative standards: natural rights theories, contractarianism and consequentialism. Of these three, he believes that only consequentialism is able to offer an actual justification. Nevertheless, I want to shortly comment on and dismiss his suggestion to see contractarianism (i.e. the position that moral acts are those that we would all agree to if we were unbiased) as a moral theory. This can be done quite easily: given our account of moral rights as pre-conventionalist, we just have to ask: If the distinctive mark of a moral right is the fact that it is not emanating from social conventional efforts, how can it be derived from a theory, which “claims that moral norms derive their normative force from the idea of contract or mutual agreement” (Cudd, 2007)? They cannot. When it comes to moral rights and duties, contractarianism therefore becomes an untenable position and cannot serve as a foundational moral theory for moral rights. As has been mentioned above, virtue ethics – which Hursthouse (2007) takes to be “one of three major approaches in normative ethics” (the other two being deontology and consequentialism) – also cannot be taken to be a full-fledged moral theory but only its supplement.

theories, which offer such sufficient reasons: status theories and instrumental theories.¹⁷³

- **Status theories** hold that “human beings have attributes that make it fitting to ascribe certain rights to them, and make respect for these rights appropriate” (Wenar, 2007a). This approach can be broadly identified as deontological¹⁷⁴ and belongs to the tradition of natural law and natural rights theories. A status-based

¹⁷³ Although with slightly different words, this dichotomy is also advanced by H.L.C. Hart (1983b), who holds that there are two basic conceptions of morality. The ‘classic thesis’ sees morality as a “uniquely true or correct set of principles – not man-made, but either awaiting man’s discovery by the use of his reason or (in a theological setting) awaiting its disclosure by revelation” (Hart, 1983b: 249). Accordingly, society is seen as an instrument of moral life, as a platform to materialise those principles. Human communities are required to stick to these naturally preset moral guidelines in order to prosper. The (rather consequentialist-utilitarian and essentially relativist) ‘disintegration thesis’ inverts the order of instrumentality between society and morality. It assumes that there is not just one morality, but that it may vary from society to society. Morality is seen as a bond, which holds societies together; if there is no common morality, a society will disintegrate. Therefore, common morality is understood as a foundation of solidarity and an instrument for society. What counts is not the quality of morality, but the strength of the belief in it; the stronger the belief, the stronger the societal bond.

¹⁷⁴ The term ‘deontology’ is derived from the Greek words ‘τὸ δέον’ (‘to deon’) and ‘λόγος’ (‘logos’). Whereas the latter can be translated as ‘teaching’ or ‘science’, the former translates into ‘that which is binding, needful, right, proper’, ‘what ought to be’ or in short: ‘obligation’, ‘duty’. The complete term therefore can be defined as ‘the science of what is binding’ or ‘the science of duty’. Deontology proposes that decisions should be made considering the factors of one’s duties and other’s rights. To sum up, deontology combines those moral theories, which hold that judging whether a situation is good or bad is contingent on whether the action that brought it about was right or wrong, i.e. in conformity with a moral norm or not. For a deontologist, actions are intrinsically good or bad – whereas their consequences can influence (but never determine) their intrinsic goodness or badness (cf. I^a-IIae q. 20 a. 5).

justification, therefore, starts with the nature of man and arrives immediately at his rights.¹⁷⁵

- **Instrumental theories** hold that “respect for particular rights is a means for bringing about some optimal distribution of interests” (Wenar, 2007a). According to this position, the morality of an action is contingent on and determined by the goodness of the action’s consequence(s), i.e. its outcome(s) or result(s), which are measured and judged by some standard of value.¹⁷⁶ Instrumental theories can be broadly identified as consequentialist¹⁷⁷. The

¹⁷⁵ When it comes to the foundation of human rights, an example of a status-theorist is Thomasma who writes: “The reason the notion of human rights can be so powerful is that it rests on a concept of the individual as having a human nature with embedded rights, metaphysically prior to any rights provided by cultural and political recognition. This assumption, too, grounds the notion that norms and principles in ethics are also founded on more fundamental bases than culture and politics.” (Thomasma, 2008: 13f)

¹⁷⁶ The definition of what constitutes a good or desired consequence – the standard of value – is a matter of debate and can range from psychological (such as pain/pleasure, happiness (hedonistic utilitarianism) or beauty (aesthetic consequentialism)) to non-psychological criteria of value (such as material equality or political liberty). With respect to a definition of good, different consequentialist thinkers have thus offered different answers: for Jeremy Bentham the good to maximise is pleasure, for John Stuart Mill it is happiness, for G. E. Moore it is ideals, for the economist and Nobel laureate Kenneth Arrow it is preference satisfaction. However, a consequentialist can also use interests to determine what rights should be ascribed and to whom; for, moral rights serve the end to bring about some optimal distribution of interests or the realisation of interests (e.g. life, liberty, etc.), to be more precise. For an interest consequentialist, moral rights and duties are the means to bring about his standard of value, which is the realisation of some previously stipulated interests. The position that moral rights are grounded in interests has been prominently advanced by Shue (1996) for example, but this position is also held by Eddy (2007) and James (1891), who thought that every interest is a claim against the world justified by its mere existence – whether they like it or not, their arguments have to be thus considered consequentialist.

¹⁷⁷ The term ‘consequentialist’ was coined and introduced by Anscombe in her influential article on ‘Modern Moral Philosophy’ (1958). According to Hooker (2008), a moral theory is a form of consequentialism “if and only if it assesses acts

instrumental approach begins with the stipulation of some good or desired consequence and works its way backward to establish which rights-ascriptions will produce those consequences. For instrumental theories, the rightness of actions is contingent on the goodness of the state of affairs that result from the respective action; if the consequences are desirable, the action is, too. In other words: the ends justify the means. Different interpretations of consequentialism can usually be located on a continuum ranging from egoism (which holds that an action is right if it leads to the most value for oneself) to utilitarianism (which holds that an action is right if it leads to the most value for the greatest number of people).

In light of these descriptions, the crucial difference between status and instrumental theories could be said to be the following: status theories say that ‘human beings have moral rights/duties because ...’, whereas instrumental theories say that ‘human beings have rights in order to ...’. So far so good; but we still have to decide which moral theory to use as the basis for human rights.

To anticipate the result of this decision: I shall neglect instrumental moral theories and turn to their alternative in order to ground moral rights and duties. The reason for casting consequentialism aside (both with respect to this thesis and in general) is twofold. Firstly, instrumental theories usually mistake the idea of the function of rights (i.e. the answer to the question of what it is to have a right/duty) with the justification of rights (i.e. the answer to the question of why we have a right/duty); but doing so is impermissible. When it comes to the function of rights, consequentialists (such as Bentham or Mill) usually adhere to the interest theory (sometimes also called the benefit theory) of what it is to have a right. According to this theory, “X has a right if and only if X can have rights and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) under a

and/or character traits, practices, and institutions solely in terms of the goodness of the consequences”.

duty” (Raz, 1986: 166). According to the Razian understanding of the function of rights, “all rights consist in the protection of individual or corporate interest” (Kramer, 1998: 1f). It is important to note that Kramer states that rights *consist* in the protection of interests; but consisting is something different from ‘are justified by’. The statement ‘to have a right is to benefit from the performance of a corresponding duty’ does not in any way logically entail that benefits justify the ascription of moral rights. A function of rights-theory tries to explain what all rights have in common from an analytical perspective, thereby helping us understand the abstract construct, which we call right. A justification, on the other hand, tries to assert which rights exist and why they exist. Conceptually speaking, these are two distinct things, which must not be confused. Function theories are *ex post* explanations, which try to answer what it is to have a right. However, they are not able to tell us what rights exist. That the interest theory cannot serve as a foundation for moral rights should also become clear once we understand that “people can have interests in x without having a right to x; and contrariwise that people can have a right to x without having interests sufficient to explain this” (Wenar, 2007a; also cf. Cruft, 2004: 372ff). There are rights, which do not serve the right-holder in any way. Furthermore, it is by no means clear why we should treat the benefit theory as exclusive or exhaustive. So, even if we would allow for a justification of moral rights and duties by reference to the interest theory of the function of rights, this would not help, since the theory, in itself is highly reductive. For example, Wenar’s ‘several functions theory of rights’, states that the interest theory does not yield accurate analyses of the existing instances of rights. Consequently, he states that there is no one single function that rights fulfil with respect to right-bearers, but six – while only one of them furthers interests or confers benefits (cf. Wenar, 2005: 233).

Secondly and more importantly, consequentialism (both in its form as act consequentialism as well as rule consequentialism) is a defective and untenable moral theory and cannot be of help in firmly grounding moral rights. This is not the place to elaborate on all the problems that the idea of consequentialism as a moral theory brings with it; the interested reader should refer to Nida-Rümelin (1995) and Erk (2009a) for a detailed

overview of the shortcomings of consequentialism. For our purposes, I take the liberty of premising that instrumental theories are untenable. Anscombe puts it quite sharply: “It is a necessary feature of consequentialism that it is a shallow philosophy.” (Anscombe, 1958: 12) I shall, therefore, neglect this alleged moral theory and turn to its alternative in order to ground moral rights and duties.

As has been said, status theories assume that “human beings have attributes that make it fitting to ascribe certain rights to them, and make respect for these rights appropriate” (Wenar, 2007a). They hold that human beings have moral rights because of X, not in order to X. When it comes to the special class of moral rights, which concerns us here, namely human rights, this rights/duties grounding attribute – as shall be shown in the next but one chapter (cf. chapter I. 4.1) – is usually taken to be human dignity: “All human rights depend upon the concept of human dignity.” (Sulmasy, 2007a: 25) As Weithmann points out “the concept of dignity can very helpfully be used to call attention to the fact that we human beings have features in virtue of which we are worthy of great respect” (2008: 437). Dignity, therefore, is clearly a status theory. Furthermore, basing our account of human rights on human dignity has the advantage of being in line with international law, which also takes human dignity as the justification for human rights (cf. ICESCR, Preamble). Summing up our findings so far, we could state that human rights are the moral rights of human beings, i.e. rights which are pre-positive and pre-conventional, and are justified with reference to the concept of human dignity. This leads to another conceptual point, namely, that not all moral rights held by human beings are necessarily human rights, but only those, which actually arise from human dignity, since there may be moral rights of human beings, which may be grounded differently. Therefore, we are in a position to sharpen our account of human rights developed above; human rights are not only the moral rights of human beings, but they are the moral rights of human beings grounded in the dignity of human beings.

3.6 A Short Commentary on the Is-Ought-Problem

Before trying to describe and ground the dignity of man, we have to look into a demur, which is usually raised by those who deny natural rights and the possibility of making human nature the source of moral rights and duties. This criticism is traced back to David Hume and holds that there is a difference between descriptive statements ('something is') and prescriptive statements ('something ought to be'), and that claims about what ought to be cannot be derived from statements about what is¹⁷⁸:

"I cannot forbear adding to these reasonings an observation which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when all of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is however, of the last consequence. For as this ought, or ought not, that expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given; for what seems altogether inconceivable, how this new relation can be a deduction from

¹⁷⁸ Although the Is-Ought-Problem is related to the so-called 'naturalistic fallacy', which has already been mentioned above and which was introduced by George Edward Moore, it nevertheless is a distinct position and should not be confused or equated with a naturalistic fallacy. A naturalistic fallacy is committed whenever a philosopher attempts to define moral abstracts (such as e.g. the term 'good') in terms of one or more natural properties; Moore therefore refutes any identification of moral properties with natural properties. Although Moore might be right that it is not possible to give a conclusive nominal definition of moral abstracts, he nevertheless misses the possibility for an essential definition, a 'definitio rei'. Although Moore's Naturalistic Fallacy and Hume's Is-Ought-Problem both seem to state that the realm of 'is' is distinct from the realm of 'ought', there is a simple but crucial distinction between them: while the Is-Ought-Problem deals with the problem of deriving moral statements from factual ones, a naturalistic fallacy (Rhonheimer has termed the problem "dualistic fallacy" (2002)) is committed, if we try to describe or define moral predicates by natural ones.

others, which are entirely different from it.” (Hume, 2000: 300 (Book III, Part I, sec. 1, 27))

This passage is usually interpreted as entailing the logical truth that no set of non-moral premises can entail a moral conclusion or norm.¹⁷⁹ The fact that something is the way it is cannot give rise to the conclusion that this something is to be morally approved or disapproved:

“It does not follow from the fact that something is, that it ought to be or to be done, or that it ought not to be or not to be done [...] there is no logical inference from the ‘is’ to the ‘ought’, from natural reality to moral or legal value.” (Kelsen, 1957: 137)

So, how are we to deal with this criticism, which – if tenable – endangers the point of this thesis? I think we should subscribe to it; for, doing so bears no harm as the criticism misses the point of our endeavour. In order to clarify what seems to be a contradiction, we first have to understand what this criticism is capable of doing and how it can be applied. The Is-Ought-Problem occurs when one assumes that because things are a certain way, they should be that way; it also occurs when one thinks that because of the fact that something is not now occurring, it should not occur – or vice versa. Consider the following examples:

- Does the fact that a society has reached a consensus on a certain topic justify a moral claim of how this topic should be regulated? I do not think so.

¹⁷⁹ Kelsen puts this as follows: Die “Lehre, die behauptet, aus der Natur Normen deduzieren zu können, (beruht) auf einem fundamentalen logischen Fehler. Denn diese Natur ist ein Inbegriff von Tatsachen, die untereinander nach dem Kausalprinzip [...] verknüpft sind, ein Sein; und aus einem Sein kann kein Sollen, aus einer Tatsache keine Norm geschlossen werden. [...] Wer in Tatsachen Normen, in der Wirklichkeit Werte zu finden, zu entdecken oder zu erkennen glaubt, täuscht sich selbst. Denn er muß – wenn auch unbewußt – die von ihm irgendwie vorausgesetzten Normen [...] in die Wirklichkeit der Tatsachen projizieren.” (Kelsen, 2000: 405)

- It is a natural fact that men tend to grow beards; but does this give rise to the ought not to have or to have beards? It certainly does not.
- Does the fact, that people tend to be envious, ground a value or disvalue of envy? No.
- Does the fact, that sometimes people lie, ground the moral rule that people should always tell the truth? No.
- People tend to favour pleasure. However, does this imply that people should strive for the highest pleasure of the greatest number? It certainly does not. It is not possible to conclude that pleasure is good from the empirical fact that men favour it.¹⁸⁰

Therefore, no values can be derived from mere facts. As these examples clearly show, mere facts as such do not give rise to oughts, “even when these facts are connected with the natural inclination of things” (Seifert, 2004: 299)¹⁸¹. We cannot simply jump from Is-statements to Ought-statements. It is a “logical matter of course that from a premise concerning an is, which does not contain a normative element, a conclusion, which contains a normative element, cannot be drawn” (Waldstein, 2002); doing

¹⁸⁰ This, by the way, is an easy way to defeat the hedonist utilitarian version of consequentialism.

¹⁸¹ When speaking of facts, one could also mean essential nature, where nature is “only the original and objective nature, [...] not any mere series of facts” (Seifert, 2004: 299). This interpretation distinguishes between mere, i.e. neutral, facts and morally potent, i.e. value-bearing, facts. A fact is not a mere empirical statement such as the result of an opinion poll, but is understood with reference to the nature of something. However, this interpretation of the term ‘fact’ does not help because it has the tendency to derive an ‘ought’ from an ‘is’ in an equally untenable way like the interpretation above. For, it admits that “that no mere factual information about a nature gives us values and that therefore a sidestepping of the need to recognize that some facts are endowed with value, others not, is impossible” (Seifert, 2004: 299). In other words, the essential nature-interpretation cannot explain how we are to distinguish value-bearing nature from value-free nature.

so would be an arbitrary projection. But, as Martin Kriele put it, this insight is “viel Lärm um nichts” (Kriele, 2004: 166), i.e. much ado about nothing. The reason for this statement is given by Wolfgang Waldstein:

“Es läßt sich nun leicht zeigen, daß diese Theorie mit ihrem ganzen Aufwand nur eine logische Selbstverständlichkeit zu beweisen vermochte, nämlich, daß von nicht normativem Sein ein Schluß auf ein Sollen nicht möglich ist. Was diese Lehre jedoch weder bewiesen hat noch beweisen kann, ist die Tatsache, daß es kein Seiendes mit normativem Gehalt gebe. Wer das für erwiesen hält, muß auch die Konsequenz annehmen, daß Normen irgendwelcher Art nicht sein, das heißt, nicht existieren können.“ (Waldstein, 1992: 133)

Hume’s Is-Ought-Problem can establish that non-normative facts cannot give rise to normative conclusions. However, it cannot prove that normative facts, i.e. facts with normative content, cannot give rise to normative conclusions. We cannot pull norms out of a hat; but if there are norms in that hat, we can do so. Having understood this, the Is-Ought-Problem loses its teeth; it actually could be said that it does not exist at all, because what it expresses is not a problem in need of a solution, but a logical matter of course. Rather, the question at hand becomes a totally different one: are there such things as value-bearing facts, i.e. facts with normative content? Expressed differently and more suited for our purposes: Does human nature have normative content?

In order to prove that the nature of living beings has normative content, Kriele (2004: 166) uses the analogy of adequate animal housing (‘artgerechte Tierhaltung’): “Es versteht sich aber von selbst, daß der Natur einer Tierart ein Aufforderungscharakter innewohnt: ihr ist Rechnung zu tragen” (Kriele, 2004: 166). That a cow should be kept, treated, nourished and utilised in a certain way is common sense; it is also common sense that this way would not be the same for other animals, e.g. poultry. The fact that a living being is what it is, determines how it ought to be treated. If we denied that, a cow and a hen would be the same – which everybody would consider as being absurd. This seems to be a matter of course for the animal kingdom. But, why is it this hard to acknowledge for the realm of human beings? Would this not be unwarranted speciesism?

A being's life is its standard of value: that which furthers its life is good, that which threatens it is evil. Understood like this, deriving an Ought or values from an Is is without any problem and logically irrefutable: "We do not affix these values arbitrarily to things but they stand in a clear relation to the essence of certain objects. They grow out of their specific nature." (Seifert, 2004: 301)¹⁸² As Seifert states, we are able to "gain a real intuition into the nature of the respective beings and, based on the understanding of their natures, into their values" (Seifert, 2004: 301). We find the values of things, "discovering in their nature and real existence the source and seat of their intrinsic goodness and non-neutrality" (Seifert, 2004: 301) as well as an objective order of such values.

The Is-Ought-Problem is not capable of showing that the realms of fact and of value do not overlap. Insisting on the impossibility of an overlap would be a logical fallacy, which believes in a positivistically narrowed concept of reality (i.e. only what can be sensually and empirically observed, exists) and denies the existence of realities, which cannot be empirically perceived. The methodological point of departure of modern science was the question what man can tell and discover about the world once he prescind from all metaphysical and religious assumptions and limits himself to the means of empiricism. However, this does not touch upon the question of what can be said about the world if we do not prescind from, but take into consideration metaphysical and religious knowledge. It is obvious that what has been disproven by science cannot be true; but empiricism has to acknowledge its methodological and knowledge-related limitedness. Since Aristotle, it has been established, that those, who "τὰ δ' ὄντα υπέλαβον εἶναι τὰ αἰσθητὰ μόνον" (Aristotle, *Metaphysics*, IV 5, 1010 a 2), i.e. suppose that reality consists only of sensible things, "εἰκότως μὲν λέγουσιν, οὐκ ἀληθῆ δὲ λέγουσιν" (Aristotle, *Metaphysics*, IV 5, 1010 a 5), i.e. speak understandably so but they do not speak according to the truth. The reason for this is that "die vor allem im Empirismus entwickelte These, synthetische Urteile a priori seien nicht möglich, selbst ein synthetisches Urteil a priori ist, das daher an der

¹⁸² For an account of how to find these values, cf. Seifert (1998a).

Selbstaufhebung scheitert” (Waldstein, 1992). Empiricism cannot exclude or deny a reality, to which it does not have access or a key.

The problem is not that we try to find where the realms of fact and of value overlap, but rather the simple-minded tendency to rush from facts to values. The problem identified with natural law theory or essentialism is not about the Is-Ought-Dichotomy (almost all natural law philosophers agree that this is a no-go), but rather the question of whether beings and especially human beings are endowed with fundamental ends. If so, then these ends are the goal of human development. And trying to achieve a goal necessarily has the implication that there are steps that should be taken or avoided, i.e. which are detrimental to the achievement of the end or further it. Fundamental ends contain implicit imperatives, i.e. norms for our behaviour. Essentialism is concerned with the question: Everything considered, what is it that I ought to do or be? In a nutshell, the so-called Is-Ought-Problem has no bearing on the endeavours of this thesis, since its alleged problem does not exist.

4 The Dignity of Human Beings

So far, it has been established what rights and duties are and what distinguishes legal (i.e. positive) from moral (i.e. pre-positive) rights and duties. It has also been established that moral duties are grounded in and justified by a moral theory, whereby the only viable moral theories are status theories. We also know that human rights are special moral rights of human beings, which are justified with reference to the concept of human dignity. It is the attribute of human dignity, which allows granting human beings rights, which no other being is granted. Human rights, therefore, are a function of a theory of human dignity, which gives an account of what it is about human beings that is so special that it grants such high-priority moral rights. In what follows, I want to outline a theory of human dignity, which is able to ground the moral rights of human beings. In doing so, I shall outline what we should understand by dignity in general, what kinds

of human dignity there are and what human rights can arise from human dignity.

4.1 The Foundation of Human Rights in Human Dignity

“Wenn wir einen Augenblick seinen Wert aus den Augen verlieren,
löst sich der Gegenstand in Atome auf.”
Nicolás Gómez Dávila (1994: 48)

Although understanding human dignity is totally different from understanding human rights, human dignity and human rights are nevertheless connected in a very essential way because understanding human dignity is a necessary precondition for understanding human rights (cf. Seifert, 2003: 63). Without knowing what we are to understand by human dignity, the human rights discourse is nothing more than idle talk. The term ‘dignity’ is the normative and philosophical linchpin of justifying human rights. It features in the first human rights declaration of the Catholic Church, the 1963 encyclical ‘*Pacem in Terris*’, which explicitly refers to “human dignity” (Pope John XXIII., 1963: 20).¹⁸³ Furthermore, it

¹⁸³ In contrast to what is commonly believed, Isensee (1987: 148ff) has convincingly shown that the Catholic criticism of human rights was not aimed at the very idea of human rights, but only at special philosophical interpretations (i.e. especially those which see the following human rights as detached from the human right to truth) of certain allegedly human rights such as religious liberty, freedom of conscience, freedom of press, freedom of opinion or academic freedom (‘*Lehrfreiheit*’). This is not to say that the Catholic faith and church have always embraced the doctrine of human rights with open arms. It is to say, however, that they are not the enemies of human rights which Enlightenment, the Freemasons or Marx took them to be, but rather the “Anwalt aller natürlichen Menschenrechte, die im Licht des Erlösungsglaubens nur noch deutlicher in ihrer universellen Anwendbarkeit auf Menschen jeder Rasse, jedes Geschlechts und jeden Standes hervortreten, und zusätzlich neuer Menschenrechte” (Seifert, 2003: 86). That the Catholic Church has embraced the idea of human dignity for a long time can also be seen in the offertory of the ‘*Missa Tridentina*’ (Tridentine Mass), i.e. the extraordinary Roman rite of the Catholic Church which has been promulgated during the Council of Trent by St.

is central to both the ‘United Nations Charter’ from 1945 as well as the ‘Universal Declaration of Human Rights’ from 1948, the latter of which notes it five times. Furthermore, the ‘International Covenant on Economic, Social and Cultural Rights’ (ICESCR) and the ‘International Covenant on Civil and Political Rights’ (ICCPR) both state that all human rights derive from the inherent dignity of the human person. The ‘European Convention on Human Rights and Biomedicine’ also uses it five times, even including the phrase ‘dignity of the human being’ in its full title.¹⁸⁴ All in all, the concept of ‘human dignity’ features in more than 60 international conventions and has been incorporated into a number of national constitutional texts.¹⁸⁵

Pope Pius V.’s bull ‘*Quo primum tempore*’ from July 14th, 1570 and which dates back to early Christianity: “Deus, qui humanae substantiae dignitatem mirabiliter condidisti, et mirabilius reformasti.” For an overview of the history of the idea of the dignity of human beings in medieval times, cf. Dales (1977).

¹⁸⁴ Which reads as: ‘Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine’.

¹⁸⁵ The German constitution (‘Grundgesetz’) can serve as an example of the role human dignity plays in justifying human rights in international and national law. Article 1 of the German ‘Grundgesetz’ reads: “Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt. Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft des Friedens und der Gerechtigkeit in der Welt.” Dignity is also mentioned in Art. 7 of the Schweizer Bundesverfassung which states: “Die Würde des Menschen ist zu achten und zu schützen.” McCrudden (2008: 664f) lists further examples of national constitutions, which have incorporated the concept of human dignity. An interesting fact as a sidenote: human dignity has first achieved constitutional status in Ireland’s constitution of 1937.

As Wildfeuer (2002: 20) points out, the concept of dignity plays a crucial role with respect to technological and bio-medical progress and the resulting problems of application at the beginning, during and at the end of human life (e.g. embryonic research, cloning, preimplantation diagnostics (PID), gene therapy, abortion, euthanasia).

The emphasis on human dignity is impressive enough to lead scholars to state that the concept “now plays a central role in human rights discourse” (McCrudden, 2008: 656; also cf. Kretzmer & Klein, 2002: V) and that human rights are inextricably linked with “the life and the dignity of man” (Nowak, 2002: 13). Human dignity seems to be the shaping principle of human rights. Dworkin notes that the very idea of human rights depends upon “the vague but powerful notions of human dignity” (1977: 198f). This relation between human rights and human dignity is also confirmed by Gewirth: “The relations between human dignity and human rights are many and complex, but one relation is primary: human rights are based upon or derivative from human dignity. It is because humans have dignity that they have human rights.” (Gewirth, 1992: 10) In the same fashion, Bielefeldt writes that human rights are founded on human dignity and that “für das Verständnis der Menschenrechte [...] der Rückbezug auf die Menschenwürde wichtig (ist)” (Bielefeldt, 2008: 34).

“Der Gedanke der Menschenwürde als Grundlage von [...] Menschenrechten hat sich im 20. Jahrhundert – zumindest dem Anspruch nach – über alle Grenzen von Religionen, Kulturen und Ethosformen hinweg weltweit Anerkennung verschafft.” (Wildfeuer, 2002: 19)

Without reference to human dignity, one cannot gain an adequate understanding of human rights: “Dignity is the ground of rights, not a synonym for rights.” (Sulmasy, 2007a: 10) Sulmasy goes on to emphasise the close relation between human rights and human dignity: “to speak clearly of human rights, one must have a clear conception of human dignity. The intimate relationship between these two concepts can be stated simply: People do not have dignity because they have rights; they have rights because they have dignity. [...] Dignity is prior to rights. [...] All human rights depend upon the concept of human dignity.” (Sulmasy, 2007a: 25)

Yet, although the above-mentioned human rights documents invoke the concept of ‘human dignity’ to justify the rights asserted in them, they neither explicitly define the meaning or content of nor justify the term ‘human dignity’ (cf. Shultziner, 2003 as well as Mann, 1998: 31). Jacobson corroborates this observation. He remarks that although an evaluation of

the history of the drafting of the UDHR based on contemporaneous documents and accounts allows for the conclusion that dignity was a standard applied throughout the process of debating and writing each of the Declaration's thirty articles, "it is less clear that the drafters ever engaged in a discussion about the meaning of dignity itself" (Jacobson, 2007: 295). It is, as the above statement by Dworkin has already suggested, vague. Therefore, although almost everyone gives at least lip service to the ideal of human dignity, the foundations for that principle are seldom explicated: some think of human dignity as a 'given', with no need for any intellectual foundation, others invoke religious grounds or offer various philosophical reasons. Dignity has been described as objective and subjective, as public and private, as individual and collective, as internal/intrinsic and external/extrinsic, as unconditional and conditional and as static and dynamic (for a list of sources, where such descriptions can be found, cf. Jacobson, 2007: 293). In short: the concept of dignity appears in a wide variety of guises, many of which seem to be at odds with each other. This problem has also been noted by Bielefeldt (2008) who writes that "bei aller Zustimmung, die der Grundsatz der Menschenwürde weithin findet, zeigt sich zugleich zunehmende Unsicherheit darüber, was denn unter der Würde des Menschen eigentlich zu verstehen sei" (Bielefeldt, 2008: 5) as well as Schockenhoff:

"Die herausgehobene Stellung, die der Gedanke der Würde des Menschen in der allgemeinen Erklärung der Menschenrechte durch die Vereinten Nationen und in vielen modernen Verfassungen einnimmt, sichert noch kein einheitliches Verständnis, an dem sich die gesellschaftlichen Auseinandersetzungen orientieren könnten. Dazu ist vielmehr eine Unterscheidung im Begriff der Menschenwürde unerlässlich, deren strikte Beachtung erklärt, in welchem Sinn dieser als ein moralisches Argument gebraucht werden kann, das von jedem Standpunkt aus rational anerkennungsfähig ist." (Schockenhoff, 2003: 19f)

Human dignity is "ein umstrittenes Prinzip" (Wildfeuer, 2002: 21), a philosophical terra incognita; the concept itself and its contents are subject to criticism (cf. Wildfeuer, 2002: 23ff). Its meaning is "left to intuitive understanding, conditioned in large measure by cultural factors" (Schachter, 1983: 849). As already mentioned above, the affirmation of

human dignity seems to be a merely political and pragmatic consensus among groups that hold quite different beliefs about what human dignity means, where it comes from, and what it entails.¹⁸⁶ None of the instruments of international law that refer to human dignity even attempt to provide a definition of this concept.¹⁸⁷ In effect, ‘human dignity’ seems to serve as a placeholder for whatever it is that gives rise to human rights. These documents might tell us that human dignity is the source of human rights, but it does not tell us why; but without this why, the mere assertion becomes arbitrary and the concept of human rights useless.¹⁸⁸

It would, however, be a mistake to conclude that – as Macklin (2003) does – that human dignity is a simple slogan, which could simply be eliminated without any loss of content or that – as Singer (1986) holds – the concept of dignity is only introduced “at the point at which other

¹⁸⁶ This criticism is also expressed in the following statement: “At the level of rhetoric, the shift from ‘natural rights’ to ‘human rights’ marks a loss of faith in our ability to justify rights on the basis of truths about human nature. To call them human rights is now to characterize the scope of the claims being made rather than hint at anything about their justification. The term refers to universality and a commitment to equality and non-discrimination, particularly across races and people. But unlike ‘natural’ it leaves open the question of justification or, worse still, takes the mere existence of a broad consensus on these matters to be a sufficient reason for avoiding the task of justification altogether.” (Waldron, 1987: 163) Also cf.: “The fundamental problem with defending the human rights regime in terms of natural rights thinking is the failure of its advocates to provide a convincing theory of human nature which would ground notions of human dignity.” (Dunne, 1999: 5)

¹⁸⁷ This is why Weithman calls it a “second-level concept” (2008: 437), i.e. a concept “for expressing moral agreement among those who may differ about what first-order ethical vocabulary best explains why human beings merit respect. It is therefore just the concept one would expect to find in public documents [...] in which signatories from diverse traditions and schools of thought express such agreement.” (2008: 437)

¹⁸⁸ An alarming consequence of this uncertainty and lack of content has been pointed out by Picker (2002). Picker states that the fact that human dignity seems to be beyond all question “steht in deutlicher Disharmonie zu einer sich umgreifenden neuen Werthaltung gegenüber dem menschlichen Leben” (Picker, 2002: 7); while the dignity of man has been made into an abstract, absolute man as a concrete individual is more and more relativised.

reasons appear to be lacking” (Singer, 1986: 228) and that it is “the last resource of those who have run out of arguments” (Singer, 1986: 228) or that – as Birnbacher states (1996) – it serves as a mere “conversation stopper” (Birnbacher, 1996: 107) or “knock-down argument” (Birnbacher, 1996: 109).¹⁸⁹ Rather, what is needed is a thorough discussion of the concept of human dignity which is capable of resolving the ambiguities and integrating them in a coherent framework: “Given that meaning and importance of the notion of dignity has been challenged so vehemently, however, and that no contemporary exposition of the notion of dignity has been sufficiently clear to satisfy the critics, a careful treatment of the topic is in order.” (Sulmasy, 2007b: 10) In what follows, I want to clarify the concept of the dignity of human beings by means of rational argumentation and in doing so embark on an exploration and outline of the concept of dignity. If “evading the task of finding the best grounding for human rights [...] demonstrates a lack of intellectual responsibility” (Freeman, 1994: 493), then capitulating in the face of supposed ambiguities as regards the concept of human dignity would be irresponsible as well. I shall thus develop a framework, which is capable of making sense of the contradictory ambiguities the term ‘human dignity’ or ‘the dignity of human beings’ seems to be afflicted with. So, what is human dignity and how are human rights and human dignity related to each other?

4.1.1 Understanding Human Dignity

“Das Würdige beschreibt sich nicht.”
Johann Wolfgang von Goethe (Faust II, V. 5562)

¹⁸⁹ As Sulmasy (2007b) notes, dismissing the idea of human dignity because of such arguments would be hasty: “These critics have cast aside thousands of years of philosophical writing, dismissed the contemporary bioethical discourse of continental Europeans, and swept away a whole body of international law. The critics have offered no substantive arguments or logical or linguistic ‘proofs’.” (Sulmasy, 2007b: 9)

Dignity is difficult to define. It is not something accessible to empirical measurements nor is it something like an organ, which can be discovered in our body. Furthermore, it is “not a distinct property or quality, like a body’s color, or an organ’s function” (Lee & George, 2008: 409f). Rather, it refers to a property or properties, which “cause one to excel, and thus elicit or merit respect from others” (Lee & George, 2008: 410) and by which one is considered worthy, honourable or estimable. It thus implies and connotes terms such as worthiness for honour or esteem, elevation, excellence and distinction. It is a special kind of value, an “exalted value” (Seifert, 2004: 92), even an “excellence of value” (Seifert, 2002a).¹⁹⁰ Value as opposed to disvalue indicates positive importance, whereby the term ‘importance’ designates “that quality or characteristic of a thing that makes it not neutral and, lifting it out of neutrality, provides the ground of meaningful motivation” (Seifert, 1997: 95). In the same fashion, Kass states that dignity conveys “a special standing for the beings that possess or display it [...] something elevated, something deserving of respect” (Kass, 2008: 308). To make a long story short: Human dignity refers to those properties of man, which lift him out of neutrality; it is a “term of distinction” (Kass, 2008: 309; also cf. Finnis, 1998: 179) – both with respect to the rest or creation as to his fellow men. Attaching human rights to the high value, which is the dignity of human beings, is to envelope the dignity in a protective capsule; but it also means that the exalted value of the dignity of human beings enveloped into a right is so important that it trumps other values.

4.1.2 Facets of Human Dignity

Which excellences or elevations are at the heart of human dignity and give their bearers special worth and standing as well as human rights?

¹⁹⁰ Seifert goes even on to say that “it is never possible to understand a thing properly speaking without understanding its value or disvalue” (Seifert, 2004: 91). In the same fashion, he writes that “any true knowledge of a being requires knowledge of its value” (Seifert, 2004: 90)

What is it that makes human beings worthy of our respect? Throughout history, we can find different perspectives on why man is lifted out of neutrality (cf. Sulmasy, 2008: 470ff):

- In his ‘De Officiis’ Cicero writes: “Atque etiam, si considerare volumus, quae sit in natura excellentia et dignitas, intellegemus, quam sit turpe diffluere luxuria et delicate ac molliter vivere, quamque honestum parce, continenter, severe, sobrie.” (De Officiis, Liber 1, 106)¹⁹¹ For Cicero, dignity is based on one’s excellence as a human being.
- In his ‘Leviathan’, Thomas Hobbes defined dignity in a very different way: “The value or worth of a man is, as of all other things, his price; that is to say, so much as would be given for the use of his power, and therefore is not absolute, but a thing dependent on the need and judgement of another. [...]. The public worth of a man, which is the value set on him by the Commonwealth, is that which men commonly call dignity.” (Hobbes, 1991: 63 (chapter 10)) For Hobbes dignity is the value one has to others; therefore, it is dependent on an external valuation and subject to the market price.
- A third view of dignity is presented by Immanuel Kant: “Das aber, was die Bedingung ausmacht, unter der allein etwas Zweck an sich selbst sein kann, hat nicht bloß einen relativen Werth, d.i. einen Preis, sondern einen innern Werth, d.i. Würde” (Kant, 1785: Ak 435).¹⁹² For Kant, dignity is a “Werth, der keinen Preis hat, kein Äquivalent, wogegen das Object der Werthschätzung (aestimii) ausgetauscht werden könnte” (Kant, 1797: Ak 462), i.e. a worth

¹⁹¹ This translates as: If we wish to reflect on the excellence and dignity of our nature, we shall realize how dishonorable it is to sink into luxury and to live a dainty and soft lifestyle, but how honorable to live thriftily, strictly, with self-restraint, and soberly.

¹⁹² This translates as: That which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, i.e. a price, but has intrinsic worth, i.e. dignity.

which has no price, no equivalent for which the object of valuation could be exchanged.¹⁹³ For Kant, dignity is inherent to man and not dependent on external valuation or one's degree of human excellence. Dignity in this sense cannot be gained, lost and/or regained – one just has it.

These three historical uses of the word 'dignity' are illustrative of the three senses or facets according to which dignity is generally understood in axiology and moral philosophy. In principle, the dignity of human beings can be divided into inherent or intrinsic, inflorescent as well as attributed/bestowed dignity (cf. Sulmasy, 2008: 473 as well as 2007b: 12):

- Intrinsic/ontological dignity¹⁹⁴:
By this kind of dignity we mean the “value that human beings have simply by virtue of the fact that they are human beings” (Sulmasy, 2008: 473). This kind of dignity can be discovered, but not generated. It signifies a human being's respect-worthiness which is independent from our subjective preferences: “the value called ‘dignity’ is an intrinsic preciousness and goodness of a being that is in no way dependent on our subjective likes or dislikes” (Seifert, 2002a). While some things may be lifted out of the neutral only subjectively – insofar as they e.g. please or displease us or are agreeable or disagreeable to us – others may not and are objectively lifted out of the neutral “by an objective in-dwelling positive importance” (Seifert, 1997: 96). This kind of dignity “bears an intrinsic relationship to being the object of morality and of moral imperatives, nay even more: to

¹⁹³ Also cf.: “Allein der Mensch, als Person betrachtet, d. i. als Subject einer moralisch-praktischen Vernunft, ist über allen Preis erhaben; denn als ein solcher (homo noumenon) ist er nicht blos als Mittel zu anderer ihren, ja selbst seinen eigenen Zwecken, sondern als Zweck an sich selbst zu schätzen, d. i. er besitzt eine Würde (einen absoluten innern Werth), wodurch er allen andern vernünftigen Weltwesen Achtung für ihn abnöthigt [...]” (Kant, 1797: Ak 434f)

¹⁹⁴ Kass (2008) refers to this dimension of dignity ‘basic dignity’, Seifert (1997b, 1998, 2002a, 2003) as ‘ontological dignity’.

being object of a special type of ‘absolute’ and unconditional moral imperatives” (Seifert, 2002a). Having dignity means to be of absolute moral value, i.e. the object of absolute moral consideration, and being vested with moral status, the violation of which constitutes “an *intrinsece malum*” (Seifert, 2002a).

- **Inflorescent dignity:**
Sometimes, dignity is also used to refer to a state of virtue or “to individuals who are flourishing as human beings – living lives that are consistent with and expressive of the intrinsic dignity of the human” (Sulmasy, 2008: 473).
- **Bestowed/attributed dignity:**
This kind of dignity refers to the value “that human beings confer upon others by acts of attribution” (Sulmasy, 2008: 473). It is a created, conventional and subjective form of value. The Hobbesian version of dignity is attributed.

Sometimes, two of the three categories mentioned above, namely inflorescent and bestowed/attributed dignity, are subsumed under the category contingent dignity. Following this logic, Wildfeuer (2002: 31) only distinguishes between intrinsic and contingent dignity. Seifert (1997, 1997b, 1998, 2002a, 2003, 2004), on the other hand, does not reduce but expand the scheme introduced above and distinguishes four kinds or roots of human dignity: inherent/ontological dignity, dignity of actual rational consciousness, acquired dignity and bestowed/attributed dignity.¹⁹⁵ There are thus at least three classification systems, which see the dignity of human beings as either two-, three- or four-dimensional. Although these approaches of categorisation seem to be contradictory, since they imply different numbers of categories of human rights, I nevertheless suggest looking at them as complementary. Sulmasy’s three-dimensional approach explicates the two-dimensional approach and Seifert’s four-dimensional

¹⁹⁵ Kass (2008) and his distinction between basic and full human dignity as well as their integral relations and mutual dependences comes close to the dimensions Seifert has in mind.

system explicates both the two-dimensional and three-dimensional approaches.¹⁹⁶ Combining these findings, the concept of human dignity can be graphically depicted as follows (cf. Figure 10:):

¹⁹⁶ There are almost as many classifications of sources and aspects of dignity as there are philosophers dealing with this topic. Although virtually all of them share a category, which has to do with intrinsic dignity, almost all of them understand inherent dignity as actualised, which is contrary to what Sulmasy or Seifert have in mind. So, despite sharing the same terminology, the content of the terms they use sometimes changes. Therefore, one has to exert special caution when comparing different approaches with regard to a classification of human dignity. Examples of other categorising schemes can be found in Gewirth (1992) or Schaber (2004). Gewirth (1992: 11ff) distinguishes between empirical dignity (i.e. dignity as “gravity or decorum or composure or self-respect or self-confidence together with various good qualities that may justify such attitudes” (Gewirth, 1992: 12)) which is a contingent and unequally distributed feature of some human beings as opposed to others and which may occurrently be had, gained, or lost (being without empirical dignity means e.g. being “too raucous or obsequious or servile or lacking in self-control or otherwise ‘undignified’” (Gewirth, 1992: 14)) as well as inherent dignity, which signifies “a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of human beings” (Gewirth, 1992: 12) and which is a necessary not contingent feature of all humans as well as permanent and unchanging and not transitory or changeable. Schaber (2004) distinguishes between inherent dignity, which all men have equally and which cannot be acquired, lost, taken away or regained, as well as contingent dignity, which can be acquired, lost and regained, and which is dependent on non-inherent characteristics such as behaviour, social status and appearance and which, in his opinion, comes in three forms. The first one is expressive dignity, which is expressed by a person’s behaviour (e.g. “The players bore the defeat with dignity.”). The second one is social dignity, which is attributed to a person according to their office and social status (e.g. the dignity of a bishop). The third one is aesthetic dignity, which relates to an entity’s outer appearance (e.g. the dignified sight of an eagle or the dignified look of a Swiss Guardsman in uniform).

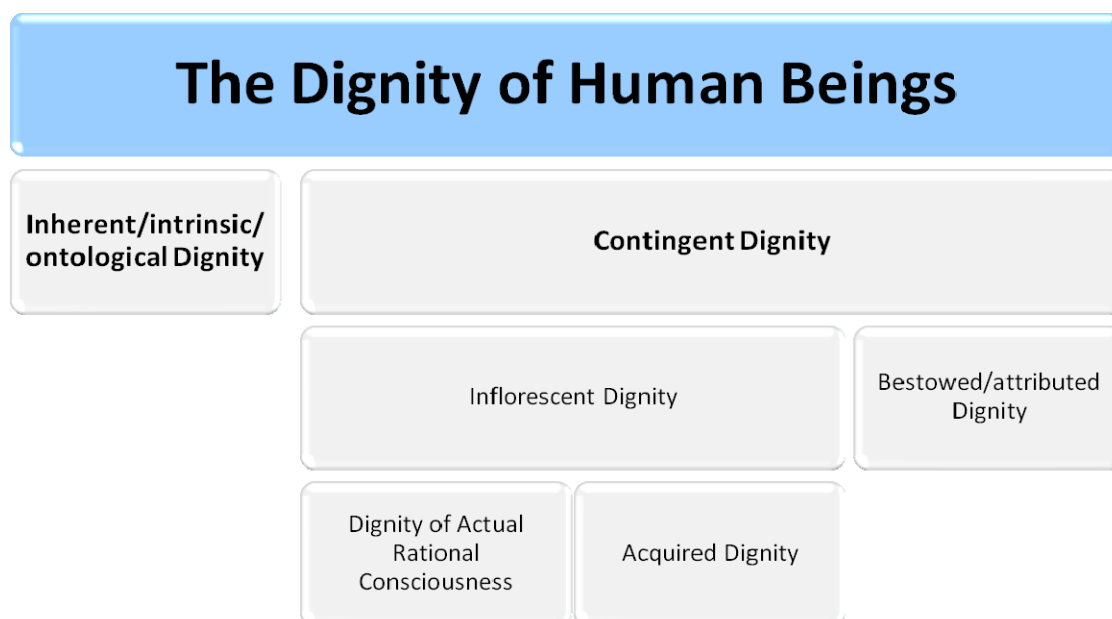


Figure 10: The Dignity of Human Beings – A Classification Scheme

In what follows, I shall take the liberty of mixing Sulmasy’s (2008) terminology with Seifert’s (1997, 1997b, 1998, 2002a, 2003, 2004) and speak of inherent, inflorescent as well as attributed/bestowed dignity, whereby the aspect of inflorescent dignity shall be subdivided into dignity of actual rational consciousness and acquired dignity. Since Seifert’s classification scheme of human dignity – to my mind – is the most elaborated one and the one into which all other interpretations can be integrated, this approach will allow for a most comprehensive and thorough analysis of the roots of the dignity of human beings. In particular, the following chapter shall thus orientate by and be structured according to the four red-bordered dimensions of dignity (cf. Figure 11):

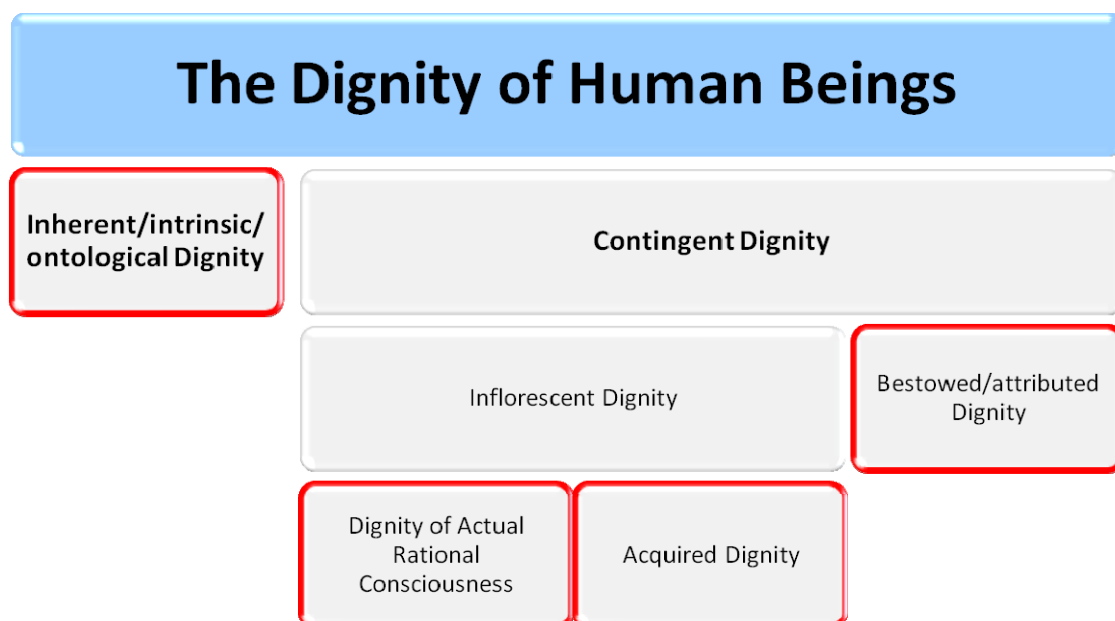


Figure 11: The Four Fundamental Roots and Dimensions of the Dignity of Human Beings

Any complete account of human rights must consist of and be responsive to all these four dimensions of the dignity of human beings.

4.2 The Four Dimensions and Sources of Human Dignity

“Men are by nature equal, say Rousseau and Hobbes and many more respectable authors. Yes, in their specific nature, that is, they are all equally men. Similarly you have it that all triangles are equal, if that is a proposition of any value. But men as individuals are not all equal. One is stronger in body, another more able in mind: one predisposed to virtue, another to vice: one born in affluence and honour, another in squalor. Not men in the abstract, but living men, start at different points of vantage, and the distance between them widens as they run the race of life. We may lay it down as an axiom, in diametric opposition to Rousseau, that inequalities are natural, equalities artificial.”

Rickaby (1919: 305)

Now that we have an understanding of the dimensions associated with the dignity of human beings, we are in a position to go in medias res and analyse the four dimensions and sources of human dignity. Doing so shall give us a deeper understanding of their nature as well as essence. Such

understanding is required to answer which moral rights of human beings, i.e. human rights, can actually be grounded and justified by reference to human dignity. So, how are we to understand the four dimensions of human dignity? What are their specific characteristics?

4.2.1 Ontological Dignity: Being a Person

“Echte Menschenrechte sind nur möglich, wenn man mit Thomas von Aquin, Gregor von Rimini – und anderen Vertretern einer *recta ratio*, d.h. eines objektiven Richtmaßes für die faktische Natur und tatsächlichen positiven Rechtsbestimmungen – in der wesenhaften Natur des Menschen als Person die unveränderliche Quelle der Menschenrechte erblickt.”
Seifert (2003)

The first source of human dignity, which has been termed “ontological dignity” by Seifert (2003)¹⁹⁷ and which not only lifts every living human being out of neutrality, but also the rest of all creation, is man’s humanity. If it is true that man has dignity precisely because he is man, what is about him that justifies this claim? How does man excel the rest of all creation?¹⁹⁸ Why is the human species considered to have an elevated moral status? The answer is: because of his “Wesensnatur” (Seifert, 1997b: 180), i.e. the “special capacities and powers that are ours and ours alone among the creatures” (Kass, 2008: 320). What is this ‘Wesensnatur’ of man? As is commonly agreed upon, it is his personhood, i.e. the state or condition of being a living person: “To be a person, whether healthy or sick, whether male or female, whether old or young, whether conscious or in coma – is the first ground of human dignity.” (Seifert, 2002a) Man is somebody rather than something because of his personhood. Personhood is the first and most fundamental foundation of human dignity and consequently

¹⁹⁷ Others refer to it as “inherent dignity” (Schaber, 2004) or “intrinsic dignity” (Sulmasy, 2008).

¹⁹⁸ That man excels the rest of creation is a fact which is “in einem empirischen Sinne interkulturell anerkannt” (Höffe, 2002: 115; 124).

human rights. But, what does it mean to be a person? What is it that gives a person the sublime objective value which is ontological dignity?

4.2.1.1 What it means to be a Person

As Boëthius (1918: ch. 3; also cf. Spaemann, 1998: 31 and Brassler, 1999: 26) tells us, the word ‘person’ initially stems from the realm of ancient theatre and is borrowed from the masks, which used to represent different subjects in ancient Latin and Greek comedies and tragedies. These masks (Greek: ‘πρόσωπον’ (‘prosopon’); Latin: ‘persona’) were placed over the face of the actors and were meant to conceal his countenance from the spectator and instead – by means of shape, colour and expression – capture and portray the essence of the different characters represented in the respective play. Since the masks embodied characteristic attributes and properties, soon all other men who could be recognized by these characteristics were also designated with the term ‘persona’ respectively ‘prosopon’. When we speak of human beings as persons, we should thus think of ‘person’ not as an “Artbegriff, sondern die Weise, wie Individuen der Art ‘Mensch’ sind” (Spaemann, 1998: 263). There are certain attributes or properties inherent to the species homo sapiens sapiens which allow us to call every representative of this species ‘person’. What we call person, however, are not the properties themselves, but the human beings in whose nature these properties reside.

“Das Wort ‘Person’ ist kein sortaler Ausdruck, mit dem wir etwas als ein So-und-so kennzeichnen und dadurch identifizierbar machen. Auf die Frage ‘Was ist das?’ antworten wir nicht: ‘Das ist eine Person’, so wie wir sagen würden: ‘Das ist ein Mensch’ oder ‘Das ist eine Lampe’. Wir müssen vielmehr schon vorher wissen, ob dies ein Mensch oder eine Lampe ist, um wissen zu können, ob es eine Person ist. Der Begriff der Person dient nicht der Identifikation von etwas als etwas, sondern sagt etwas aus über ein bereits als ein So-und-so Bestimmtes. Es handelt sich aber andererseits auch nicht um ein Prädikat, das dem bereits in seiner Art Qualifizierten eine bestimmte zusätzliche Eigenschaft zuspricht. Es gibt keine Eigenschaft, die ‘Personsein’ hieße. Es ist vielmehr so, daß wir von Wesen aufgrund bestimmter Eigenschaften, die wir zuvor identifiziert haben, sagen, sie seien Personen.” (Spaemann, 1998: 14; also cf. Spaemann, 2009)

Based on this intuitive and empirical insight, it was Boëthius who coined the definition that “*persona est naturae rationabilis individua substantia*” (Boëthius, 1918: ch. 3), i.e. that a person is the individual¹⁹⁹ substance of a rational nature. Saint Thomas Aquinas elaborated on the Boëthian definition (cf. I^a q. 29) and emphasised the ‘Selbstand’ of the person (“*per se existit*” (I^a q. 29 a. 2 co.)), who is individually different from all others (“*per se una*” (I^a q. 29 a. 4 co.)) as well as free because he can act of himself and on his own (“*per se agunt*” (I^a q. 29 a. 1 co.)). Similar to Boëthius and in an attempt to improve his definition, Richard of St. Victor defines a person as “*intellectualis naturae incommunicabilis existentia*” (1959: IV,22), i.e. the incommunicable existence of an intellectual nature, who exists in himself alone according to a singular mode of rational existence (“*existens per se solum juxta singularem quendam rationalis existentiae modum*” (1959: IV, 24)).²⁰⁰ Therefore, what is characteristic of a person is his absolute individuality, uniqueness and non-substitutability as a subject endowed with a rational nature. According to this understanding of personhood, it is not the functions or properties that make a person, but being part of a nature, which is characterised by these properties and functions.

Once we consider a person an individual, unique, unrepeatable subject of a rational nature, we grasp that it is of high dignity to be the bearer of such nature (“*magnae dignitatis est in rationali natura subsistere*” (I^a q. 29 a. 3 ad 2)) because the nature, which ‘person’ includes in its definition, is of all natures the most exalted:

¹⁹⁹ Cf. Boëthius (1918: ch. 2): “*Sed in his omnibus nusquam in universalibus persona dici potest, sed in singularibus tantum atque in individuis; animalis enim vel generalis hominis nulla persona est, sed vel Ciceronis vel Platonis vel singulorum individuorum personae singulae nuncupantur.*” (This translates as: But in all these things person cannot be applied to universals in any instance, but only to particulars and individuals; for there is no person of a man if animal or general; only the single persons of Cicero, Plato, or other single individuals are termed persons.)

²⁰⁰ The term ‘incommunicability’ is consistent with Boëthian ‘individuality’. Therefore, it does not refer to a person’s uncommunicative isolation, but rather points to the non-duplicatable identity of the person. There is only one exemplar of every person.

“Persona, sicut dictum est, significat quamdam naturam cum quodam modo existendi. Natura autem, quam persona in sua significatione includit, est omnium naturarum dignissima, scilicet natura intellectualis secundum genus suum. Similiter etiam modus existendi quem importat persona est dignissimus, ut scilicet aliquid sit per se existens.” (De potentia, q. 9 a. 3 co.)²⁰¹

Therefore, “persona significat id quod est perfectissimum in tota natura, scilicet subsistens in rationali natura” (I^a q. 29 a. 3 co.), i.e. person signifies what is most perfect in all nature, that is, a subsistent individual of a rational nature. Man is “der geistige Aristokrat innerhalb der Natur” (Höffe, 2002: 119). The dignity of being a person is also expounded by Alexander of Hales, who defines that “persona est hypostasis, distincta proprietate ad dignitatem pertinente” (Alexander of Hales, 1951: 1, 23, 9 b), i.e. that a person is a substance, which is distinguished by means of a peculiarity (‘Wesenhaftigkeit’) related to dignity. Thus, personhood is a source of human dignity. The sublime value, which is dignity “belongs so intimately to the essence of the person that it itself distinguishes persons from other beings” (Seifert, 2002a) and cannot be understood independently of grasping the essence of the person in whose nature it is rooted. Personhood and dignity are inextricably linked and cannot be separated from each other. To sum up, given the Boëthian and Aquinian definition of person, personhood is inextricably linked with the following preconditions:²⁰²

²⁰¹ This translates as: As has been said, person denotes a certain nature with a certain mode of existence. Now the nature which person includes in its definition is of all natures the most exalted/worthy, namely a nature, which is intellectual by its genus. Likewise, the mode of existence signified by the term person is most exalted/worthy, namely that a thing exists by itself.

²⁰² Although not explicitly mentioned in the definitions given above, it should be added that personhood always necessitates life; only living, i.e. animate beings, can be persons: “Nur ein lebendiger Mensch oder ein lebendiger Geist (oder auch eine lebendige ‚getrennte Seele’) ist Mensch und ist Person, nicht der Leichnam.” (Seifert, 2003: 55) Also cf. Boëthius (1918: ch. 2): “neque in non uiuentibus corporibus personam posse dici manifestum est (nullus enim lapidis ullam dicit esse personam), neque rursus eorum uiuentium quae sensu carent (neque enim ulla

1. Having a rational nature
2. Being an individual substance

In the following sections, I shall explain these conditions:

4.2.1.1.1 *The Person as Individual Substance*

Applying the term ‘individual substance’ to persons does not mean that a person is merely some material thing, but rather that he is “a particular kind of basic entity” (Robinson, 2004). The term ‘substance’ (‘οὐσία’ (ousia), ‘υπόστασις’ (hypostasis)) is owed to Aristotle and can only be understood within the framework of Aristotelian ontology. In his *Κατηγορίαι* (*Categories*), which is devoted to the question, ‘What are the things we talk about and ascribe properties to?’, Aristotle distinguishes ten categories of beings. These categories are all based on the different senses of ‘is’ or ‘are’ when we assert that ‘X is Y’ (*Categories*, 1 b 25-2a4). They are: substance (what x is), quality (what x is like), quantity (how much/many x there are), relation (how x is related to something else), place (where x is spatially located), time (where x is temporally located), condition/state (a description of x at some time), activity (what x is doing) and passivity (what is being done to x).²⁰³ Within this list of categories,

persona est arboris), nec uero eius quae intellectu ac ratione deseritur (nulla est enim persona equi uel bouis ceterorumque animalium quae muta ac sine ratione uitam solis sensibus degunt), at hominis dicimus esse personam, dicimus dei, dicimus angeli.” This translates as: “It is apparent that ‘person’ cannot said to be in bodies, which do not live (for no one says that there is any person of a stone), nor yet of the living things which lack sense (for neither is there any person of a tree), nor indeed of that, which is bereft of mind and reason (for there is no person of a horse or ox or any other of the animals which dumb and without reason lead a life of sense alone), but we say that there is a person of a man, a person of God, a person of an angel.”

²⁰³ In Aristotle's own words this reads as: “Each (individual term) signifies either substance or quantity or qualification or a relative or where or when or being in a position or having or doing or being affected. To give a rough idea, ideas of substance are man, horse; of quantity: four foot, five foot; of qualification; white, grammatical; of a relative: double, half, larger; of where: in the Lyceum, in the

Aristotle gives a privileged position to the category of substance (cf. *Metaphysics*, 1045b27) because the items in the other categories, i.e. the non-substances, “all depend somehow on substances” (Cohen, 2008) and exist only in a substance (cf. *Categories*, 1a25). Substance is primary being; the other categories are the various kinds of properties that substance can possess. Substance is thus used to exclude accidents (Aquinas, *De potentia*, q. 9 a. 2 co.).²⁰⁴ Applying a second system of classification (cf. *Categories*, 1a20)²⁰⁵, Aristotle then continues to distinguish two senses of ‘substance’ (*Categories*, 2a11): ‘primary substance’, which is “that which is neither said-of a subject nor present-in a subject; for instance, the individual man or horse” (*Categories*, 2a11) and

market-place; of when: yesterday, last year; of being in a position: is-lying, is-sitting; of having: has-shoes-on, has-armour-on; of doing: cutting, burning; of being-affected: being-cut, being-burnt.” (1b25 - 2a4)

²⁰⁴ Cf. Boëthius (1918: ch. 2): “personam in accidentibus non posse constitui (quis enim dicat ullam albedinis uel nigredinis uel magnitudinis esse personam?)” This translates as: A person cannot be constituted among accidents (for who can say that there is a person of white or black or size?).

²⁰⁵ This system of classification proceeds by means of two concepts (1a20) and is to be applied not across, but within the categories: (a) said-of and (b) present-in. According to Aristotle, any being is either said-of (predicated-of) another or is not said-of (not predicated-of) another and any being is either present-in another or is not present-in another. Although the precise meaning of the terms ‘said-of’ as well as ‘present-in’ is not settled by Aristotle, “most scholars conclude that beings that are said-of others are universals, while those that are not said-of others are particulars (and that) beings that are present-in others are accidental, while those that are not present-in others are non-accidental” (Studtmann, 2007). If we combine the said-of and present-in relation, we get the following scheme of beings: (1) Said-of and present-in: accidental universals, (2) Said-of and not present-in: essential universals (secondary substances), (3) Not said-of and present-in: accidental particulars, (4) Not said-of and not present-in: non-accidental particulars (primary substances). Accidentality can be understood as ontological dependence, the said-of relation establishes a hierarchy of universals and particulars, which structures each category as an upside-down or Porphyrian tree ranging from universals (top) to particulars (bottom): ‘man’ is said-of an individual man and ‘animal’ is said-of man; in the same fashion, ‘animal’ is said-of the individual man.

‘secondary substance’ which is said-of and not present-in a subject. This Aristotelian classification gives us the following three divisions of being:

1. Substances:

Substances are always not present-in subjects, but can either be not said-of (primary substance) or said-of (secondary substance) of subjects. The distinction between primary and secondary substances boils down to a distinction between individual subjects and the kinds of individual subjects, i.e. between individuals and the “universal concepts that designate specific kinds of such individuals” (Robinson, 2004).

a. Primary substance

Primary substances are that which is neither in a subject nor said-of a subject (cf. *Categories*, 2a11) – “fundamental subjects of predication” (Cohen, 2008), which exist in and by themselves. As “an individual of an appropriate kind” (Robinson, 2004), a primary substance is a concrete, particular, existing individual, which is one in number and separable, by which we should understand that it is capable of existing independently of anything else.²⁰⁶ Example: In ‘Socrates is a

²⁰⁶ In the *Categories*, primary substance is the concrete individual thing; the *Metaphysics* equate a thing’s form or essence as its substance. A much-debated question therefore is whether these two positions are contradictory. Although often thought to be incompatible (cf. Graham, 1987), it can be established that the theory of primary substance of Aristotle’s *Categories*, is not contradicted by the account of substance presented in his *Metaphysics* (book VII). On the contrary, both accounts are complementary (cf. Wedin (1996, 2002) as well as Yu (2003)) as the latter is meant to explain certain features of the former. This can be easily understood once we realise that the guiding question of the *Metaphysics* is not about what things are or have substance but “in virtue of what do c-substances (i.e. the primary substances of Aristotle’s *Categories*) have the formal features attributed to them in the *Categories*” (Wedin, 1996: 41). The negative criterion of the *Categories* (“that which is neither said-of a subject nor present-in a subject; for instance, the individual man or horse” (*Categories*, 2a11)) tells us only which things are (primary) substances. But even if we know *that* something is a substance, we still do not know what *makes* it a substance, i.e. “what the cause is of its being a substance” (Cohen,

man’, ‘Socrates’ is a primary substance. ‘Man’ is said of Socrates because it characterises him as a whole. In contrast, the individual, Socrates, is not attributable to and cannot be predicated of any other thing.

b. Secondary substance

Substance in a secondary sense is the class (species, genus) of which primary substance is a member. Secondary substances are those things “within which, as species, the primary substances are included (and) also those which, as genera, include the species” (Categories, 2a15). But, not only are primary substances members of a class, they are also essentially characterised by the class to which they belong; for, secondary substance refers to that which is commonly held in a species or

2008). We still have to give an answer to the question: if x is a substance, then what is the substance of x , i.e. what makes x a substance? To answer this is to identify the substance of that thing. Therefore, the Metaphysics asks about what a particular subject’s substance is, i.e. the substance-of a primary substance. In answering this problem, the Metaphysics takes primary substance to be a “hylomorphic compound” (Cohen, 2008), i.e. to have two structural components: matter and form. Matter is the stuff (material or immaterial) of which the primary substance consists (i.e. “whatever, for a given kind of object, meets a certain role or function, namely that of being that from which the object is constituted (Robinson, 2004)) and form (i.e. the structural law of formation) which is peculiar to the kind of thing it is and which informs the way “that stuff is put together so that the whole it constitutes can perform its characteristic functions” (Cohen, 2008). In short, the form is what kind of thing a primary substance is, and the matter is what it is made of. However, while matter is an essential component of substance, it is not “an equal partner with the form, but [...] the catalyst by means of which the form becomes an individual substance” (Robinson, 2004). Form therefore is “paradigmatically substance” (Robinson, 2004). Whereas the Categories deals with the relation between substance and other categories (‘what is substance?’), the Metaphysics is about the relation of the structural components of and within the category of substance (‘what is the substance of an individual subject?’). And because Aristotle seeks the primary source of the features attributed to primary substances (“what internal feature of a Categories primary substance could be its substance” (Wedin, 1996: 73)), the substance of a c-substance is its primary substance. With this view, it is natural that primary substance turns out to be form.

genus and designates the universal essence or nature as contained in genus or species. In other words, secondary substances are “essential characteristics of primary substances” (Studtmann, 2007). A secondary substance shows us what a primary substance is. Although primary substances exist by themselves, there are in fact no primary substances that exist without a secondary substance. As far as the relationship between primary and secondary substance is concerned, Aristotle gives pride of place to the primary substances, for if primary substances were not to exist, then no other entity, i.e. no secondary substance (or any other category, for that matter), would exist (Categories, 1a25, Categories, 2b6; also cf. Metaphysics, 1028a10ff). A secondary substance is a collection of individual primary substances

In contrast to primary substances, secondary substances are universals, i.e. said of other things, and cannot exist by themselves. Example: In ‘Socrates is a man’, ‘a man’ is a secondary substance or substantial kind and predicated of Socrates. ‘Man’ does not exist in itself, but Socrates does; Socrates can be pointed at, as every individual man can be pointed at, but one cannot point to ‘man’ as such. The concept of manhood is a universal concept, which is used as a predicate to describe objectively who Socrates is; without the actual subject (Socrates), there could be no secondary substance (predicate).

2. Non-substances

Non-substances can be thought of as either accidental particulars or accidental universals: this class includes all categories, which are not substance (i.e. quality, quantity, relation, etc.). Example: In ‘Socrates is fat’, ‘fat’ is a non-substantial (to be more precise: it is a quality) accidental universal, as it is said-of Socrates and present-in him. ‘Fat’ is described as being present-in because it picks out a constituent feature of Socrates, which could be said to be, in a logical though not a physical sense, part of or present in him.

As far as the Boëthian definition of person is concerned, it is disputed whether the term ‘substance’ taken by itself signifies a primary or secondary substance. It seems probable that it prescind from both, and is restricted to primary substance only by the addition ‘individua’ (cf. St. Thomas Aquinas, *De potentia*, q. 9 a. 2 ad 7). An individual is that which, unlike the higher branches in a Porphyrian tree (genus and species), cannot be further subdivided; therefore, an individual substance implies a substance which is “completam per se subsistentem separatim ab aliis”, i.e. complete, subsisting of itself and separately from others (III^a q. 16 a. 12 ad 2)²⁰⁷. When speaking of individuality, we should be aware of the fact that this attribute cannot mean that man is self-sufficient or independent; on the contrary, man cannot survive as an individual since it is against his nature (ὁ ἄνθρωπος φύσει πολιτικὸν ζῷον (Aristotle, *Politics*, 1253a), i.e. man is by nature a political animal) and not feasible in practical life.²⁰⁸ Accordingly

²⁰⁷ Saint Thomas Aquinas continues: “Alioquin, manus hominis posset dici persona cum sit substantia quaedam individua, quia tamen est substantia individua sicut in alio existens, non potest dici persona.” (III^a q. 16 a. 12 ad 2) This translates as: Otherwise, a man’s hand could be called a person since it is an individual substance; nevertheless, because it is an individual substance existing in something else, it cannot be called a person.

²⁰⁸ Also cf. “Homo naturaliter est animal politicum, vel sociale. Quod quidem ex hoc apparet quod unus homo non sufficit sibi si solus vivat, propterea quod natura in paucis homini providit sufficienter, dans ei rationem, per quam posset sibi omnia necessaria ad vitam praeparare, sicut cibum, indumenta, et alia huiusmodi ad quae omnia operanda non sufficit unus homo. Unde naturaliter est inditum homini ut in societate vivat.” (ScG, lib. 3 cap. 85 n. 11) (This translates as: Man is naturally a political animal, or a social one. This is apparent, indeed, from the fact that one man is not sufficient unto himself if he lives alone, because nature provides but few things that are sufficient for man. Instead, it gives him reason whereby he may make ready all the things needed for life, such as food, clothing, and the like; one man is not sufficient to do all these things. So, to live in society is naturally implanted in man.) In the same fashion, Seifert states that a person is “also essentially characterized by the fact that she stand in relation to the world, to others, and ultimately to an absolute being” (2004: 113). But this distinctive relational feature of the person must not be confused with a reduction of personal being to relation being: “Persons are not relations, but find themselves essentially in such relations.”

and for the sake of precision, individuality should be equated with uniqueness and unrepeatability (in the sense of ‘*Unterschiedenheit*’), i.e. the quality that every person is distinct from others and cannot be subdivided any further.²⁰⁹ An individual substance, therefore, is a particular self-subsisting subject, “a determinate individual that is capable of existing on its own” (Cohen, 2008).²¹⁰ This particularity of the person has also been seen by Saint Thomas Aquinas who writes that “*omne individuum rationalis naturae dicitur persona*” (I^a q. 29 a. 3 ad 2), i.e. that every individual of rational nature is called a person. That a person is never an abstract, but always a unique and unrepeatable individual is also confirmed by Richard of St. Victor, for whom a person signifies a “*proprietas qui non convenit nisi uni soli*” (1959: IV, 6), i.e. a property, which only befits an individual (a single one). Referring to somebody as ‘person’ tells us that he is the bearer of a specific individuality and an “individual, unique, unrepeatable subject of rational nature” (Seifert, 2002a), an “*in sich stehendes Subjekt*” (Seifert, 1997b: 180), a ‘some-one’, who possesses “‘*esse*’ (Eigensein) und nicht bloßes ‘*in-esse*’ (In-etwas-anderem-Sein)” (Seifert, 2003: 54). In this sense, personhood is inseparable from substance, i.e. being an ultimate subject “that stands in itself in being” (Seifert, 2004: 104), or as Seifert terms it “*inseitas*” (2003: 56).

(Seifert, 2004: 113) As Messner shows it is family, which is “*die Grundsituation des Menschen sowie Ursprung und Urbild aller Friedensordnung*” (2004a: 59).

²⁰⁹ A word of caution is in order: In common language, this uniqueness is sometimes also referred to as ‘personality’. However, using this term can be ambiguous, since we sometimes also say that a pet has a certain personality. But this does not mean that pets are persons; rather the term is meant to describe the differentiated individuality of a pet, which is more accentuated in higher animals than in lower ones. However, when talking about the uniqueness of a person, we do not mean personality in a behavioural sense (i.e. in the sense of quirks), but as an existential claim. Also cf. Spaemann (1998: 175): “Aber was Personen zu Personen macht, ist nicht ihre Einzigartigkeit, sondern ihre Einzigkeit. Die Einzigkeit ist nicht eine bloße Folge der Einzigartigkeit und im Übrigen nur indexikalisch durch die Einnahme einer Raum-Zeit-Stelle definiert.”

²¹⁰ Consequently, Seifert uses the terms ‘substance’ and ‘subject’ interchangeably (cf. Seifert, 2004: 100).

If a person is said to be an individual substance of a rational nature this means that a person is a primary substance of a secondary substance, which is characterised by its rational nature. A person is an ultimate representative of a rational nature.

4.2.1.1.2 *The Person as Individual Substance of a Rational Nature*

According to Boëthius, personhood can only befit an animate individual of a ‘*natura rationalis*’. In this context, nature (Greek: φύσις, Latin: *natura*) is that which gives form to and which specifically makes an object the kind of substance that it is.²¹¹ It is “*cuiuslibet substantiae specificata proprietates*” (Boëthius, 1918: ch. 4), i.e. the specific peculiarity or character of any substance. So, the inherent character of an individual substance of a rational nature is rationality. As a “*singulare alicuius generis determinati*” (I^a q. 29 a. 1 ad 4), a person is every individual being who is a member of a genus, which is characterised by its rational nature. In other words, a person is a being that exists on its own with a specific nature that is shared with other beings of its kind and is rational, i.e. ‘*vernunftbegabt*’.

But, why do we ascribe personhood only to individuals who are particular substrates (‘*Träger*’) of a *rational* nature? The answer is simple: from all beings it is only in such individuals’ nature to understand the laws of their being and existence (through the gifts of reason (‘*Verstand*’) as well as self-awareness) and can behave as well as act in accordance with it (through the gift of freedom, which is the result of his reason and self-awareness). Due to their natural capacity for thought, reason and intelligence (in the sense of ‘*Vernunftbegabtheit*’), beings of rational nature are capable of being self-aware and transcending themselves (which is the basis for religion). Further, they can have dominion over their own actions (“*habent dominium sui actus, et non solum aguntur, sicut alia*” (I^a

²¹¹ Saint Thomas Aquinas states that nature is “*unumquodque informans specifica differentia*” (I^a q. 29 a. 1 ad 4), i.e. the specific difference that gives form to anything. Also cf. Boëthius (1918: ch. 1): “*Natura est unam quamque rem informans specifica differentia.*”

q. 29 a. 1 co.)) and act of themselves (“per se agunt” (I^a q. 29 a. 1 co.)).²¹² They are endowed with free will and are free to choose, which actions to take and which not to take²¹³. However, as ‘causa efficiens’²¹⁴ of their

²¹² Aristotle shares this view when he writes that man is the first principle as well as lord (“ἀρχὴ καὶ κύριος”) and controls the existence or non-existence of his actions (cf. Aristotle, Eudemian Ethics, Book 2, 1223a: “ὧν (τῶν πράξεων) γε κύριός ἐστι τοῦ εἶναι καὶ τοῦ μὴ εἶναι”). Seifert describes this capability of man as “ein gleichsam gottähnliches Herrschaftsverhältnis über das Sein oder Nichtsein eigener Akte” (2003: 73).

²¹³ Also cf. Spaemann (1998: 22): “Harry Frankfurt hat in seinem Aufsatz "Freedom of the Will and the Concept of a Person" (Frankfurt, 1971) einen ähnlichen Gedanken entwickelt, wenn er von "Volitionen zweiter Stufe" spricht. Es handelt sich um das Phänomen, dass wir uns zu unseren Wünschen und Willensakten noch einmal verhalten können. Wir können wünschen, bestimmte Wünsche zu haben oder nicht zu haben. Wir bewerten nicht nur die Dinge entsprechend unseren Wünschen, sondern wir bewerten unsere Wünsche. Wenn es uns gelingt, unsere Wünsche mit dieser Bewertung in Einklang zu bringen, fühlen wir uns frei, wenn nicht, erleben wir uns als ohnmächtig, so wie Süchtige oder Triebtäter, die nicht wollen, was sie wollen.” Also cf. Spaemann, 2006b: “In a famous essay, Harry Frankfurt noted that human beings do not merely wish what they wish. They can wish to have other wishes. Think, for example, of drug addicts. They can be discontent with their own appearance and character. Frankfurt speaks of *secondary volitions*. Persons can have secondary volitions. For this reason, persons can also make promises, i.e. they can determine their future volition by granting to others a claim upon it. For this reason, too, persons can also be forgiven. One need not nail them down to be forever precisely the ones who have done this or that. We can and must allow others to reject their deeds.”

²¹⁴ In his Physics (II, 4; 194 b 16 ff; also cf. Falcon, 2008) Aristotle defines four kinds of causes which answer questions of the form: ‘Why is S P?’, i.e. ‘Why is this object as it is?’ (e.g. ‘Why is Peter musical?’). According to Aristotle there are four answers in terms of four causes (where X is a primary substance):

1. Material Cause: That from which X is made or comes to be (as substratum) and which persists. Example: Why is the leaf yellow? It is yellow because it contains xanthophyll.
2. Efficient Cause: That which acts (as an agent) to produce X. The efficient cause is the primary source of change, respectively motion and rest.

actions, they are also and necessarily responsible for their actions and forbearances. Reason, freedom and responsibility are therefore inextricably linked: “Ihre (i.e. a person’s) Handlungen folgen also nicht einfach aus ihrer Natur [...] Es geschieht nicht etwas durch sie, wie bei anderen Dingen, sondern sie handeln durch sich selbst. Das heißt: sie sind frei.” (Spaemann, 1998: 41)

4.2.1.2 Only Human Beings can be granted Personhood

Given our account of personhood, every living individual being of a genus, which is endowed with rationality, can be a person. This has been expressed in slightly more understandable terms by Wiggins:

“A person is any living being that belongs to a species whose typical members are intelligent beings, equipped with reason and reflection, and whose physical equipment typically enables them to consider themselves as the same thinking individuals at different times and in different places.” (Wiggins, 1980: 188; cited in Spaemann, 2006a: 297)²¹⁵

3. Formal Cause: That which X is (to be), the form or essence of X. The formal cause gives an account of what-it-is-to-be and the parts of the account. Example: Why is Peter alive? He is alive because he has a soul.

4. Final Cause: That for which/for the sake of which, X is made/done or why X is, X’s end (telos, goal, aim, function or purpose).

Imagine Michelangelo’s marble statue ‘David’: it is made of marble (material cause), represents David (formal cause), was made by Michelangelo (the efficient cause), and is intended to represent David (final cause).

²¹⁵ Spaemann cites the same passage in another one of his articles (2003: 47) in a slightly different way: “A person is any animal the physical make-up of whose species constitutes the species’ typical members thinking intelligent beings, with reason and reflection, and typically enables them to consider themselves the same thinking things, in different times and places.” As I did not have the chance to access Wiggins’ book, I give both formulations, which are essentially congruent. Also cf. Finnis (1995: 48), who states that “to be a person is to belong to a kind of being characterized by rational (self-conscious, intelligent) nature.” Bernard

So, which beings can be granted the title ‘person’? It should be obvious that the only beings who deserve this title are the individual members of the species ‘homo sapiens sapiens’. To be more precise: as there is no other species of the genus ‘homo’, we could also state that every ‘homo’, i.e. every human, is a person. And as being a member of this species is both the necessary and sufficient condition for personhood, all human beings are persons. They do not have to become persons; they just are – qua nature. In the 15th century, Giovanni Pico Della Mirandola elaborated on this gift of man, which is unique in and lifts him above all fauna and flora (also cf. Psalm 8). In this ‘Oration on the Dignity of Man’, God speaks to Adam:

“Nec certam sedem, nec propriam faciem, nec munus ullum peculiare tibi dedimus, o Adam, ut quam sedem, quam faciem, quae munera tute optaveris, ea, pro voto, pro tua sententia, habeas et possideas. Definita caeteris natura intra praescriptas a nobis leges coercetur. Tu, nullis angustiis coercitus, pro tuo arbitrio, in cuius manu te posui, tibi illam prefinies. Medium te mundi posui, ut circumspiceres inde commodius quidquid est in mundo. Nec te celestem neque terrenum, neque mortalem neque immortalem fecimus, ut tui ipsius quasi arbitrarius honorariusque plastes in quam malueris tute formam effingas. Poteris in inferiora quae sunt bruta degenerare; poteris in superiora quae sunt divina ex tui animi sententia regenerari.” (della Mirandola, 1990: 4f)²¹⁶

Williams agrees by stating that, “there are certain respects in which creatures are treated in one way rather than another simply because they belong to a certain category, the human species” (Williams, 2008: 142).

²¹⁶ This translates as: “We have given you, Adam, no fixed seat nor features proper to yourself nor endowment peculiar to you alone, in order that whatever seat, whatever features, whatever endowment you may responsibly desire, these same you may have and possess according to your desire and judgement. Once defined, the nature of all other beings, is constrained within the laws prescribed by us. Constrained by no limits, you may determine it for yourself, according to your own free will, in whose hand we have placed you. I have placed you at the world's center so that you may thence more easily look around at whatever is in the world. We have made you neither of heaven nor of earth, neither mortal nor immortal, so that you may, as the free and extraordinary shaper of yourself, fashion yourself in the form you will

Accordingly, impersonal creatures, such as e.g. animals and human corpses, which are not persons, “while likewise possessing some dignity, possess dignity only in an essentially weaker or merely analogical sense” (Seifert, 2004: 99). Thus, it would be wrong to conclude that animals (especially higher animals) are not without their special dignity and special standing; as Portmann (1961; 1967) has beautifully shown, they have dignity – they just have a different and lower level of dignity than man. Therefore, “in order to understand human dignity, we need to gain a proper understanding of what it is to be a person, to reach an adequate ontology of the person and a proper philosophical anthropological concept of human personhood.” (Seifert, 2004: 99)

Sometimes, such an account of personhood and ontological dignity is considered ‘speciesist’, where the term is usually understood as anthropocentric view of the world and “an unjustified preference for the members of the human species, on the basis of the mere fact that they are human” (Reichlin, 1997: 20).²¹⁷ But, as can be convincingly shown, the ascription of ontological dignity is not speciesist but “in fact justified by the consideration of the unique character of personal life as the mediation of finiteness and transcendence, a character, which cannot be found in other species, even though some may show a few signs of rationality in their behaviour” (Reichlin, 1997: 20). In the end, the speciesism argument is weak: on the one hand, it is based on a misconstrued evolutionary ontology of man, which sees him as a mere intermediate product of evolution and only gradually, but not essentially different from any other animal (cf. Seifert, 2004: 141f). On the other hand, it misconstrues “die Bedeutung, die unsere Zugehörigkeit zur menschlichen Natur für unser Personsein hat” (Schockenhoff, 2003: 31); for, it is his nature as a human being (i.e. his genetic makeup as well as his human soul), which determines the space within which man can move. To attribute personhood

prefer. It will be in your power to degenerate into the lower forms of life, which are brutish; you shall have the power, according to your soul’s judgement, to be reborn into the higher orders, which are divine.”

²¹⁷ A prominent proponent of such a position is Singer (1986).

to mankind alone is not speciesist; it is an undeniable fact that man is more than any animal because of his mere nature and ontology; a nature and ontology, which grounds “an essential unbridgeable difference between animals and human persons” (Seifert, 2004: 142). Furthermore, such an account cannot be considered speciesist because, as Höffe rightly points out, it does not deny beings with a rational nature, which might be discovered on other planets of the universe, their status as persons and, consequently, their ontological dignity. We have to understand “daß nicht eine Art kontingenterweise privilegiert wird, sondern daß alle vernunftbegabten Arten aller Planeten und Galaxien gleichrangig zählen” (Höffe, 2002: 119f).²¹⁸ It is not because we are humans that we are persons, but human beings are persons because they are the only known beings with a rational nature.

4.2.1.3 All Human Beings are Persons from the Moment of Conception

As has been established, personhood belongs to every individual subject “endowed with a nature making it capable in principle of understanding, free acts, moral conscience, religious acts, etc.” (Seifert, 2002a). And as only human beings share in a nature, which is endowed with the gift of reason, free will and individuality, we know that from among the realm of animate beings only the individual members of the species ‘homo’ can be persons. The question now becomes whether this position can actually be upheld, i.e. whether all human beings are persons or whether some human beings have to be excluded from the elite circle of personhood. Larmer aptly points out that “our difficulties in saying when a person begins are primarily the result of our inability to say what a person is” (Larmer, 1995: 241). Since we now know what a person is, we should also be able to answer the question: when does a person begin?

²¹⁸ This is also how we are to understand the ‘Gottesebenbildlichkeit’ of man: man does not have a rational nature because he is created in the image of God, but he is the image of God because he has a rational nature (also cf. I^a-IIae pr.).

Based on the analysis and discussion in the previous sections, the answer should be rather evident and straightforward. Our account of personhood clearly commits us to the position that every human being is a person from the moment of conception, i.e. the moment at which a new human genome has been constituted by means of combination of a spermatozoon and an ovum.²¹⁹ Personhood is not a property, but rather the *being* of the person; “therefore the person does not begin later than the existence of a new human life no longer identical with the parental organism” (Spaemann, 2006b). As Schockenhoff (2003) rightly points out, this ‘moment’ cannot be determined precisely: “die Befruchtung sich als ein ausgedehnter Prozeß darstellt, der mit dem Vorkernstadium beginnt und nach spätestens 24 Stunden seinen Abschluß erreicht” (Schockenhoff, 2003: 25). At the end of this process – i.e. once the constitution of a new genome has been constituted, no sooner²²⁰ or later – an individual substance of a rational nature has undeniably come into existence. For: “‘Person’ meint nicht das, was aus einem Menschen werden kann, sondern meint denjenigen Menschen, aus dem etwas werden kann.” (Spaemann, 2002b: 423) Even in his single-cell state, man is indisputably genetically human and shares in

²¹⁹ Joyce (1978: 101f) cautions us to see the importance of the moment of conception: “The so-called fertilisation process is not as passive as the terminology would suggest. The nuclei of the sperm and the ovum dynamically interact. In doing so they both cease to be. One might say they die together. They really should not be said to unite. That suggests that they remain and form a larger whole. But the new single-celled individual is not an in tandem combo of the two parent sex cells. In their interaction and mutual causation of the new being, the sperm and ovum are self-sacrificial. [...] There is neither sperm nor ovum once the process of interaction is completed, even though cytoplasmic matter from the ovum remains. It is really a misleading figure of speech to say that the ovum is ‘fertilised’ by the sperm, passively as a farmer’s field is fertilised. It is proper rather to speak of the sperm-ovum interaction process. There is no such thing as a ‘fertilised ovum’.” Rather the spermatozoon and the ovum become a new and whole – though in the beginning developmentally immature – human being and member of the human species; when the sperm joins the ovum, these two individual cells cease to be, and their union generates a new and distinct organism.

²²⁰ The spermatozoon and the ovum cannot be persons as they are not subjects of a rational nature, for they are not complete human beings, but only parts of one.

the same nature as every grown-up human individual. This is why Tertullian states that “homicidii festinatio est prohibere nasci, nec refert, natam quis eripiat animam an nascentem disturbet” (Apologeticum, IX, 8)²²¹. The terms ‘person’ and ‘human being’ are equivalent and can be used synonymously. Every human being is a person from the moment of conception and the beginning of human life is always the beginning of personal human life. The zygote is an individual substance of a rational nature although this nature is possessed in an undeveloped form and revealed over time. However, it would be wrong to think that any moment other than conception is decisive for the moral status as well as the uniqueness of man:

“Der qualitative Sprung der Menschwerdung steht am Anfang des gesamten embryonalen Entwicklungsprozesses. In den späteren Gefahrenzonen, besonders bei der Nidation, geht es dagegen nicht mehr um den erstmaligen Schritt der Menschwerdung, sondern darum, daß eine menschliche Existenz sich durchträgt und ihr Entwicklungspotential weiter entfalten kann. Auch im weiteren Verlauf der Embryogenese kann die sprachliche Benennung unterschiedlicher Entwicklungsphasen nur den Sinn haben, fließende Entwicklungsschübe zu kennzeichnen [...]. Die Annahme einer nicht gegebenen, sondern nur graduell einsetzenden Schutzwürdigkeit des embryonalen Lebens kann sich daher nicht auf die biologische Entwicklung selbst, sondern nur auf externe Festlegungen berufen, die an dieser keinen Anhaltspunkt finden.” (Schockenhoff, 2003: 26).

The fact that some still adhere to what Birnbacher calls the ‘non-equivalence doctrine’ (“Nichtäquivalenz-Doktrin”) (cf. Birnbacher, 2002: 31f; 2006: 54f)²²², i.e. distinguish between being a human being and being

²²¹ This translates as: To prevent birth is hastening of murder; and it does not matter whether one destroys a born soul already born or a soul that is coming to the birth.

²²² Whereas the ‘equivalence doctrine’ considers all living human beings persons and all persons human beings, the non-equivalence doctrine states that not all living human beings are persons but only those who meet additional criteria, i.e. exhibit certain properties or functions. Membership with the species *homo sapiens sapiens* and vitality are neither necessary nor sufficient conditions for personhood. Proponents of this doctrine, such as Locke (1690b; esp. Book II, Chapter 27, Section

a human person, consequently deny the importance of the moment of conception and opt for one or a combination of several other moments during pregnancy²²³, is either due to the anatomically wrong idea that the human embryo²²⁴ is not yet a human being but a mere animal²²⁵ or due to a

9f), Singer (1993) or Hoerster (2002), hold that man is a person only during certain stages of his life and that especially unborn as well as infants and old people do not exhibit personhood. Birnbacher (2002) himself, for example, holds that instead of arguing from personhood to human rights, one should rather and directly argue from the properties/capacities, which lie behind the concept of personhood.

²²³ Possible candidates are implantation, attainment of human appearance, motility, quickening, viability, sentience (which can only be taken to mean the ability to feel pain), conscious awareness or birth. Adherents of this view claim that for an entity to be regarded as a person, it must have developed certain (at least incipiently exercisable) capacities or abilities. As Eijk (2006) suggests, we can distinguish between extrinsic or intrinsic criteria, whereby “extrinsic criteria are those that do not derive from the embryo as such but from external factors” and intrinsic criteria “refer to certain characteristics of the embryo itself”. Once we allow for such a functionalist approach, there is no end to the list of the necessary and/or sufficient criteria of what it means to be human – Ide (2006) lists 13 criteria, but according to Lenk (1998: 49-71) more than 200 of them can be counted. As can be easily shown, each definition other than personhood from the moment of conception either fails on its own terms or has unfavourable consequences by denying moral relevance to some commonly recognised group of human beings. The development of human beings is continuous and “there is no empirical fact which allows us to say: ‘This is a person and this is not.’” (Spaemann, 2003: 50; also cf. Congregation for the Doctrine of Faith, 2008: 5) Apart from the fact that the above-mentioned criteria are not tenable, we must furthermore not forget that they heavily depend upon “the anthropology that is the foundation of this criterion” (Eijk, 2006); so often the problem is not the criterion itself but a deficient underlying anthropology.

²²⁴ Some words regarding terminology might be helpful before going in medias res: Pregnancy is usually counted from the first day of the woman’s last menstrual period (LMP), not the date of conception, which generally occurs two weeks later. Therefore, the average length of pregnancy according to the gestational age calculation is 40 weeks, although the unborn usually only spends around 38 weeks in the uterus. A pregnancy is considered full-term if birth falls between 37 to 42 weeks; before this gestational age, it is taken to be premature, after that overdue. The term ‘embryo’ is used to signify the human being in his early stages of development, i.e. until about eight weeks after fertilisation (or until ten weeks gestational age, i.e.

functionalist and reductionist misunderstanding, misinterpretation and misapplication of what it means to be a person: “Even when the old Boethius’ definition of the person is quoted (*rationalis naturae individua substantia*), it is usually intended to mean ‘an individual able to perform rational acts or intellectual operations’, so that what is considered worthy is not the being itself which develops, possesses and practices these operations, but rather the operations themselves.” (Reichlin, 1997: 17) Our account of personhood, however, is not dependent on actualised capacities but substantial being. Therefore, we must be careful not to confuse ‘being a person’ with ‘functioning as person’. Every person is actual, the functioning is potential. Actual persons are potential statesmen, dentists, craftsmen, etc.; but they are still actual persons – there is no such thing as a potential person. This is where Warren is mistaken:

“Neither a foetus’s resemblance to a person, nor potential for becoming a person, provides any basis whatever for the claim that it has any significant right to life.” (Warren, 1973: 60)

It is true that it would be a logical error to think that potential personhood implies possession of the rights of actual persons. As has been established, all human beings are persons regardless of whether they utilise

ten weeks from the first day of the woman’s last menstrual period); from then on he is instead called a foetus. The embryonic period is further subdivided into 23 so-called ‘Carnegie-Stages’ (cf. O’Rahilly & Müller, 2001: 87).

²²⁵ As the renowned anatomist Erich Blechschmidt (2000, 2002, 2003) has proven (based on scientific embryomorphological evidence, which is available to the public at the “Humanembryologische Dokumentationsammlung Blechschmidt” at the University of Göttingen), the human embryo is characteristically human and a distinct individual from the moment of conception (‘Gesetz der Erhaltung der Individualität’). Man, therefore, does not develop from something into a human being, but man develops as a distinct human being; there is no such thing as a “Tier-Mensch-Übergangsfeld” (Blechschmidt, 2002: 167) because “ein menschlicher Keim individualspezifische Chromosomen besitzt und deshalb nicht die Entwicklung von Pflanz und Tieren wiederholen kann” (Blechschmidt, 2002: 58) and “gerade die frühen Stadien der menschlichen Embryonalentwicklung sich sehr deutlich von der Frühentwicklung anderer Spezies unterscheiden” (Blechschmidt, 2002: 57).

the capacities, which their nature endows them with or whether they are not capable of doing so. There are just persons whose natural capacities for rationality have been actualised and there are those whose natural capacities for rationality have not (yet) been actualised – which, as we shall see, results in different levels of dignity, although both at least have ontological dignity. I completely agree with Spaemann who holds: “So gibt es keinen Grund, nicht auch diejenigen als Personen zu betrachten und mit ihnen als Personen umzugehen, die die gleiche Natur, aber noch in einer unentwickelten oder einer defekten Form besitzen.” (Spaemann, 2002b: 420) This necessitates the conclusion that ontological dignity is not the only dimension of human dignity, but only the floor under which a human being cannot fall. However, it is by no means the ceiling, it is not dignity in its fullness, which depends on the actualisation of the potentiality of personhood and the potentialities resulting from actualised personhood and points to the other three dimensions of human dignity.

In a nutshell: A person begins with the beginning of a living human body, a body, which has in itself the capacity and indeed the inherent tendency to develop those operations that are typical of the developed person. Therefore, as soon as there is human life, i.e. a human soul, there is also personhood.²²⁶

²²⁶ In an attempt to undermine this position, some authors (cf. Donceel, 1970) cite Saint Thomas Aquinas, who held that the embryo receives his rational, i.e. distinctly human, soul only some 40 to 80 days after conception. Thus, they conclude, the embryo becomes a person not at the moment of conception, but later. The reasoning is the following: human life always necessitates a human soul; therefore, there can be no human being and consequently no human person until ensoulment with an intellectual soul. Although it is true that Saint Thomas Aquinas was a proponent of a delayed or belated ensoulment and hominisation theory (*Contra Gentiles*, lib. 2 cap. 89 n. 11; for an explication of his position cf. Pangallo, 2006), he did so because he could not know better. The scientific state of knowledge of his time led him to believe that the embryo's and thus man's soul gradually develops from a vegetative, to a sensitive and then to a rational, i.e. human, soul. However, as Breuer (2003: 85ff) has argued, the scientific basis for Aquinas' position and the theory of successive animation is outdated and untenable (also cf. Graf, 2003: 181ff). This position is also supported by Ashley & Moraczewski (2001): “Aquinas, however,

The Individuality-Charge

Most of the objections made against the position outlined above lack scientific or philosophical consistency and therefore do not deserve a detailed discussion at this time. However, there is one charge against the position that every human being is a person from the moment of conception, which is worthy of mention. This charge doubts the individuality of the early embryo, which – as has been established above – is a necessary criterion of personhood. According to this position, the embryo is not an individual from the moment of conception, but becomes an individual only after the primitive streak has formed and twinning has become impossible²²⁷: “Even when human life does begin at conception, it

did not know that the matter out of which the human body is generated is already highly organized at conception and endowed with the efficient and formal causality necessary to organize itself into a system in which, as it matures, the brain becomes the principal adult organ. Hence he was forced to resort to the hypothesis that the male semen remains in the womb, gradually organizing the menstrual blood, first to the level of vegetative life and then to the level of animal life, so as to be capable of the further self-development needed for ensoulment. But he also supposed that this entire process from its initiation was teleologically (final cause) predetermined to produce a human person, not a vegetable, an infra-human animal, or a mere embryonic collection of independent cells.” Also cf. Seifert (2004: 68) who writes that the intimate unity of body and soul contradicts the theory of delayed ensoulment. Furthermore, Pangallo (2006) states that, “the ancient advocates of belated animation acknowledge that, from a moral and juridical point of view, even abortion carried out in the initial phases of the life of the embryo can be considered equivalent to that performed in subsequent phases, by a practical principle of prudence: as it regards human life, neither probabilism nor even probabiorism can be applied, rather a mitigated tutiorism must be applied: that is, in doubt, the human embryo must not be killed, even if the more probable hypothesis is in favour of its not being a person.”

²²⁷ It should be noted that the twinning charge is only applicable to cases of monozygotic twins (0.3% of all pregnancies), i.e. cases in which a zygote splits sometime during the period from conception to implantation (which coincides with the formation of the primitive streak). Depending on the exact moment of the split, biologists distinguish between several types of monozygotic twinning (cf. Breuer,

is not necessarily the life of an individual; twins may form at any point up to an approximately fourteen days following conception.” (Harris & Holm, 2003: 118)²²⁸ In the same fashion, Engelhardt states that “the possibility of twinning which exists through the second or third week of gestation would seem to preclude human individuation until after this period” (Engelhardt, 1974: 228).

The early embryo’s potential for twinning is rooted in the quality of the cells of the early embryo, which are of a special and different quality than the cells of his later developmental stages. The early embryo’s cells are totipotent, i.e. they have the capacity to develop into any cell type (and consequently into any tissue and organ) and form an entire organism.²²⁹ This totipotency is lost after the formation of the primitive streak. As a consequence, as long as the early embryo’s cells are totipotent, a separation of one or several cells from the early embryo neither kills the early embryo nor the cell(s). If a group of cells or even one single cell is separated from the early embryo they (respectively it) can nevertheless “exercise their totipotentiality and produce a clone or twin” (Ashley & Moraczewski, 2001). So, the individuality-charge asks how an embryo can actually be an individual if each of his cells, when separated, can form another embryo? And if the embryo is not an individual, it cannot be a person.

2003: 90); but these are of no further interest for our purposes. Dizygotic twins (1% of all pregnancies) always and only come about if two ova are fertilised by two spermatozoa, i.e. one spermatozoon each, at the same time. The latter case is of no relevance for the twinning problem because dizygotic twins are necessarily and doubtlessly individual from the moment of conception.

²²⁸ Only after the formation of the ‘primitive streak’, which is the precursor of the spinal cord, embryonic fission, which produces identical twins, cannot occur.

²²⁹ In contrast to these so-called ‘embryonic stem cells’, adult stem cells (found in the bone marrow of adults) are not totipotent but only multipotent. Adult stem cells can only develop into some but not all cell types and therefore only some organs and tissue. This is why science is more eager to research with embryonic stem cells, so as not to have to restrict itself to the morally unobjectionable research with adult stem cells or (multipotent) stem cells from the umbilical cord.

However, as can be convincingly shown (cf. Seifert, 2003: 67f; Seifert, 2004: 117f; Ashley & Moraczewski, 2001; Breuer, 2003: 92ff; Spaemann, 2006b), possible twinning is not a cogent argument against the position that the foetus is not a person, i.e. individual, before implantation. Generally, the twinning argument is based on the following premises (cf. Seifert, 2004: 117):

- Premise 1 (P1): It is impossible to split a person and get two persons from one.
- Premise 2 (P2): Embryos can be split, i.e. can twin, during the first two weeks of their existence.
- Premise 3 (P3): Twinning is only possible until the formation of the primitive streak.
- Conclusion (C): Therefore, the embryo cannot be a person until after the formation of the primitive streak.

Because P2 and P3 are medical facts, C stands and falls with the validity of P1. In order to overcome the individuality-charge, P1 has to be rebutted. So, let us have a closer look at P1. It stipulates that one cannot get two persons by splitting one person. Given the definition of ‘person’ as an individual substance of a rational nature, this stipulation amounts to saying that an individual cannot be split, i.e. that one cannot get two individuals out of one. By this account, being an individual would equal indivisibility and numerical identity.

Although this seems to be a powerful charge at first glance, science itself has provided us with an easy argument to refute P1: cloning. In giving it some thought, it should be easy to understand that twinning and cloning are very similar processes: “twinning is a form of cloning that is not artificial but results from an embryological accident” (Ashley & Moraczewski, 2001). In both processes, a new human being is generated from an already existing one. There are only two differences: (a) while twinning is a natural occurrence, cloning is an artificial one; (b) a clone can be “of a slightly or greatly different age than the cell (nucleus) donor” (Seifert, 2004: 117), whereas the age difference of twins can only be up to

two weeks. In the end, however, a clone and a twin are both copies.²³⁰ When it comes to cloning, do we think that the clone (i.e. the original person) has been divided into two persons? We do not. We also should not think so when it comes to twinning. Do we think that the original human being, from whose body the nucleus was taken, was not a person prior to cloning? We do not: “No one will claim that the clonable adult is not an individual.” (Fisher, 1991: 238) So why should we think so when it comes to twinning? Although it is true that a person or personhood can never be divided (e.g. as organic cell tissue can), we do not have to assume the death of an existing person nor the nonexistence of a person during the period of possible twinning (cf. Seifert, 2003: 67). We do not hold that in the case of cloning, which allows for twinning after implantation and throughout a person’s life, the person who is cloned is divided; rather, we hold that a new person comes into existence with the already existing one being unaltered in his status as person. Similarly to cloning, “twinning may just play the same role as conception and give rise to a new human being that receives a new soul” (Seifert, 2004: 117).

Furthermore, if we consistently applied the individuality-charge to the process of cloning, “absolutely nobody would be a person because cloning [...] remains possible until our death and perhaps some time beyond our death” (Seifert, 2004: 117). Given these considerations and the fact that we do not consider ourselves non-persons until we have been cloned, twinning does and cannot imply that there is no person prior to twinning. Given these considerations, the twinning-charge can be refuted by reference to the process of cloning:

“If by a developmental accident twinning occurs [...] the only reasonable explanation is that a clone of that individual has been formed by its loss of a part. By reason of its totipotentiality, that part can begin an independent development. Thus organism A that was developing normally up to the point of accidental twinning continues its

²³⁰ Studies have shown that monozygotic twins do not necessarily have to be genetically identical. They are so by necessity at the instance of twinning; but mutations during the course of their further development might change the genom of each twin (cf. Breuer, 2003: 90f). By implication, this should also be true for clones.

development alongside its somewhat younger clone, its monozygotic twin (organism B).” (Ashley & Moraczewski, 2001)

The only modification the individuality-charge gives us reason to make is that not all persons begin at the moment of conception; some come into existence by splitting from a zygote. It is, therefore, not permissible to state that before formation of the primitive streak there is no person; the only thing we can state is that there is at least one person: “the twinnable embryo is just that: an individual with the potential to become two” (Fisher, 1991: 238).

This result is also not contradictory to the remarks regarding the understanding of ‘individual substance’. Some paragraphs ago, it was stated that, unlike the higher branches in a Porphyrian tree (genus and species), an individual substance cannot be further subdivided; but this does not imply that an individual is indivisible per se, but only that an individual is the ultimate representative of a certain species and genus. Individuals make up a species. There are no subclasses of ‘homo sapiens sapiens’. An individual substance implies a substance, which is complete, subsisting of itself and separately from others (III^a q. 16 a. 12 ad 2). Referring to somebody as ‘person’ tells us that he is the bearer of a specific individuality and an “individual, unique, unrepeatable subject of rational nature” (Seifert, 2002a), an “in sich stehendes Subjekt” (Seifert, 1997b: 180), a ‘some-one’ who possesses “‘esse’ (Eigensein) und nicht bloßes ‘in-esse’ (In-etwas-anderem-Sein)” (Seifert, 2003: 54). None of these characterisations speak of indivisibility or contradict the personhood of the early embryo in light of the twinning-charge. Being an individual is a quality, which is not dependent on quantitative arguments such as cell division.

In conclusion, the individuality-charge fails in its attempt to disprove the individuality and thus personhood of the zygote or early embryo. As long as we are not absolutely certain that the early embryo is not a person, we should adapt the legal guideline ‘in dubio pro reo’ and adhere to the maxim ‘in dubio pro vita’. As long as not proven otherwise, we should treat the early embryo as a person.

4.2.1.4 *Characteristics of Ontological Dignity*

As should have become clear, man possesses ontological dignity independent of race or ethnicity or disability or dementia and even when he is asleep or when he has fallen into a state of unconsciousness or coma. In the same fashion, the human embryo “who cannot use his intellect yet – but possesses it as a condition of the possibility of ever using it – is endowed with this dignity of the person” (Seifert, 2002a). Human beings possess this kind of dignity not only when they function as a person, but by virtue of being one. Therefore, ontological dignity is grounded in “the substantial being of a man and its potencies, and not only their actualisation” (Seifert, 2002a; cf. Seifert, 2003: 68); it is *dignitas humanae substantiae*. This is where e.g. Griffin (2008: 32f; 2001a: 311; 2001b: 6f) is mistaken, who equates personhood with the exercise of intentional agency and liberty and thereby advocates too narrow a concept of human dignity.²³¹ Being a person not acting as one, means having ontological and inherent dignity.

Following from what has been said above, ontological dignity exhibits certain characteristics (Seifert, 1997b: 180f; 2003:65f; 2004: 188f). Given the fact that we have ontological dignity by virtue of our humanity (i.e. humanity is the sufficient condition for ontological dignity), this kind of dignity cannot be nullified, lost or destroyed “sobald und solange die Person existiert” (Seifert, 2003: 65), i.e. as soon and as long the person exists. Understood like this, ontological dignity is universal. Consequently, it cannot be disposed of as it is innate and inextricably linked with every individual man; man cannot get rid of his nature and humanity and neither can his nature be taken from him. Ontological dignity is pre-positive. When it comes to the ontological dignity of a person, this value is not contingent on age, consciousness, illness or our subjective inclinations. It

²³¹ The same misled assumption is also made by Fabre (2006: 16), who wrongly assumes personhood to consist in the conscious actualisation of a person’s capabilities: “Accordingly, X is a person if he is an embodied and individualized being, is conscious, is aware of his continued existence (that is, is aware that he occupies the same body as, and is psychologically continuous with, some individual at some past time), and, finally, has the capacity for rational and moral agency.”

is unconditional. It is the substantial being of a man, which grounds his personhood and thus his ontological dignity; consequently, ontological dignity is always had by all human beings. It is an inherent endowment of every human being and “must be a characteristic of criminals as well as saints, of cowards as well as heroes, of fools as well as sages, of mental defectives as well as mentally normal persons, of slaves as well as masters, of subjects as well as lords, of disease-ridden invalids as well as athletes, of drug addicts as well as persons of self-control, of starving proletarians as well as well-fed capitalists, and so forth” (Gewirth, 1992: 15). It is the bottom line of dignity, under which no human being can fall. Ontological dignity grants objective value and consequently requires an adequate response, which is not subject to our arbitrariness; we are subject to it and have to respect it. Ontological dignity stands for an “elementaren Achtungsanspruch des Menschen” (Bielefeldt, 2008: 34) that occupies “den Stellenwert einer unhintergehbaren Prämisse aller moralischen und rechtlichen Verbindlichkeiten” (Bielefeldt, 2008: 5).

Furthermore, ontological dignity is timeless in the sense that it applies to all men of all times. Ontological dignity is inalienable and indisposable (‘unverfügbar’) and applies equally to every person “in a manner that absolutely cannot be eliminated” (Seifert, 2004: 118). Furthermore, it is characteristic of ontological dignity that it is indivisible; it is a “Superlativ” (Wildfeuer, 2002: 36) and there are, therefore, no degrees of perfection nor weak or strong forms of it. Ontological dignity is inviolable, which does not mean that it cannot be violated, but that “a person endowed with dignity ought never to be violated with respect to that which constitutes this dignity” (Seifert, 2002a).²³² It is not commandable (‘unverfügbar’) in so far as no man can command over another as he does over his property. Last but not least, ontological dignity is an absolute value which, if at stake, does not allow for an evaluation and weighing of interests; when it

²³² Thus, the expression ‘inviolable’ has to be understood and interpreted correctly. Of course, dignity can be violated; every act of murder is proof of this. Human dignity is inviolable, not in the sense that it is violation-proof, but rather that it is not to be violated, since sacred things are not to be violated (cf. Höffe, 2002: 117). Inviolable could therefore be substituted with not-to-be-violated.

comes to ontological dignity ‘*homo homini res sacra est*’, i.e. man is for man a sacred thing. Ontological dignity thus is the foundation of the moral principle ‘*neminem nocere*’. It is this ontological dignity, which is at the heart of the remarkable consensus on the high value attributed to human life (cf. chapter I. 1.1.1.2).

4.2.2 Inflorescent Dignity

As has been said above, dignity is not only rooted in a state of virtue, i.e. in the flourishing of human beings. As Seifert shows (1997b, 1998, 2002a, 2003), this kind of dignity, which Sulmasy has termed “inflorescent dignity” (2008: 473)²³³ can be subdivided into two aspects:

4.2.2.1 *Dignity of Actual Rational Consciousness: Functioning as a Person*

The second source of human dignity lies in the conscious actualisation of the person’s capabilities and can be called “the dignity of awakened personhood or the dignity of actual rational consciousness” (Seifert, 2002a). Awakened personhood has indefinite nuances as well as degrees of maturity and reaches from “der Wachheit vom embryonalen Zustand, in dem gewisse Laute wahrgenommen werden, über die frühkindliche Entwicklung bis zum Erwachsenen” (Seifert, 1997b: 182) and “vom Unmündigen zum Mündigen, und ferner vom ungebildeten bis zum durch Erkenntnisse und Erfahrungen vielfältiger Art gereiften und erwachten Menschen” (Seifert, 2003: 71). Ontological dignity and the dignity of awakened personhood are not divorced from each other; rather, the second constitutes the actualised state of the first for “all the specific personal characteristics of mind and free will, of feeling and happiness, can only be

²³³ Inflorescent stems from the Latin word ‘*inflorescere*’, which can be translated as ‘to begin to flower’. Inflorescent dignity is therefore this kind of dignity, which pertains to the process of blossoming.

realized through the conscious life of persons” (Seifert, 2002a).²³⁴ Therefore, ontological dignity of the person remains the foundation of all human dignity, but is profoundly ordained to find fulfilment in the second one. The second source of dignity is based on the actualisation of the potential of the rationality, which is characteristic for the species *homo sapiens sapiens*.

Blaise Pascal said that “man is obviously made to think. It is his whole dignity and his whole merit; and his whole duty is to think as he ought.” (Pascal, 2007: 146 (p. 59))²³⁵ A similar position is upheld by Bayertz, who writes that “human dignity is based on the fact that the human being does not just exist unconsciously, but is conscious of his existence; the human being thinks.” (Bayertz, 1996: 75) Both these statements seem to indicate that man deserves dignity only in actualised rational and conscious life – just according to Descartes’ stipulation, ‘*cogito ergo sum*’. Pascal is both right and wrong. He is wrong in stating that actualised rationality is the

²³⁴ Seifert furthermore adds: “Von diesem erwachten, aktualisierten Personsein läßt sich auch erst die Würde der personalen Substanz recht erkennen, weil wir sie dann als Subjekt all jener Potentialitäten erkennen, die im erwachten bewußten Leben aktualisiert werden.” (Seifert, 2003: 71)

²³⁵ Also cf. the following statements by Pascal:

- “Thought constitutes the greatness of man.” (Pascal, 2007: 346 (p. 120))
- “Man is but a reed, the most feeble thing in nature, but he is a thinking reed. The entire universe need not arm itself to crush him. A vapour, a drop of water suffices to kill him. But, if the universe were to crush him man would still be more noble than that which killed him, because he knows that he dies and the advantage which the universe has over him; the universe knows nothing of this. All our dignity consists then in thought. By it we must elevate ourselves, and not by space and time which we cannot fill. Let us endeavour then to think well; this is the principle of morality.” (Pascal, 2007: 347 (p. 120))
- “A thinking reed.- It is not from space that I must seek my dignity, but from the government of my thought. I shall have no more if I possess worlds. By space the universe encompasses and swallows me up like an atom; by thought I comprehend the world.” (Pascal, 2007: 348 (p. 120))
- “Thought. All the dignity of man consists in thought. Thought is therefore by its nature a wonderful and incomparable thing.” (Pascal, 2007: 365 (p. 124))

only source of human dignity²³⁶; and he is right in so far as actualised rationality is *a* source of human dignity. For, although it is true that the capacity to think and will freely is the most characteristic feature of the human race, we have to be careful not to overrate this second source of dignity and substitute the first with the second source of dignity by assuming that the dignity of human life is rooted only in personal consciousness. This was realised by Friedrich von Schiller and Johann Wolfgang von Goethe who wrote in their ‘Xenien’ (numbers 374 and 375):

“Einer aus dem Haufen:
*Cogito, ergo sum. Ich denke, und mithin so bin ich,
 Ist das eine nur wahr, ist es das andere gewiss.*
 Ich:
*Denk ich, so bin ich! Wohl! Doch wer wird immer auch denken?
 Oft schon war ich, und hab wirklich an gar nichts gedacht!”*

If man’s dignity would be constituted by the active use of his capacity for rationality, he would have no dignity when he is asleep or even if he were gazing through a window at a beautiful scenery without pondering anything; consequently, he could be e.g. murdered without any consequences during these periods of time. This is not to say that we should abandon the idea that the conscious actualisation of the person’s capabilities is a source of human dignity; it is rather meant to caution those who advance the philosophical position that the actualised rationality and

²³⁶As Punt points out (cf. Punt, 1987: 162ff), it was the secularisation of thought, which led to the philosophical position that not man’s nature, but his actualised rationality and reason are the source and criteria for his rights. Bayertz adds: “With the concept of human dignity in its specifically modern interpretation, the human being defines its own essence as subjectivity. Neither God, nor Fate, nor Nature tell the human being what to think or what to do. The human being is its own master. To put it pointedly, the human being is no longer just an image of God, but has become a kind of God itself, capable of thinking and deciding rationally, of shaping its environment and itself, and ultimately, of creating its own values and norms. The only difference to the Gods is human mortality.” (Bayertz, 1996: 77) Human rationality and reason have become independent, absolute and the hallmark of man – an “inner-world god” (Bayertz, 1996: 78).

reason of man are the primary or sole foundation of human dignity. Such a position is problematic because it indiscriminately ignores ontological dignity, while setting the dignity of awakened personhood as absolute.²³⁷

As Seifert (2003: 71ff) argues, dignity of awakened personhood has several facets and is rooted in the following actualised properties of man:

1. Self-awareness (reflexivity, distinguishing between self and something)
2. Reason/‘Verstand’ (rationality in the sense of thinking, communication, intelligent cognition as well as cognition of truth, consciousness and self-knowledge (which is the basis for self-awareness))²³⁸

²³⁷ An example of a proponent of such problematic position is Feinberg (1980) who argues that human dignity is only dependent on the capability to assert claims; only beings, which exhibit this capability actually have dignity. To respect a person’s dignity simply is to recognize him as being in a position to make and assert valid claims: “What is called ‘human dignity’ may simply be the recognizable capacity to assert claims. To respect a person, then, or to think of him as possessed of human dignity, simply is to think of him as a potential maker of claims.” (Feinberg, 1980: 151) But, as our account of human dignity shows, the inability to realise claims – either because of physical incapacity or higher competing claims – does not necessarily imply that one does not have any dignity.

²³⁸ This aspect also includes language. Rolston (2008: 136) states that “humans are remarkable among all other species in their capacities to process thoughts, ideas, symbolic abstractions figured into interpretive gestalts with which the world is understood and life is oriented”. Rolston goes on to cite the linguist Stephen R. Anderson, who found out that there are “massive differences in expressive capacities between human language and the communicative systems of other animals” (Anderson, 2004: 11): “When examined scientifically, human language is quite different in fundamental ways from the communication systems of other animals. [...] Using our native language, we can produce and understand sentences we have never encountered before, in ways that are appropriate to entirely novel circumstances. [...] Human languages have the property of including such a discrete infinity of distinct sentences because they are hierarchical and recursive. That is, the words of a sentence are not just strung out one after another, but are organized into phrases, which themselves can be constituents of larger phrases of the same type, and so on without any boundary.” (Anderson, 2004: 2-8) Anderson comes to the

3. Freedom

Because of his self-awareness and reason, the actualised person has autonomy over his acts (i.e. is free from heteronomy); but he is also free to destine himself to moral goodness or evilness through the very actions he chooses (cf. Wojtyła, 1981: 61). Since it is a basic moral principle that one do what is good and avoid evil (“bonum est faciendum et prosequendum, et malum vitandum” (I^a-II^ae q. 94 a. 2 co.)), man’s freedom is necessarily geared towards the realisation of moral acts: “Die Hinordnung auf dieses ihr Ziel hin erst verleiht der Freiheit ihren eigentlichen Wert und begründet in einzigartiger Weise die Würde der Person und ihres Gewissens.” (Seifert, 2003: 73) This freedom is also decisive for the third source of dignity mentioned below.²³⁹

conclusion that “no other primate functions communicatively in nature even at the level of protolanguage, and the vast gulf of discrete, recursive combinability must still be crossed to get from there to the language capacity inherent in every normal human. We seem to be alone on our side of that gulf, whatever the evolutionary path we may have taken to get there.” (Anderson, 2004: 318.)

²³⁹ Free will or moral freedom “that property in virtue of which a rational agent, when all the conditions required to elicit a volition are present, can either put forth or abstain from that volition” (Maher, 1915: chapter 19, p. 395). Therefore, free will is not the same as a groundless volition (‘grundloses Wollen’), it is not a choice without a ‘Beweggrund’, but a choice between ‘Beweggründen’. Free will is the capability to decide something for ourselves. It is sometimes argued – based on either philosophical or scientific reasons – that we do not have a free will, since our behaviour is throughout conditioned by causal factors. But as von Wachter (2007: 266-274) has shown, despite recurring ‘scientific proofs’ of the non-existence of a free human will, neither brain research nor philosophy have been able to show that there is no such thing as free will; rather, there is a strong argument to be made for a human free will (the argument from ‘human counter-suggestibility’, which says that we can, i.e. are free, to act contrary to predictions trying to pinpoint our future behaviour; also cf. Swinburne, 1997: 252-259). Furthermore, the latest results from research in the field of epigenetics show (Spork, 2009) that we can and do influence our genetical code and are thus not determined by our genes but can determine them and the way they work.

4. Affectivity (“geistiges Fühlen” (Seifert, 2003: 74), i.e. the capability to experience mental suffering as well as happiness; physical suffering and pain of a rational being also has a more dignified quality than the suffering and pain of any other animal)²⁴⁰

²⁴⁰ Thinkers such as Tooley (1972; 1984) wrongly absolutise this aspect of actual rational consciousness (in combination with the aspect of self-awareness and reason) in grounding rights: “1. The concept of a right is such that an individual cannot have a right at time *t* to continued existence unless the individual is such that it can be in its interest at time *t* that it continue to exist. 2. The continued existence of a given subject of consciousness cannot be in that individual’s interest at time *t* unless either that individual has a desire, at time *t*, to continue to exist as a subject of consciousness, or that individual can have desires at other times. 3. An individual cannot have a desire to continue to exist as a subject of consciousness unless it possesses the concept of a continuing self or mental substance. 4. An individual existing at one time cannot have desires at other times unless there is at least one time at which it possesses the concept of a continuing self or mental substance. Therefore: 5. An individual cannot have a right to continued existence unless there is at least one time at which it possesses the concept of a continuing self or mental substance.” (Tooley, 1984: 130) For Tooley, one can only have rights if he can be said to have desires, which in turn can only be had if one has reason and self-awareness. Peter Singer is another example of someone, who absolutises actual rational consciousness. For him, a being can only have rights if it has interests; but, “the capacity for suffering and enjoyment is a prerequisite for having interests at all, a condition that must be satisfied before we can speak of interests in a meaningful way.” (Singer, 1986: 221) Consequently, only beings that can experience suffering or enjoyment, i.e. have developed cognitive and emotional capacities, have moral status and can therefore be granted rights. Others such as Schaber (2004; Schaber: 2007: 141) or Eddy (2007: 321) consider human dignity to consist in self-respect (‘Selbstachtung’), which is also an absolutisation of a combination of several facets of actual rational consciousness (reason, self-awareness and affectivity). As Lee & George (2008) point out, we have to be careful with using self-respect as an absolute criterion for dignity: “Something may harm one’s sense of dignity without damaging or compromising one’s real dignity. People who become dependent on others often feel a certain loss of dignity. Yet their personal dignity, and even their manifestation of that dignity, may not have been harmed at all. Often one’s sense of dignity can be at variance with one’s real dignity.” (Lee & George, 2008: 410) Given our account of human rights, all these views have to be rejected as reductive and defective. They are too narrow in their understanding of the concept of human dignity (and as has

5. ‘Gemeinschaftsbezug’

It is common sense that man is a social animal. Therefore, it is characteristic for him to stand in relation with his environment. Although he is relational, a person cannot be reduced to relationality, as for example Richard Schröder (2002)²⁴¹ does. Relationality is an important aspect of personhood (as we shall see, it is decisive for the third and fourth source of dignity outlined below) but it surely is not a sufficient criterion for the ascription of personhood.

6. Religiousness (‘Gottesbezug’)

As Seifert (2003: 74) holds: “In der metaphysisch-religiösen Erkenntnis Gottes sowie im religiösen Akt, den in gewisser Weise jeder Mensch, auch der Atheist, der irgendetwas anderes anstelle Gottes als absolutum anerkennt, vollziehen muß [...] entfalten sich der tiefste Charakter und die Unendlichkeitsdimension personalen Seins, sowie die höchste Form personaler Transzendenz. Diese metaphysische Offenheit der Person auf das absolute Sein selbst konstituiert [...] die eigentlichste Würde des personalen Subjekts.”

In contrast to the first source of human dignity and human rights, this second source can be lost through e.g. irreversible coma, etc.. Therefore, it is “not as inalienable as the dignity and rights which are grounded simply

been said above they are not capable of providing a tenable account of personhood). Having goals and interests is only one aspect among many, and certainly not the most fundamental one in grounding moral importance and human rights.

²⁴¹ Schröder considers the decisive criterion for the ascription of human dignity being accepted by others. The earliest moment for such an ascription is the moment of implantation since this is the first time a mother and her unborn child have a physical connection and can therefore communicate. However, as Sica (2006) has shown, the embryo-maternal communication does not start with implantation. Rather, implantation is preceded by a series of oviductal-embryo interactions whereas the “communication is not one-way, because the embryo itself produces hormones and other molecules which support the dialogue”. Schröder’s argument thus rests on a faulty premise.

in the substance, existence and essence of the person” (Seifert, 2002a); nevertheless, it is inalienable as long as a person lives consciously.

Active vs. Passive Potentiality

The distinction between ontological dignity and the dignity of actual rational consciousness or being a person and functioning as a person is often challenged and ridiculed, but seldom understood. This opposition is often due to a failure in distinguishing between an active potency and a passive potency or between a radical capacity and a developed capacity. The first and second source of human dignity are closely related to the theory of ‘potentia’ (potency, potentiality, power, capacity; Latin: ‘potentia’, Greek: ‘δύναμις’ (‘dynamis’)²⁴²) and ‘actus’ (act, action, actuality, perfection, determination; Latin: ‘actus’, Greek: ‘ἐνέργεια’ (‘*energeia*’); *entelecheia*)²⁴³. Potentia usually refers to an aptitude to change, to act or to be acted upon, i.e. to give (active potentiality) or to receive (passive potentiality) some new determination. In contrast, actus is the fulfilment of such a capacity. Consequently, *potential* refers to something future, which at present exists only as a germ to be evolved; *actus* denotes the corresponding complete reality. In a nutshell: *potentia* is the determinable being, *actus* the determined being (cf. Dubray, 1907a); actus is any present degree of reality, potentia is the capacity of reaching that stage of reality. However, while potentia is prior to actus, as far as the

²⁴² As Reichlin (1997: 13) points out, the term ‘potency’ is the most accurate term by which the Greek ‘δύναμις’ (‘dynamis’) is translated.

²⁴³ This theory results from an analysis of the nature of change, which is a passage from one state to another. This analysis states that if one being passes from state A to state B, it must already possess in state A the seed of its future determination in state B; it has the capacity of becoming B, before it actually is B. To deny this would mean to deny the reality of change and the evolution of things. For what we call change would then simply be a series of instantaneous appearances and disappearances of realities, with no internal connection whatsoever between the members of the series. The walnut tree must potentially be in the acorn; if it were not there potentially, how could it ever issue from it?

process of actualisation is concerned, “actus est prior potentia ratione” (St. Thomas Aquinas, In Met. lib. 9 l. 7 n. 3; also cf. ScG, lib. 2 q. 78 as well as Aristotle 1050b 6-1051a 2). Although a statue, i.e. the actus of an unhewn block of marble, is the result of a sculptor’s work, he has to first have an idea of what the final statue should look like before he starts chiselling.

Despite its prominence in philosophical debate, this concept of potentia and actus is often misunderstood, misinterpreted and misapplied in a merely functionalist way – which, to a large extent, accounts for its rejection.²⁴⁴ An example of such superficial thinking is the following statement by Benn:

“For if A has rights only because he satisfies some condition P, it does not follow that B has the same rights now because he satisfies some condition P, it does not follow that B has the same rights now because he could have property P at some time in the future. It only follows that he will have rights when he has P. He is a potential bearer of rights, as he is a potential bearer of P. A potential president of the United States is not on that account Commander-in-Chief.” (Benn, 1973: 143)

Where Benn goes wrong can be easily understood once we come to grips with the concept of potentiality and especially the distinction between active and passive potentiality. As Reichlin (1997) shows, it is wrong to understand potency as or equate it with certain empirical facts in the future; potency “rather points at an ontological quality of the being considered” (Reichlin, 1997: 12) and is “basically designed to account for a being's continuity through change, so that that being's identity is preserved while it completes and perfects its nature, acquiring those capacities and qualities which did not show themselves in its early stages, but toward which its development actually pointed” (Reichlin, 1997: 12). Understood like this, a human being develops and perfects the human nature it already possesses.

²⁴⁴ Cf. Reichlin: “Even when the old Boethius' definition of the person is quoted (rationalis naturae individua substantia), it is usually intended to mean ‘an individual able to perform rational acts or intellectual operations’, so that what is considered worthy is not the being itself which develops, possesses and practices these operations, but rather the operations themselves.” (Reichlin, 1997: 17)

Potentiality thus means “that an entity, which has a certain nature, has an inherent capacity to realize its particular nature” (Liao, 2009). If we say a walnut has the potential to become a walnut tree, this only means that it has the inherent capacity to realise its nature of being a walnut tree (cf. Buckle, 1988; Young, 1994). This idea can be understood more easily if we turn to the above-mentioned distinction between active potentiality and passive potentiality (cf. Reichlin, 1997: 13f; Wade, 1975: 239ff). Passive potentiality is extrinsic and “where something happens to a being” (Wade, 1975: 239), whereas active potentiality is “where a being itself actively does something” (Wade, 1975: 239).

Passive potentiality is simply a disposition to receive modifications and, therefore, needs the intervention of an external impetus (an extrinsic efficient cause) to be actualised (e.g. our skin needs the external impetus of the sun to tan; a tree needs the external impetus of a carpenter in order to become a chair). Active potencies, on the other hand, “are those in which the principle of becoming is internal, in that it does not depend on external causes” (Reichlin, 1997: 14). Active potentialities are those potentialities, which are inherent to the nature of a being or as Wade (1975: 243) puts it: “a thing is potentially all those things which it will be of itself if nothing external hinders it”. Therefore, to state that the embryo has the potential for intellectual life, self awareness, etc. is to state that as a biological member of the species *homo sapiens sapiens* “it has a natural tendency to develop those biological structures that will enable it to perform, at the right time, those operations that are distinctive of a thinking being” (Reichlin, 1997: 15). The zygote’s active potentiality is all about the capacity to actualise his inherent potentialities towards which he has a natural tendency, i.e. a tendency, which is dependent on his very nature; his active potentiality is the potentiality to complete and perfect himself. This is affirmed by Aristotle in his ‘*De generatione animalium*’:

“When we are dealing with definite and ordered products of Nature, we must not say that each is of a certain quality because it becomes so, but rather that they become so and so because they are so and so, for the process of becoming or development attends upon Being and is for the sake of Being, not vice versa.” (Aristotle, De Generatione Animalium: 778b)

Man, therefore, becomes what he is, not somebody new. As a member of the human species, the zygote already participates in the rational nature of his species “which is in no sense equivalent to the actual performance of rational operations” (Reichlin, 1997: 20). With the beginning of his human body, i.e. from the moment of his conception, man has a natural tendency to develop higher functions and in doing so passes through different degrees of actualisation. It is this active potentiality of the species *homo sapiens sapiens*, i.e. the tendency to develop higher functions, which is sufficient to ascribe every member of this species a minimal amount of dignity. Human beings have a special dignity, ontological dignity, because they belong to a species of beings, which – if developing normally – characteristically exhibit the capabilities necessarily associated with personhood; and they have the dignity of actual rational consciousness once they have actively actualised the capabilities inherent in them.

“Die Statue entwickelt sich nicht selbst aus dem Marmor heraus; ohne den Künstler, dessen Pläne und Arbeit, oder ohne sehr zufällige Erosionen bleibt sie ein Marmorstück. Punkt. Die befruchtete Eizelle entwickelt sich dagegen von innen heraus durch einen vom Früh-Embryo selbst gesteuerten Lebensprozeß. Auch wenn sie Zusatzimpulse, ohnehin Nährstoffe brauchen, entwickeln sich die Eizellen von innen heraus.” (Höffe, 2002: 138)

Although an embryo does not have the developed capacity to engage in e.g. cognitive activities, he has the active potentiality to develop this capacity and all capacities rooted in his being the kind of being he is. From this follows that he is not a potential person, but a person with potential. The embryo is not Benn’s potential president; rather he is an actual president, who has not learnt to make use of his powers as a Commander-in-Chief. Of course, the exercise of the capacities, for which we have a radical capacity or active potency, can be inhibited by disease or accident (temporarily or permanently); but we do not cease to be the kind of beings

we are. We are and remain persons (for a more elaborated version of this argument cf. Lee, 1996: 24-28).²⁴⁵

It cannot be stressed enough that there is a difference between being a person and the active actualisation of the capabilities typical for it. A person begins with the beginning of a human body, a body, which has in itself the active potentiality and inherent tendency to develop those operations that are typical of the developed person. The “purely ontological unconscious being of the person compared to his awakened state relates to each other as potency to act” (Seifert, 2002a) – or to be more precise: as active potency to act. The first source of dignity and thus moral worth is being a person, not acting or functioning like one. It is not about whether man actualises this active potential, but about “was prinzipiell in seiner geistigen Substantialität als Anlage und Potenz angelegt ist” (Seifert, 1997b: 180). The mere potential for the actualisation

²⁴⁵ As a sidenote: the concept of active and passive potentiality is useful to understand the relationship between the gametes and the person. Human sperm and ovum cannot be considered persons because they only have the passive potentiality to become a living biological member of the human species. This potentiality can only become actualised by intervention of an external impetus: “Far from being a potential person, in Aristotle's perspective a gamete is not even a potential embryo, at least not in the sense of an active potentiality; in fact, its potency for becoming an embryo is not inherent to itself and perfectly ordered as to produce an embryo, but rather depends essentially on external causes. The human sperm does not just need a proper place wherein to develop its inherent potentialities, but needs an external event which is going to change radically its identity and potentialities, that is, it needs a sexual act or an in vitro procedure that enables it to approach a human female gamete; and even when these acts are performed the process is far from being complete, since most male gametes die without having realized their fertilizing potential.” (Reichlin, 1997: 13) Arguing from a different and rather pragmatic angle, Feinberg and Baum Levenbook (1993) point out that those who equate the potentiality of sperm and ovum with the potentiality of the zygote are furthermore vulnerable to a *reductio ad absurdum*: “at the end of that road is the proposition that everything is potentially everything else, and thus the destruction of all utility in the concept of potentiality. It is better to hold this particular line at the zygote.” Of course, one would not need this line of reasoning once the difference between active and passive potentiality is understood.

of the rationality, which is characteristic for his species and not actualised rationality is sufficient to grant every human being personhood. The second aspect of human dignity is rooted in the actual actualisation of the person's active potentialities.

As should have become clear, this dimension of dignity cannot be possessed by infants or comatose. It is “grounded only in awakened and consciously lived personhood of a certain level of maturity” (Seifert, 2002a) and makes sense only for “ein bewußt sein Sein erlebendes Subjekt” (Seifert, 2003: 75). We should also be aware, that this second source of human dignity can never replace but only complement the first source, which remains the incontrovertible foundation of the dignity which forbids murdering an innocent human being.

The first two sources of human dignity lift man above the rest of creation; but although they are of high importance, they are not the highest nor most important source and dimension of personal dignity. For, “never forget: even the devil or a demonic human person possesses the first two dimensions and sources of dignity.” (Seifert, 2002a)

4.2.2.2 Acquired Dignity: Fulfilment of the Personal Vocation to Transcendence and Moral Dignity

The third source of human dignity is “the result only of the good actualizations of the person through knowledge of truth, and above all through the moral perfections of justice, love of truth, kindness, etc.” (Seifert, 2002a). Therefore, it is dependent on the fulfilment of the personal vocation to transcendence and moral dignity.²⁴⁶ This source of dignity is based on the first two sources of dignity (i.e. the nature of man and its actualisation), but not only depends on the mere actualisation of personhood (which is not sufficient to ground it), but on the quality of its actualisation. It is the “Frucht der sittlichen Gutheit” (Seifert, 2003: 79),

²⁴⁶ Cf. Seifert (2003: 79): “Wäre der Mensch im Erkennen von der Wirklichkeit und Wahrheit abgeschnitten, besäße er diese Würde nicht. Antwortet er nicht angemessen auf Wahrheit und Wert, erwirbt er sie nicht.”

i.e. of the good use of intellect and freedom, which culminates in holiness.²⁴⁷ Acquired dignity is all about the way a person utilises his (awakened) personhood.²⁴⁸ It is this dimension of dignity, which reveals what it is to be a person and what distinguishes a person from every other animal: a person has to become what he is.

Since this dimension of dignity automatically belongs to persons, but has to be conquered through morally good conduct, it is not inalienable and can be lost: evilness can make a person lose this dignity. Consequently, there are innumerable degrees of it. While all men are equal with respect to the first dimension of dignity, acquired dignity knows qualitative differences, which depend on the moral goodness of the respective person.

²⁴⁷ Given its moral character, Seifert excludes “eine eher technische immanente Vervollkommnung menschlicher Fähigkeiten durch Lehre, Lernen usf. [...], die gar nicht Würde zu nennen ist” (2003: 79).

²⁴⁸ In this, humans are unique; “there is nowhere in animal behavior the capacity to be reflectively ethical” (Rolston, 2008: 148). “Animals do not feel ashamed or proud; they do not have angst. They do not get excited about a job well done, pass the buck for failures, have identity crises, or deceive themselves to avoid self-censure. They do not resolve to dissent before an immoral social practice and pay the price of civil disobedience in the hope of reforming their society. They do not say grace at meals. They do not act in love, faith, or freedom, nor are they driven by guilt or to seek forgiveness. They do not make confessions of faith. They do not conclude that the world is absurd and go into depression. [...] They do not worry about whether they have souls, or whether these will survive their death. They do not reach poignant moments of truth.” (Rolston, 2008: 144) Rolston backs up his statements by citing scientific evidence such as from the work of Frans de Waal. Although the latter finds precursors of morality in animals, de Waal concludes: “Even if animals other than ourselves act in ways tantamount to moral behavior, their behavior does not necessarily rest on deliberations of the kind we engage in. It is hard to believe that animals weigh their own interests against the rights of others, that they develop a vision of the greater good of society, or that they feel lifelong guilt about something they should not have done. Members of some species may reach tacit consensus about what kind of behavior to tolerate or inhibit in their midst, but without language the principles behind such decisions cannot be conceptualized, let alone debated.” (de Waal, 1996: 209)

The appropriate response to the positive form of the third kind of dignity “reaches from esteem to veneration and, if this dignity is infinite, adoration [...], it is in an entirely new sense sacred and holy compared to the first” (Seifert, 2002a). But the closer we draw to its negative end, i.e. moral wretchedness or maliciousness, the more we see that it not only influences, but can also be taken as a precondition of ontological dignity and the dignity of actual rational consciousness. That this is indeed so can be easily seen by the fact that every society punishes criminals by e.g. robbing them of their freedom of movement or to educating their children. Some as e.g. St. Thomas Aquinas (cf. II^a-IIae q. 64 a. 2) even hold that a complete lack of this dimension of dignity even allows for capital punishment. I deem it is safe to say, that – on a purely axiological level – the third source of human dignity is the most important one.²⁴⁹ Although a thorough discussion of the degree of influence of the third dimension of dignity on the first two dimensions cannot be undertaken within the framework of this thesis, it should nevertheless be pointed out, that even the worst criminal “must never be deprived of other human rights which are also rooted entirely and solely on the second level of personal dignity: for example the right to a fair trial, to defend himself in court, to the freedom of conscience and religion. Thus some of the human rights rooted in the consciousness of living persons are absolutely inalienable as long as they live, and whatever crime they committed. Others that are rooted on the second level can be lost when their abuse is great and when the justice of punishment requires it.” (Seifert, 2002a) In the same fashion, Pope John Paul II. (1995: paragraph 9) also asserted that not even a murderer loses all his dignity.

²⁴⁹ Acquired dignity might be less foundational than the first or second source of dignity, but it is of such high value that – according to Christian doctrine – it decides over the eternal fate of man and his soul, which is at the heart of the first source of human dignity. Therefore, without it the first as well as the second dimension of dignity are of no use to the soul of man.

4.2.3 Bestowed/Contingent Dignity: Dignity as Gift

Whereas the first three dimensions of dignity are rooted in the human being himself (his substantial being as a person, his consciousness, i.e. awakened personhood, as well as the good use of his intellect and freedom), the fourth dimension of dignity protrudes man and factors in sources of dignity, which do not depend on man's nature or his free intellectual or moral acts. Rather it "proceeds from gifts" (Seifert, 2002a) and as such is awarded.

As Seifert (2003: 82ff) shows, these gifts can come in two basic forms which, in turn, have further subcategories:

1. Dignity resulting from gifts attributed by man

- Social roles and functions, i.e. roles and functions awarded or attributed by society or the state, such as offices of authority such as that of e.g. a teacher, judge, policeman, statesman or king, which give their bearers new kinds of dignity.
- Relations with another person, which are able to confer a "value of uniqueness" (Seifert, 2002a), for example by becoming the object of inter-human love. The love of other persons e.g. confers the dignity of a husband or a wife or that of a loved child.²⁵⁰

²⁵⁰ This kind of affection is a typical human thing, which is not even displayed by chimpanzees, which some take to be our closest relatives. Based on her long-lasting experience with apes and though she found among them pair bonding, grooming, and the pleasure of the company of others, Dame Jane Goodall, the famous primatologist, wrote: "I cannot conceive of chimpanzees developing emotions, one for the other, comparable in any way to the tenderness, the protectiveness, tolerance, and spiritual exhilaration that are the hallmarks of human love in its truest and deepest sense. Chimpanzees usually show a lack of consideration for each other's feelings which in some ways may represent the deepest part of the gulf between them and us. For the male and female chimpanzee there can be no exquisite awareness of each other's body – let alone each other's mind. [...] Not for them the romance, the mystery, the boundless joys of human love." (Goodall, 1971: 194) Also cf. Rolston (2008: 142): "With chimpanzees, if a brother departs and disperses to another troop for a year and then returns, brother does not remember and

- Relationships with other human beings. Having a spiritual home and being integrated into a community, i.e. having “einen Ort und eine Stelle in einer Gemeinschaft” (Seifert, 2003: 82), ground a new value.
- Natural relations, roles and functions such as parenthood. These can ground new forms of dignity. Strictly speaking, this aspect of dignity is not attributed by society, the state or an individual, but rather is a “bleibendere, aus zwischenmenschlichen Bezügen objektiv erwachsende Würde” (Seifert, 20003: 84). It is attributed by man only in a weak sense and can be interpreted as a bridge between dignity attributed by man and dignity, which is not attributed by man but a gift from nature.

2. Dignity resulting from gifts not attributed by man

- Natural gifts, “such as beauty or intelligence, genius or charme, strength of character, etc.” (Seifert, 2002a). These gifts constitute a special dignity of the genius, of the artist, etc.. This aspect of attributed dignity usually includes “die Würde des großen Geistes, oder auch des Helden und nicht zuletzt durch seine spezielle Kraft und andere Gaben ausgezeichneten Menschen” (Seifert, 2003: 83). This position is also assumed by Wildfeuer (2002: 31), who states that there is a kind of contingent dignity which is due to “sinnlich wahrnehmbare Eigenschaften der Gravität, Monumentalität, Kollossalität, Grandiosität und des In-sich-Ruhens”.
- Dignity can also be a gift attributed by God (if one believes in Him). This class includes the dignity of a religious office (e.g. a priest or prophet) or “the dignity of the person on the order of grace and of God’s love and presence through grace in a soul” (Seifert, 2002a) or the dignity resulting from such gifts as grace, the redemption and renovation of nature. As Seifert

recognize (re-cognize) brother. Chimps take their family and troop cues from whoever is nearby and do not have the concept of ‘brother’. But humans cognize such family relationships.”

(2003: 83; 85) states, one cannot explain these Godly gifts by means of philosophy alone, but has to turn to the philosophy of religion and theology.

Gifts are something transient; one has no claim to them, one can lack them temporarily or even one's whole life, they can be bestowed upon one and they can end, be taken away, lost or revoked (which is not only due to the fact that it requires the contribution of the person to whom this dignity is awarded). It is thus characteristic that when it comes to this dimension of human dignity, differences and inequality across persons exist. Attributed dignity is not inalienable and there are innumerable degrees of attributed dignity according to the respective talents, roles, functions etc. it is based on. Not only can it vary within a society, but also between societies, which might attribute different amounts of social dignity to persons such as judges or teachers, for example.

Some philosophers attempt to derive human dignity from social acceptance only, which is equal to stating that all human dignity is the result of an attribution by others (cf. Herrmann, 2003; Schröder, 2002). However, as should have become clear, this is problematic and even contradictory. If the ascription of human dignity is dependent on social attribution, human dignity becomes arbitrary and nothing more than a "revozierbares Toleranzedikt" (Spaemann, 1987: 295). Human dignity can never be reduced to acts of social or interpersonal attributions. This undeniably adds to a man's dignity, but it is not the decisive factor. Spaemann formulates this insight as follows:

"Würden wir aufgrund bestimmter tatsächlicher Eigenschaften als Mitglieder der menschlichen Gesellschaft erst durch andere kooptiert, so läge es im Belieben einer Mehrheit dieser anderen, diejenigen Eigenschaften zu definieren, aufgrund deren jemand Menschenwürde besitzt und Menschenrechte beanspruchen darf. Das aber würde den Gedanken des Menschenrechts überhaupt aufheben. Dieser setzt nämlich voraus, daß jeder Mensch als geborenes Mitglied der Menschheit kraft eigenen Rechts den anderen gegenübertritt, und dies wiederum bedeutet, daß die biologische Zugehörigkeit zur Spezies homo sapiens allein es sein darf, die jene Minimalwürde begründet, welche wir Menschenwürde nennen." (Spaemann, 1987: 305f)

Man's relation to and integration into a community is not what constitutes human dignity; in its first three sources human dignity exists even without a 'you'.

4.2.4 Human Dignity and its Four Dimensions: Concluding Remarks

“Human Dignity has gleamed only now and then and here and there,
in lonely splendor, throughout the ages, a hope of the better men,
never an achievement of the majority.”

James Thurber

Having sketched out a sufficiently detailed account of the concept and sources of human dignity, these explanations have to be enriched by some concluding remarks.

4.2.4.1 The Close Relationship between the Four Dimensions of Human Dignity

As should have become clear, the four dimensions of human dignity are not distinct from each other, but closely related (cf. Seifert, 2003: 89f):

- The first dimension (ontological dignity) is the foundation of the other three dimensions and the most important one for the right to life and the value of human life.
- The second dimension is the necessary precondition for the third dimension of dignity (acquired dignity), which can only come about through conscious and freely chosen acts.
- Furthermore, the first dimension of dignity is geared towards ('hingeordnet auf') the second as well as third dimension of human dignity and – to a not too small extent – is influenced by them.
- All four dimensions of human dignity are geared towards ('hingeordnet auf') the third dimension of human dignity, which is their “raison d'être” (Seifert, 2003: 90).

4.2.4.2 Not all Human Beings have Equal Human Dignity

Given our account of human dignity, it becomes obvious that human dignity is not an egalitarian concept. It is both a “Gestaltungsauftrag” and a “Wesensmerkmal” (cf. Wildfeuer, 2002: 49). As ‘Wesensmerkmal’ it grants a certain minimal amount of human (ontological) dignity, which can never be lost; as ‘Gestaltungsauftrag’ it allows for innumerable degrees, which can be added to the minimal amount of human dignity that I just mentioned. The claim that all humans have equal dignity can, therefore, only mean that there is a certain aspect of human dignity, which is common to all human beings and that no man is ever without this dimension of human dignity (cf. Spaemann, 1987: 304). However, it cannot mean and it would be wrong to state that all human beings share equally in all four dimensions of human dignity²⁵¹ – this would imply putting Stalin and Mother Theresa on the same level.²⁵² Given our account

²⁵¹ This finding is supported by Pojman who holds that egalitarianism – at least in a secular version – is a flawed notion and “one of the shallowest assumptions of our time” (Pojman, 1992: 622). In two of his articles Pojman (1992 & 1996) shows that contemporary philosophy’s arguments for equal human rights based on equal human worth are deficient and cannot offer plausible reasons to support the thesis that all people are of equal worth. Thus, “on the secularist’s naturalistic assumptions, there is reason to give up egalitarianism altogether” (1996). One needs “some metaphysical explanation to ground the doctrine of equal worth, if it is to serve as a basis for equal human rights” (Pojman, 1996: 296).

²⁵² cf. Pojman’s following statement: “There is good reason to believe that humans are not of equal worth. [...] It is hard to see that humans are equal in any way at all. We all seem to have vastly different levels of abilities. Some, like Aristotle, Newton, Shakespeare, Gödel, and Einstein are geniuses; others are imbeciles and idiots; the rest at various places along the intelligence continuum. Some are wise like Socrates and Abraham Lincoln; others are very foolish. Some have great powers of foresight and are able to defer gratification, while others can hardly assess their present circumstances, gamble away their future, succumb to immediate gratification and generally go through life as through a fog. Empirically, it looks like Churchill, Gandhi and Mother Teresa have more value than Jack-the-Ripper or Adolf Hitler. While all members of a community may be equally parts of that body, some members are more indispensable than others. Just as the brain is more important than the little toe or appendix, people vary in functional value.” (Pojman, 1992: 621)

of human rights as the moral rights of human beings which are justified with reference to the concept of human dignity (cf. chapters I. 3.4 and I. 3.5), not all human beings consequently share equally in all human rights which can be justified with reference to the dignity of human beings (also cf. chapter I. 5.3) – although there are some human rights shared by all human beings of all times.

It is important to understand that “der Mensch in seinem tiefsten Wesen und seiner Substanz nach Person ist und als solche eine unveräußerliche ontologische Würde besitzt, daß er aber zugleich in vielen Hinsichten seine personale Würde – nämlich seine moralische Würde – erst frei erwerben muß und daß sie ihm in wieder anderer Hinsicht verliehen ist.” (Seifert, 2003: 91). Human dignity is all this: an inalienable possession, endangered actualisation, conquest and gift.

It is true that – as the United Nations’ Universal Declaration of Human Rights states – all human beings are born (better: conceived) “free and equal in dignity and rights”. We are conceived and born with the minimal amount of human dignity there is, namely, ontological dignity and we can never fall below this level of dignity. Although this means that all human beings have equal fundamental dignity, namely ontological, this does not mean that all men have equal overall dignity. We all begin life with the same amount of dignity, but throughout life, the level of our dignity can vary. What sets human beings apart with respect to their dignity is their contingent dignity (cf. Wildfeuer, 2002: 34f).

Our findings can be graphically summarised as follows (cf. Figure 12:):

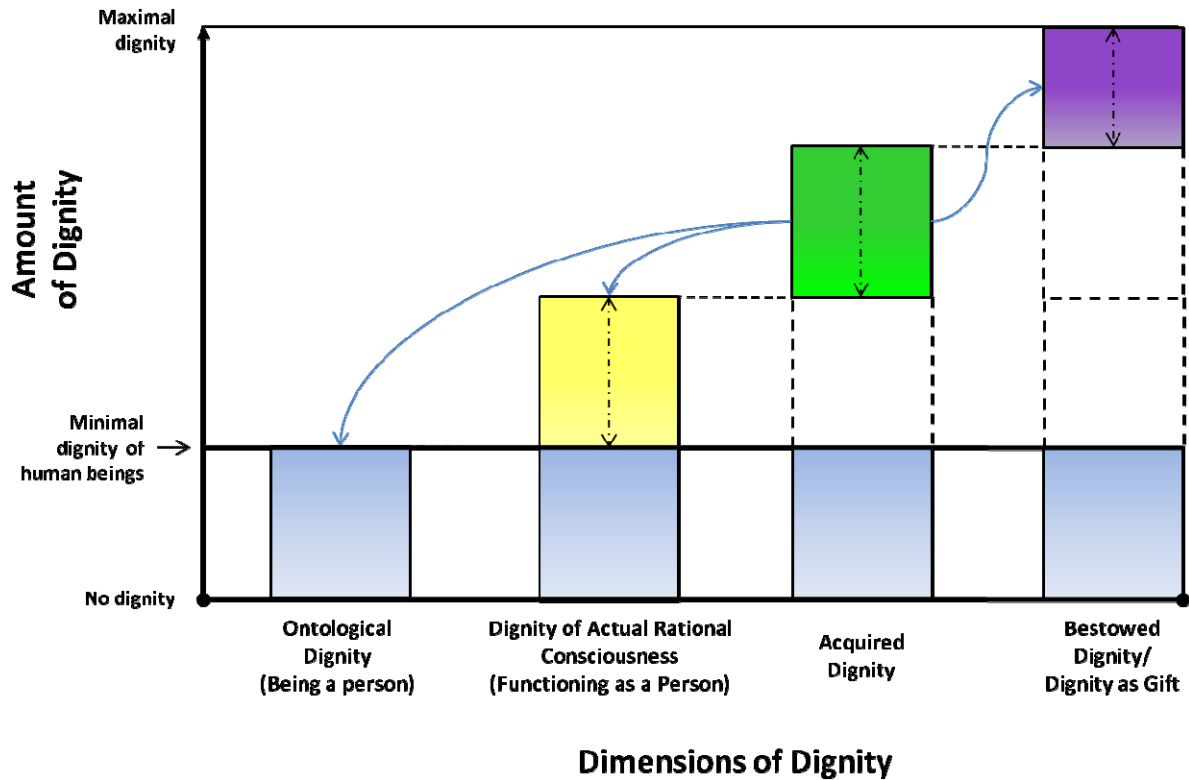


Figure 12: The Four Dimensions and Amounts of Human Dignity

5 From the Dignity of Human Beings to Human Rights

So far, we have established that human rights have their foundation in the dignity of human beings; we have also introduced an account of the dignity of human beings, which is capable of integrating and making sense of the contradictory ambiguities the terms ‘human dignity’ or ‘dignity of human beings’ seem to be afflicted with. The next step in developing our philosophy of human rights is to show how the dignity of human beings can actually ground human rights. How do we get from statements about dignity to the ascription of human rights?

5.1 Respect: The Mediator between Dignity and Human Rights

We have heard that dignity is essentially a non-neutral, positive and exalted value that indicates positive importance. As such, it asks us to respond to it adequately:

“Whether one chooses or rejects something which is agreeable, but is indifferent from the point of view of value, depends upon one’s own pleasure. Whether one does or does not eat an excellent meal is up to oneself. But the positive value calls for an affirmation, and the negative value for a refusal on our part. Confronted with these, the way in which one should behave is not left to one’s arbitrary pleasure; instead it should be the subject of preoccupation and the right response should be given, for interest in and adequate responses on our part are due to values.” (von Hildebrand, 1950: Chapter I)²⁵³

Our response to the value of human dignity is not left to our arbitrary pleasure, but exerts a sublime demand and duty on us, namely to accord some valuing form of moral recognition to its bearer. The moral recognition required to be accorded to the bearers of dignity is respect: dignity is “something deserving of respect” (Kass, 2008: 308). The dignity of human beings demands and warrants respect from others or to be more precise, the dignity of human beings is that by which human beings exact or demand respect from one another (cf. Kant, 1797: Ak 435). Therefore, the key to bridging the dignity of human beings and human rights is respect. There is a value represented in human beings that entitles them to respect and that must be respected; this value is the four-dimensional dignity of human beings. If we have a close look at the relationship between the dignity of human beings and human rights, we can state that the dignity of human beings does not directly give rise to human rights.

²⁵³ For von Hildebrand, only those who actually manage to understand that there are things important in and of themselves and to who subordinate themselves to them, can be the bearers of moral values: “The capacity to grasp values, to affirm them, and to respond to them, is the foundation for realizing the moral values of man.” (von Hildebrand, 1950: Chapter I)

Rather, it is respect for the dignity of human beings, which does the trick. Respect, therefore, is the mediating factor between the dignity of human beings and their human rights. Human rights are the moral rights, which human beings have because they are entitled to have their dignity respected by others (who in turn have the duty to take their hats off to, i.e. respect, the dignity of other human beings). Human rights are, therefore, derivative of this basic human right. However, as long as we do not know what to understand by respect, we do not know how the dignity of human beings can ground human rights and what respect for the dignity of human beings can actually demand from us.

Respect (stemming from the Latin verb ‘respicere’, which can be translated with ‘to look (back) at’, but also ‘to regard’ or ‘to consider’) is not only an attitude or feeling (such as esteem or deference), but much more a behaviour, which is expressed by a proper regard for or recognition of something, i.e. which is expressed in and by action. Feinberg (1973) has identified three distinct aspects, which have been associated with the term ‘respect’:

- Firstly, there is “Respekt” aspect of respect, which Feinberg defines as an “uneasy and watchful attitude that has ‘the element of fear’ in it” (Feinberg, 1973: 1). As Dillon (2009) points out, “its objects are dangerous things or things with power over the subject”. Examples of ‘respekt’ are the respect a surfer has for a 25-metre high wave or the attitude one has towards everything dangerous that one has to deal with in general. ‘Respekt’ is not to be mistaken for fear (which might be a result of it); it is rather the awareness of the graveness of an action or situation and might be said to lift our attention.
- The second aspect of respect according to Feinberg (1973) is “observantia”, which involves regarding an object or being of value “as making a rightful claim on our conduct, as deserving moral consideration in its own right” (Dillon, 2009). Observantia is respect in a practical sense, which guides our actions and requires us to behave in a certain kind of way.
- “Reverentia”, the third aspect of respect, is “the special feeling of profound awe and respect we have in the presence of something

extraordinary or sublime, a feeling that both humbles and uplifts us” (Dillon, 2009). Reverentia is a distinctive positive feeling of deference that one has in the presence of something he considers having exalted value.

If we think about Feinberg’s three aspects of respect, we will soon see that reverentia and ‘respekt’ are two sides of the same coin: both are feelings of respect, the former positive and uplifting, the latter rather negative and associated with fear. Observantia, on the other hand, is more than a feeling: it is motivating and calls for meaningful behaviour. So, when we say that the dignity of human beings necessitates or demands respect, we can only mean that it demands observantia, i.e. that it has to be respected by certain forms of behaviour, because it cannot be demanded of us to feel reverentia or ‘respekt’. There can be no demand to experience a feeling, but there can be a demand to behave in a certain way – even if such behaviour would be contrary to our feelings. When thinking about respect for the dignity of human beings, we have to bear in mind that what we are thinking about is observantia-respect.

Their dignity entitles human beings to demand observantia-respect from all other human beings. But the observantia-respect, which can be demanded on the basis of the dignity of human beings, is not the right to *equal* concern and respect as Dworkin (1977: 180) advocated. Rather, it is the right to individual respect according to the dignity of the human being in question; it is the right to be given what is due to one because of one’s dignity – if one lacks the second, third or/and fourth dimension of human dignity²⁵⁴, one cannot expect observantia-respect for what is not there.²⁵⁵

²⁵⁴ As has been shown in chapter I. 4.2.1, no human being can lack the first dimension of human dignity.

²⁵⁵ The following example might shed some light on this statement: As pointed out above, the dignity of actual rational consciousness has several facets and is rooted – amongst others – in man’s self-awareness, reason and freedom. Observantia-respect for this facet of dignity entitles all human beings possessing these actualised properties to the enjoyment of e.g. the human right to freedom of movement. Babys and young children – who do not (yet) possess the above-mentioned actualised

There is a common equal basis of observantia-respect, which can be demanded by every human being, but beyond which the observantia-respect that can be demanded differs from human being to human being. Given this foundational right of respect, human beings can never be without rights. Having said this, human beings are in a position to make a claim on the conduct and behaviour of others towards them. What does and can the duty to observantia-respect the dignity of human beings comprise? Basically, to observantia-respect the dignity of another human being requires others to turn toward it and to behave affirmatively, i.e. to give it appropriate consideration and recognition by deliberating about one's behaviour. It thus involves the duty to appropriately weigh the respective human being's value in one's deliberations about how to behave and then to behave accordingly. Therefore, the basic right the dignity of human beings grants the respective human beings is to have their dignity respected. The mere fact that a human being possesses such exalted value entitles him to having his dignity observantia-respected by others and obliges others to observantia-respect his dignity.

5.2 What Forms of Human Rights are there?

Where does this leave us? As has been established in the previous chapter, the fact that human beings possess dignity gives them the human right to have their dignity observantia-respected. This finding, however, begs the question of the nature of this human right. What kind of moral right is the human right to have one's dignity respected? As a special class of moral rights, a human right can come in one or more of the following forms:

1. Passive right: Moral claim-right/duty
 - a. Moral negative claim-right in rem

properties – cannot be said to have the human right to freedom of movement and can thus be patronised by their parents, for example.

A moral claim-right not to be interfered with or dealt with or treated in a certain way with the corresponding duty resting with everybody

b. Moral negative claim-right in personam

A moral claim-right not to be interfered with or dealt with or treated in a certain way with the corresponding duty resting with a specifically identified person or group

2. Active right: Moral liberty-right

a. Moral liberty-right in rem

A moral no-duty with the corresponding no-claim-right resting with everybody

b. Moral liberty-right in personam

A moral no-duty with the corresponding no-claim-right resting with a specifically identified person or group

3. Moral cluster-right

A combination of one or more of the above-mentioned moral claim-rights and moral liberty-rights

The first question we could try to answer is whether the human right to have one's dignity observantia-respected is a passive or an active right.²⁵⁶ The answer is rather simple: if observantia-respecting something requires us to behave in a certain way and if dignity grants its possessor the right to observantia-respect, then such a right is not a right, which is concerned with what the possessor of the dignity which is to be observantia-respected is allowed to do; rather, it is concerned with the action and behaviour of others. Consequently, it is a passive right, which obliges others. However, the human right to observantia-respect cannot be a liberty-right, i.e. a right to take a certain action or behave in a certain way. On the one hand, it does not make sense to speak of a moral liberty-right to have one's dignity respected. An active right is a right to do something; having one's dignity respected, however, does not exactly amount to doing something, but the

²⁵⁶ As has been mentioned above, active rights allow the right-bearer to take a certain action or behave in a certain way, whereas passive rights oblige another party or parties.

opposite. On the other hand, if we interpret the human right to respect as an active moral liberty-right, one would have a liberty-right to respect the dignity of others – which would mean nothing else than saying that one is free from the duty to respect the dignity of others. However, such a statement would be contrary to the idea of dignity. Observantia-respect for dignity can be demanded, it is everybody's duty to observantia-respect the dignity of others. Therefore, no one is free to observantia-respect the dignity of others, since everybody is obliged to do so. Consequently, no one has an active moral liberty-right to respect. While it is true that one is free to do what one does not have a duty not to do, we are just not free when it comes to observantia-respecting the dignity of others.

This means that the dignity of human beings (or to be more precise: observantia-respect for the dignity of human beings) can only ground passive negative human rights or a human cluster-right:

1. Passive right: Moral claim-right/duty

- a. Moral negative claim-right in rem

A moral claim-right not to be interfered with or dealt with or treated in a certain way with the corresponding duty resting with everybody

- b. Moral negative claim-right in personam

A moral claim-right not to be interfered with or dealt with or treated in a certain way with the corresponding duty resting with a specifically identified person or group

2. Moral cluster-right

But we can go a step further: cluster-rights have been introduced as a combination of two or more of the four basic – or as Wenar calls them “atomic” (Wenar, 2005: 225; 2007) – Hohfeldian incidents of rights. Cluster- or molecular rights, therefore, are a combination of claim-rights, liberty-rights, immunity-rights and power-rights. Since we have excluded the latter two Hohfeldian instances from our discussion of moral and human rights, moral molecular rights can only be a combination of moral claim-rights and moral liberty-rights, since these are the only remaining pure Hohfeldian forms of moral rights. However, if we look at the list just presented, we will see that such a combination is no longer possible. If

observantia-respect for the dignity of human beings can only ground moral and human claim-rights, it does not make sense to maintain the class of moral cluster-rights. The latter can thus also be eliminated from our list. The final list of human and moral rights, which can be derived from the dignity of human beings comprises only two items and looks as follows:

1. Passive right: Moral claim-right/duty
 - a. Moral negative claim-right in rem
 A moral claim-right not to be interfered with or dealt with or treated in a certain way with the corresponding duty resting with everybody
 - b. Moral negative claim-right in personam
 A moral claim-right not to be interfered with or dealt with or treated in a certain way with the corresponding duty resting with a specifically identified person or group

By a process of philosophical deliberation and elimination, our initial list of seven conceptually possible classes of moral rights has been narrowed down to two classes. Observantia-respect for the four dimensions of the dignity of human beings can ground the following forms of human rights (cf. Figure 13:):

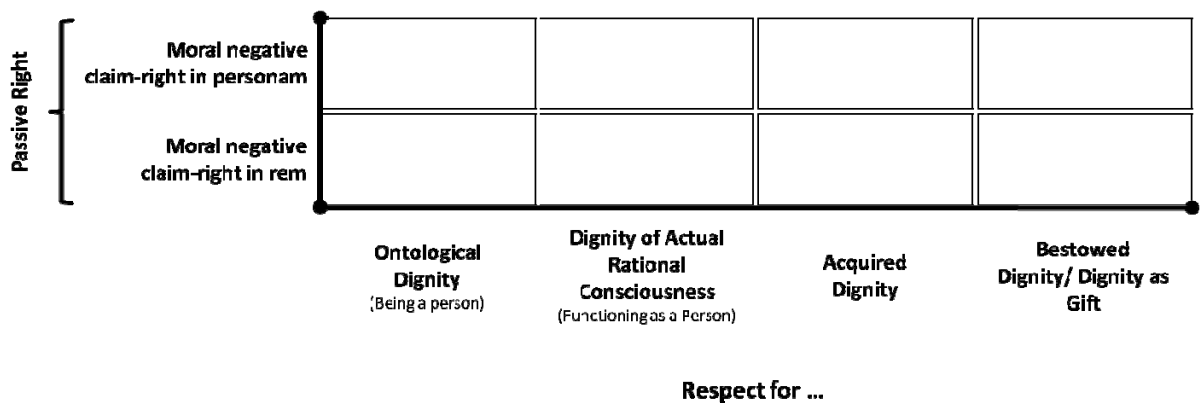


Figure 13: Forms of Human Rights Arising from Respect for the Dignity of Human Beings

Proposing that human rights can only come as a passive negative moral right in rem and/or in personam, however, is not to say that our originally established list of seven classes of moral rights is wrong. It is only to say that grounding human rights in human dignity limits the actual number of possible classes to two. If one takes the dignity of human beings to be the justification for human rights, one has to dispel the idea that any of the four dimensions of dignity can ground every moral right and content oneself with the fact that such a justification can only be used to ground passive negative moral rights. In short, if there is such a thing as a human right to health justified by reference to the dignity of human beings, this right can only be a passive and negative claim-right in rem or in personam.

5.3 Human Rights: Strict versus Non-Strict

But, unfortunately, we are not done yet. Before entering the last chapter of this thesis, we have to introduce and apply another distinction, which applies to the moral rights that can be held by human beings. When writing about the relation between moral rights and human rights, I cautioned the reader to set aside possible preconceptions of the term ‘human right’ and to not prematurely reduce it to ‘moral rights that all human beings are entitled to’. The reason for this request was that a philosophical discussion of the concept of human rights should not be limited to begin with. If we had done this, we would have lost the richness of the dimensions of dignity. We are now in a position to reintroduce this limitation and put it into perspective. So far, I have taken human rights to be the moral rights of human beings – as opposed to and contrasted with the moral rights of non-humans. The genus ‘moral rights’ can thus be split into the species ‘moral rights of human beings’ and ‘moral rights of non-human beings’. This categorisation is exhaustive and covers all cases of ‘moral rights’.

However, virtually no philosopher, politician and contemporary thinker applies the term ‘human rights’ in the way I suggest. Rather, they use it in a more strict sense to imply those moral rights of human beings to which all human beings are entitled, i.e. which are equal, inalienable and universal. Understood like this, human rights constitute the minimal

standard of and for human behaviour, i.e. the least every human being can demand. Human rights are “concerned with avoiding the terrible rather than with achieving the best” (Nickel, 2006). They aim at protecting minimally good lives for all human beings and are thus about the “lower limits on tolerable human conduct” (Shue, 1996: xi), rather than “great aspirations and exalted ideals, saintly restraint and heroic fortitude and awesome beauties that enrich life” (Shue, 1996: xi). As such minimal standards, they furthermore leave room for cultural and institutional accommodation and peculiarities. In order to align our understanding of human rights with the common one, we have to introduce the distinction between human rights in a strict or narrow sense and human rights in a non-strict or broader sense. In a non-strict sense, human rights are those moral rights, which can only be possessed by human beings, but which do not necessarily have to be possessed by all human beings of all times. In contrast and as has been adumbrated, human rights in a strict sense are those moral rights, which can only be possessed by human beings and which are possessed by all human beings of all times – equally, inalienably and universally. As the account of human rights introduced in this thesis has been justified by reference to the status theory, which takes the dignity of human beings as the property, which makes it fitting to ascribe certain moral rights to human beings, we have to render the distinction introduced above more precisely. The dignity of human beings can be divided into contingent dignity as well as inherent or intrinsic dignity. Whereas the latter dimension of dignity is universal and inalienable, the former dimension (which comprises the three dimensions ‘dignity of actual rational consciousness’, ‘acquired dignity’ and ‘bestowed dignity’) depends on capabilities, properties or behaviours, which some human beings might have or exhibit while others might not. Human rights in their strict sense can, therefore, only arise from observantia-respect for the inherent, i.e. ontological dignity of all human beings. Consequently, contingent dignity is the foundation for human rights in their non-strict sense.²⁵⁷ Summing up these findings, we can draw up the following tree of moral and human rights (cf. Figure 14:):

²⁵⁷ Having understood this allows us to see “the fatal flaw in Kant’s [...] approach to

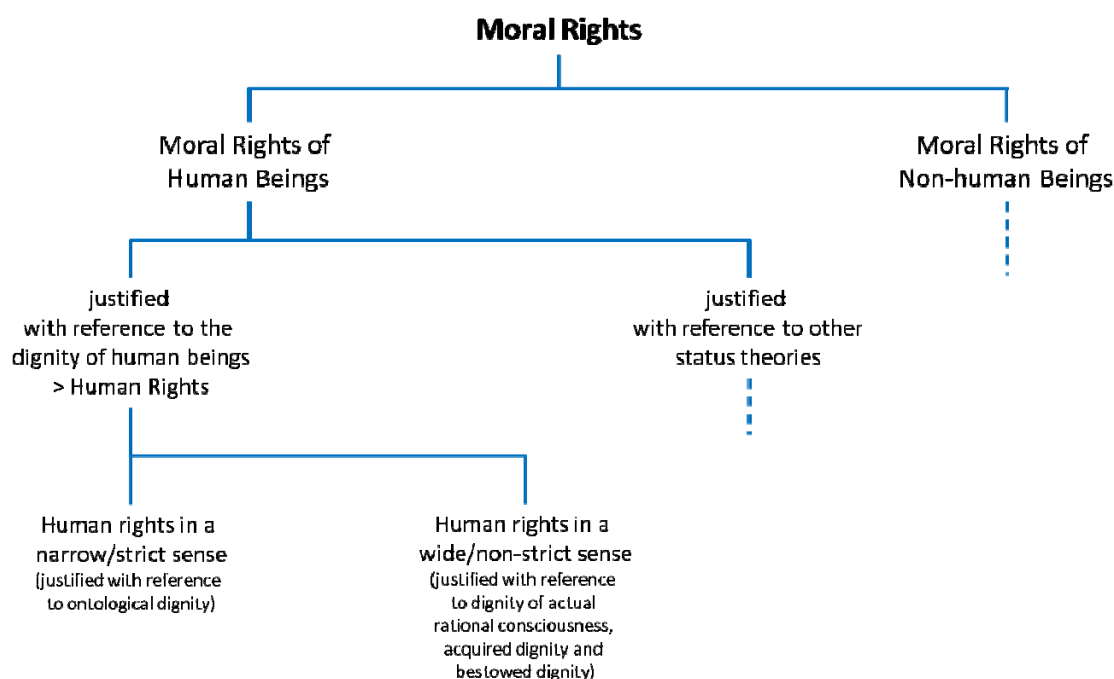


Figure 14: The Classification of Moral Rights

For the purposes of this thesis, I shall adapt the standard usage of the term ‘human rights’ and consequently restrict it to its narrow sense. When speaking of human rights, I am referring to moral rights, which can only be possessed by human beings and which are possessed by all human beings of all times – equally, inalienably and universally. This has certain implications for what has been established so far. Over the course of the preceding pages, it was argued that there are no moral positive claim-rights and that observantia-respect for the dignity of human beings can only ground passive negative claim-rights in rem and/or personam. Consequently, the initial list of seven possible forms of moral rights/duties was reduced to two moral rights, which can serve as human rights

human dignity” (Woltersdorff, 2008: 333) as well as in every capacity approach: “If we insist that the capacity for rational agency gives worth to all and only those who stand to the capacity in the relation of actually possessing it, then it is not human rights that are grounded but the rights of those who possess the capacity” (Woltersdorff, 2008: 333).

grounded in dignity. This chapter, on the other hand, argued that we have to narrow our understanding of human rights to its strict sense, i.e. that sense, which sees human rights as inalienable, universal and equally held by all human beings. Understood like this, such human rights can only be justified with reference to the ontological dignity of human beings, since the other dimensions of dignity do not exhibit universality or inalienability (cf. Figure 15:).

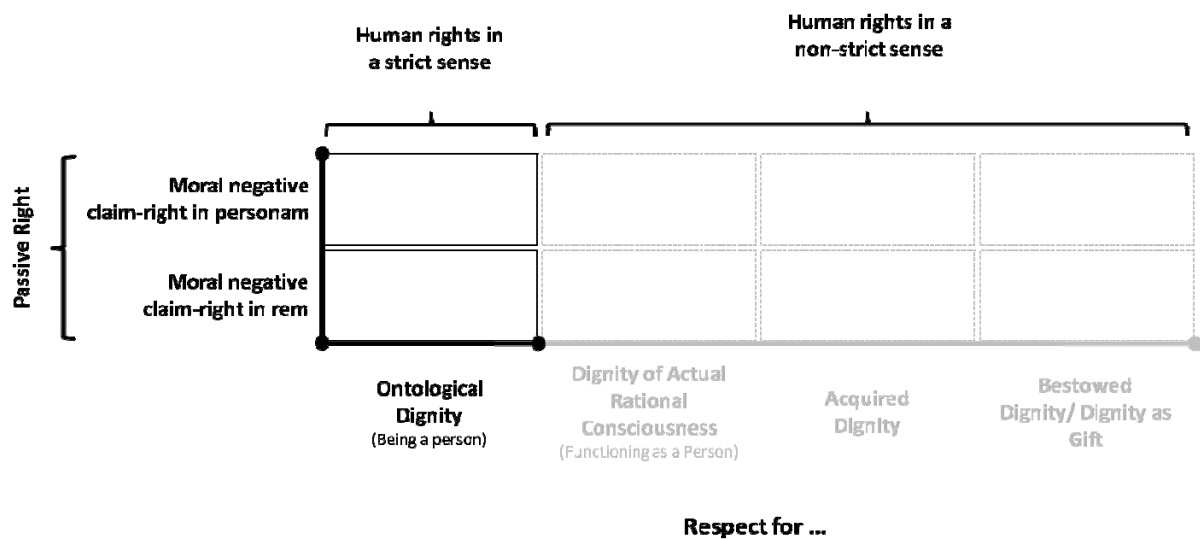


Figure 15: Human Rights in a Strict Sense and the Dignity of Human Beings

What does this mean for the argument of this thesis? Well, it simply means that if there is such a thing as a human right to health, it can only be a passive negative claim-right grounded in the ontological dignity of human beings. Thinking about such a right, one can confidently ignore human rights grounded in the dignity of actual rational consciousness, acquired dignity and bestowed dignity and only focus on the two boxes with the bold outline in the figure shown above.

IV HEALTH: A HUMAN RIGHT?

1 A Summary of what has been established so far

So far, we have laid the theoretical foundations, which allow us to answer the research question of this thesis. This research question asked whether there is such a thing as a human right to health grounded in human dignity and, if so, what it entails from a philosophical perspective. In order to find an answer, I have set out to scrutinise the concepts underlying such a right ascription, namely health and human rights; in doing so I have introduced a theory of health as well as human rights grounded in the dignity of human beings. Before combining these two concepts in order to answer the research question of this thesis, I want to summarise the central aspects of the two preceding chapters.

1.1 Health

As has been established by the theory of health introduced above, the essence or nature of health is threefold. Health is (1) a norm, (2) a state and (3) a habit. (1) First of all, health is a norm, i.e. a standard. At its core, this standard deals with the quality of our lives. A healthy life is considered a good life. Health is something we strive for; but this does not tell us anything about the content of the norm. The definition of the content of the norm can be undertaken in a positive or negative fashion as well as according to an objective, subjective or social dimension. From the resulting six options, health as objective norm – the human natural-biological norm, which is discovered by the bio-medical sciences as well as the humanities – is the *primus inter pares*. (2) Secondly, health is a state. This state is measured against the yardstick of health as norm. Depending on how one does with respect to health as norm, one is considered to be in perfect health, normal health or unhealth. Health as state and health as norm form the static theory of health, which is deficient, since it cannot explain changes in health between two states of health. In order to account for this weakness, one has to enrich the static theory with a behavioural component. (3) Thirdly and finally, health is a good habit. Health as status is only a snapshot in time. The changes in health status depend on a variety of determinants, some of which can be directly or indirectly influenced and

others which cannot be influenced; all determinants can both be pathogenic or salutogenic. The directly and indirectly influenceable determinants are subsumed under the term behavioural pathogens or salutogens. Health as good habit is an individual's steady disposition according to which he is well disposed with respect to health as norm. Health as habit directs our behaviour in a way, which makes the determinants of health, which we can influence directly or indirectly, turn out as behavioural salutogens. Health as habit guides our health behaviour, i.e. the behaviour relevant to our health, in ways, which further our health. Health as habit is not the behaviour itself, but the perfection of the powers of the human soul, which expresses itself in healthy acts. Health is the good habit by which we are, remain or become healthy. Visualising these findings and graphically depicting the complete theory of health, the result looks as follows (cf. Figure 16:):

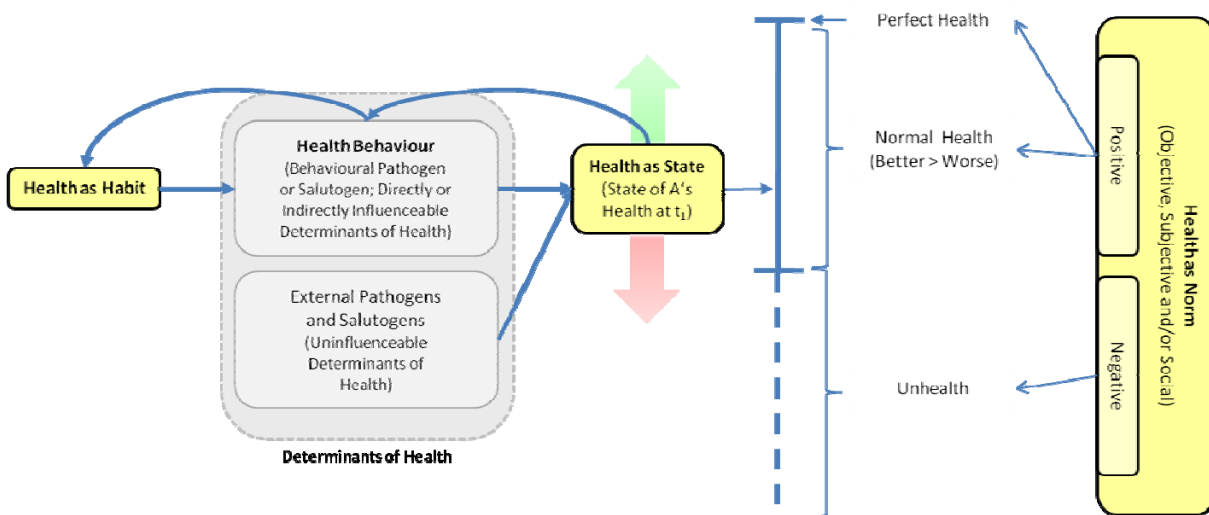


Figure 16: A Comprehensive Theory of Health

1.2 Human Rights

When it comes to human rights, we know that human rights are rights. But they are not just any rights. They are neither positive nor pre-positive conventional rights, but pre-positive pre-conventional and thus moral rights. However, they are not just moral rights. They are a special class of moral rights, namely the moral rights of human beings. As moral rights,

human rights have to be validated by reference to a justified moral theory, i.e. one that is well supported by appropriate reasons and moral reasoning. As far as moral theories are concerned, the only tenable moral theories are status theories; as has been shown, neither instrumental (i.e. consequentialist) theories nor contractarian theories nor contemporary understandings of virtue ethics are capable of serving as a moral theory, which can ground moral rights and duties. Status theories hold that “human beings have attributes that make it fitting to ascribe certain rights to them, and make respect for these rights appropriate” (Wenar, 2007a). One of these attributes of human beings and the attribute, which international law also refers to as the foundation of human rights is dignity. The dignity of human beings makes it fitting to ascribe certain moral rights to them and respectful treatment of these rights appropriate. Human rights are validated by reference to the dignity of human beings. For the purposes of this thesis, human rights have three characteristics: they are moral rights, they are the moral rights of human beings and they are those moral rights of human beings, which are validated by reference to the dignity of human beings.

Dignity is a non-neutral and positive value, a “term of distinction” (Kass, 2008: 309). The dignity of human beings refers to a property or properties by which man is considered worthy, honourable or estimable and which lifts man out of neutrality – both with respect to the rest of creation as well as to his fellow men. Man is and can be lifted out of neutrality by four forms of dignity:

- Ontological dignity (being a person)
- Inflorescent dignity
 - Dignity of actual rational consciousness (functioning as a person)
 - Acquired dignity
- Bestowed dignity/Dignity as gift

As an exalted value, the dignity of human beings exerts a sublime demand and entitles their possessors, i.e. gives them the moral and human right, to have their dignity observantia-respected. This is how the dignity of human beings grounds human rights: qua possessing dignity, human beings have the human right to have their dignity observantia-respected.

Doing so requires other human beings to behave affirmatively, i.e. to give appropriate consideration and recognition in deliberating about their behaviour. It involves the duty to weigh the respective human being's value appropriately in deliberations about how to behave and to behave accordingly.

By means of philosophical discussion, the number of possible forms of moral rights, which human rights can come in, has been reduced to two, namely the passive negative moral rights *in rem* and *in personam*. Having carved out the four dimensions of dignity has also allowed us to substantiate and concretise the use of the term 'human right'. According to this concretisation, one can distinguish between human rights in a strict sense and human rights in a non-strict sense. Human rights in a strict sense are only those moral rights of human beings, which are universal and inalienable; in a non-strict sense they are those human rights, which are not necessarily equally held by all human beings and which can be lost. Consequently, only ontological dignity – but not the other three dimensions of dignity (contingent dignity) – can be used to justify human rights understood in a strict sense. When speaking of human rights in a strict sense one can only mean passive negative rights justified with reference to ontological dignity (cf. Figure 17:).

Following this dichotomy, the human rights asserted in international law must be human rights in a strict sense (for, they are considered inalienable; cf. UDHR: Preamble). Since the human right to health as part of these human rights assertions of international law is a human right in a strict sense and since this thesis is devoted to scrutinising the philosophical foundations of this right, we can focus our further deliberations on human rights in a strict sense without further ado.

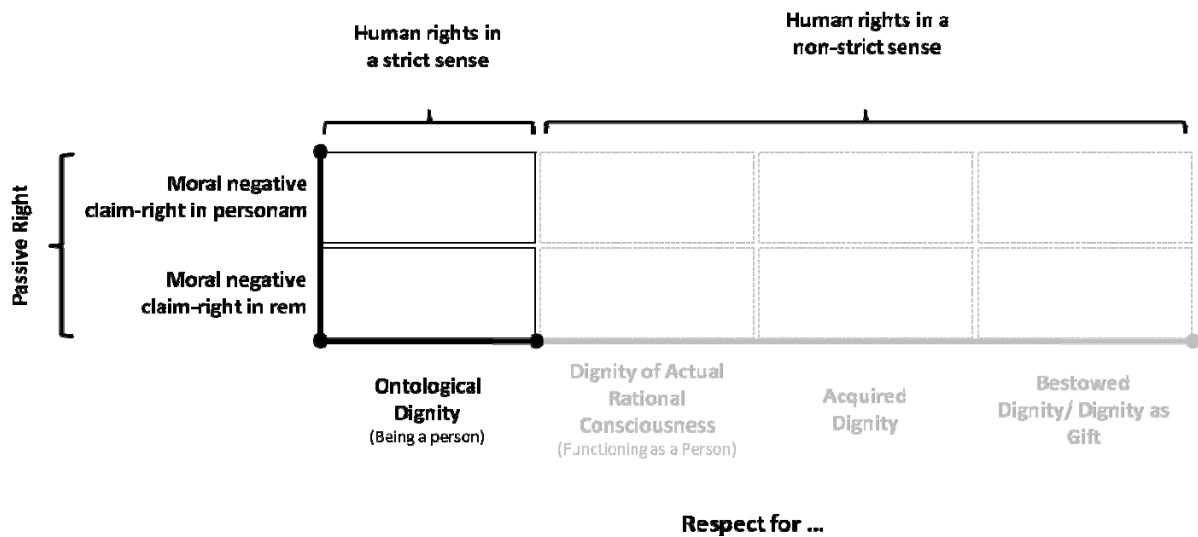


Figure 17: Forms of Human Rights Arising from Respect for the Dignity of Human Beings

Given this preparatory work and discussion, we are now ready to state the following preliminary result: If there is such a thing as a human right to health, it can only be a passive negative claim-right (to be more precise: a passive negative claim-right in rem and/or in personam) grounded in the ontological dignity of human beings.

2 Health and Ontological Dignity: Is Health a Human Right?

We are now in a position to answer the research question. As has been said, observantia-respect for the dignity of human beings grounds human rights, which are necessarily passive and negative in nature, while human rights in a strict sense are only those, which are justified by reference to the ontological dimension of the dignity of human beings. This allows for the conclusion that health can only be a human right if it has something to do with the ontological dignity of human beings. Therefore, the full mechanism for a possible justification of a human right to health looks as follows:



If health has an influence or is somehow related to the ontological dignity of human beings, then health grants the right to be observantia-respected and consequently a passive negative claim-right in rem and/or personam. In order to find out whether and if so, to what extent health is a human right, the next step must be to combine the concepts of health and ontological dignity outlined above and see, whether they are related in any way. Only if the concepts of health and ontological dignity overlap, does it make sense to speak of a human right to health; otherwise and contrary to what all instruments of international law postulate, there cannot be a human right to health grounded in the dignity of human beings.

So, how are health and the ontological dignity of human beings related? The relation can be twofold: (1) health can be considered as an independent variable, which influences dignity as a dependent variable or (2) dignity can be considered as an independent variable, which influences health as a dependent variable. It must, however, be emphasised that what we are looking for is the possible influence that health – in any of its facets as norm, state or habit – has on the dignity of human beings and not the influence that the dignity of human beings might exert on the respective human being’s health. Since dignity is the crucial factor in justifying human rights, it is only via ontological dignity that health can be justified as a human right: health can only be a human right if it is an aspect of ontological dignity and, in consequence, has to be observantia-respected. This conclusion, however, does not hold true for the reverse direction of influence. The fact that dignity has an influence on health does help in justifying health as a human right.²⁵⁸ We should, therefore, rephrase the

²⁵⁸ Mann (1998) as well as Chilton (2006) state that – although the exact pathways are “simultaneously complex, intuitively powerful and difficult to assess” (Mann, 1998: 32; cf. Chilton, 2006: 212) – a growing body of evidence suggests that “violations of dignity affect the health of individuals and populations” (Chilton, 2006: 212). The data also indicate that regular violations of individual dignity cause chronic stress and have severe adverse effects on well-being and thus health: “Occasional lapses of

question posed at the beginning of this paragraph: how does health (as an independent variable) influence the ontological dignity of human beings (as a dependent variable)?

As has been said above, ontological dignity is an inherent endowment of every human being and is had by every human being from the moment of conception to the moment of death; it cannot be lost, taken away or be disposed of and is universal, timeless, inalienable, indisposable ('unverfügbar'), indivisible as well as unconditioned. Ontological dignity is an absolute value – a "Superlativ" (Wildfeuer, 2002: 36), which has its roots in the fact that – from the moment of conception until death – every human being is a person. Put differently: being a person is the sole foundation of ontological dignity. So, health can only be related to ontological dignity if it has an influence on our personhood. Personhood consists in being an individual representative of a species endowed with a rational nature, i.e. being an individual substance of a rational nature. The crucial thing to understand here is that personhood has nothing to do with nor requires actualised rationality. Every human being has ontological dignity because he is a person, not if he functions as one. Its only prerequisite is that the respective being is part of a species generally endowed with the gift of rationality.

Now, does health have anything to do with or does it have any influence on a being's being the kind of being it is? Is a human being's being an individual substance of a rational nature in any way influenced by health as state, norm or habit? As should be perspicuous, one cannot argue in favour of such an influence. Being a person does not depend on and is not influenced by health – whether as state, norm or habit. One's personhood has nothing to do and is completely independent of one's health, since health has nothing to do with our being the kind of being that we are. Human beings are individual substances of a rational nature regardless of their health status, their health habits or any definition of health norms. As

dignity were experienced as memorable. Given this, the impact on health for people living in an environment characterized by repetitive, severe and sustained violations of individual and collective dignity is likely to be substantial" (Mann, 1998: 34).

stated above, our personhood and ontological dignity cannot be nullified, lost, destroyed or disposed of and is not contingent on age, consciousness, (un)health or our subjective inclinations; they are unconditioned. Therefore, health can obviously have no influence on ontological dignity. Otherwise, ontological dignity would be bereft of or lose its just mentioned attributes. This allows us to conclude that a human right to health cannot be grounded in observantia-respect for a human being's ontological dignity. And this also is the answer to the research question of this thesis: as human rights (in a strict sense) are those moral rights of human beings, which cannot be lost, nullified or destroyed and which are universal and held by all human beings of all times and as we have to justify such rights with reference to the dignity of human beings²⁵⁹, these rights must be grounded in the only dimension of the dignity of human beings, which cannot be lost, nullified or destroyed and which is universal and held by all human beings of all times, namely ontological dignity. If this is so, then health cannot be conceptualised as a human right deriving from ontological as it is not an aspect of or has an influence on the ontological dignity of human beings.

3 A Marginal Note: Is there no Right to Health, at all?

The result of this thesis, therefore, is the following: there is no (strict-sense) human right to health directly grounded in the (ontological) dignity of human beings. Given our line of reasoning, this conclusion positively forces itself upon us. Nevertheless, the reader might consider this outcome as rather unsatisfactory – not least because of the fact that it contradicts the prevailing opinion codified in international law. As a last step, I want to consider whether these readers can be helped and whether the assertion that health is not a strict-sense human right is the last thing, which can be said about this topic. I do not think so. As has been argued, moral rights

²⁵⁹ cf. Sulmasy (2007a: 25): “All human rights depend upon the concept of human dignity.”

must be justified with reference to a moral status theory; as a special class of moral rights, human rights are and can only be justified with reference to the dignity of human beings. However, this is not the only way of grounding moral rights. For, despite the fact that health cannot be a strict-sense human right grounded in ontological dignity, it is possible to conceive of it as a moral right grounded in duty or as a moral right derivative of the strict-sense human right to life.

3.1 A Moral Right to Health grounded in the Human Right to Life

It can be argued that some sort of moral right to health can be derived from the strict-sense human right to life. In order to comprehend this, we first have to understand, which human rights observantia-respect for the ontological dimension of dignity actually grounds. So, what can every human being demand from every other human being when it comes to observantia-respect for his ontological dignity? Let me rephrase this question in order to make it clearer: what can every human being demand from every other human being, when it comes to observantia-respect for his personhood (i.e. for being an individual substance of a rational nature)? In order to find the solution to this problem, we have to establish what it is that influences our ontological dignity. As has already been said, ontological dignity is unconditioned; it cannot be nullified, lost, destroyed or disposed of and is not contingent on age, consciousness, (un)health or our subjective inclinations. Given this quality of ontological dignity, it should be rather obvious that ontological dignity is completely independent and not influenced by anything. Therefore, it seems that there is no human right grounded in observantia-respect for human dignity. However, this is not completely true. There is something ontological dignity is dependent on, namely life, the most basic phenomenon there is (cf. chapter 1.1). As has been shown in chapter 4.2.1.3, personhood does not begin later than the existence of a new human life, which is no longer identical with the parental organism. This, in turn also means that it does not begin earlier. A person is always a living human being; dead human beings cannot be

persons and cannot have ontological dignity. This means that the only thing ontological dignity is dependent on is life – although we should not speak of dependence, but rather of prerequisite. Life is the *sine qua non* of ontological dignity. It does not influence the amount of ontological dignity, but its very existence. Life is like an on/off-switch; a living human being has ontological dignity, a dead human being does not and cannot have ontological dignity.²⁶⁰ Human life is always personal life. Therefore, observantia-respect for a human being's ontological dignity gives the respective human being a passive negative human right to have his life respected. He has this right because it is only by respecting life that we can respect ontological dignity. The first dimension of human dignity thus transfers the high value it stands for to life: observantia-respect for ontological dignity is nothing else than observantia-respect for the high value of personal life and life itself. It is ontological dignity, which is at the heart of the remarkable consensus on the high value attributed to human life (as adumbrated in chapter 1.1.1.2) and which results in the human right, to have one's life respected. This right, however, has a twofold nature: it not only is the foundation of the human right to life and the correlative precept 'thou shall not murder', but also the principle to not harm anyone ('*neminem nocere*'), whereby harm is to be understood as harm to one's life (and not e.g. to one's possessions). It contains both the right of every human being not to be deprived of his life ('right to life') as well as the right to preserve the integrity and value of his personal life ('right to live'). In conclusion, the first dimension of human dignity grounds the human right to have one's life observantia-respected, which in

²⁶⁰ This, however, only proves that human corpses do not exhibit ontological dignity. However, it does not necessitate the conclusion that human corpses do not have any dignity at all. Such special dignity of a dead body, which requires us to treat it in a certain way (by e.g. forbidding the desecration of corpses) is e.g. argued for in the Catechism of the Catholic Church (1993: 2300 (Part III, Section 2, Chapter 2, Article 5)).

turn contains such primary and fundamental rights as (cf. Seifert, 2003: 69)²⁶¹:

- The human right to life: The right not to be deprived of one's life
This right includes the inviolability of life and prohibits all murder/homicide, including abortion and euthanasia. It does, however, not automatically and necessarily include the right to not be killed. The right to not be murdered refers to cases of killing not justified by commutative justice or 'restitutio'. The right not to be killed would, in contrast, imply that killing is never permissible, even in cases of a just war.
- The human right to live: The right to preserve the integrity and value of one's personal life
This right e.g. includes
 - the right to be treated as an end and not a mere means (cf. Kant, 1785: Ak 429 as well as 433)
 - the right not to be abused, either sexually or in other ways (which prohibits embryonic stem cell research)
 - the human right to be treated humanely

As I have posited at the beginning of this chapter that a right to health can be derived from the human right to have one's life respected, we now have to bridge the gap between the rights developed above and health. So, how does health fit into the picture? As has been stated above (cf. chapter 1), health and life are interrelated in a complex fashion. While health and life are not equivalent, health is both a qualitative aspect of life (life in perfect health is life in higher quality than life in normal health or unhealth) as well as instrumental to the preservation of life (lack of health

²⁶¹ Also cf. Maritain (1943: 37): "The human person has rights because of the fact that it is a person, a whole, a master of itself and its acts and which, consequently, is not merely a means to an end, but an end, an end which must be treated as such. [...] by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are owed to a man because of the very fact that he is a man."

can end life and cause death). Given this relation between health and life, health fits both the right-to-life-aspect as well as the right-to-live-aspect of every person's human right to have his ontological dignity and thus life observantia-respected.

As far as the right-to-life-aspect is concerned, a person can be deprived of his life directly (e.g. being murdered by a single gunshot), but he can also be deprived of his life indirectly (e.g. harming his health in a way, which will eventually lead to death and which could be considered gradual murder).²⁶² A certain minimal amount of health (which must not be under-run) and a certain maximum degree of unhealth (which must not be over-run) are the sine qua non for the continuation of personal life. The human right to life, therefore, also and at the very least includes the derivative right to a certain minimal level of health, i.e. the right not to have one's health harmed in a way which might – directly or indirectly – lead to death. If something we do to a person unjustifiably makes this person fall below the minimal health-threshold required for survival, this must be considered a violation of a person's human right to life.²⁶³

But the human right to have one's ontological dignity observantia-respected does not only forbid actions, which harm a person's health in a lethal fashion but also concerns its right-to-live-aspect – an aspect, which is not about a person's very survival, but about his survival and living without harm and in integrity. As the etymology of the word 'health' has revealed (cf. chapter II) health is about living in integrity. Harming somebody's health – even without lethal consequences – amounts to doing harm to the integrity of life and to a violation of every person's right to have his life, its high value and its integrity observantia-respected. Consequently, any harm to a person's health has to be considered a

²⁶² Such scenario e.g. includes cases of A slowly poisoning B or of A infecting B with an eventually lethal virus or of A exposing B to an eventually lethal amount of radioactive radiation.

²⁶³ Interestingly, Spirago (1898) includes health in his discussion of the fifth commandment ('Thou shalt not murder.') and therefore corroborates our line of reasoning: "Wir sind verpflichtet, alles zu unterlassen, was die Gesundheit oder das Leben des Nächsten zugrunde richten könnte" (Spirago: II, 94).

violation of life's integrity and the human right to observantia-respect towards one's life.

To sum up: The strict-sense human right to have one's ontological dignity respected equals the human right to life. From this right to life we can – besides the right, not to have one's life taken directly – deduce the right not to have one's life taken indirectly by having one's health violated in an eventual lethal fashion as well as the right not to have one's integrity of life in general violated by having one's health harmed. But, what kind of rights are these rights to health, which are derived from the human right to life? It should be obvious that we cannot classify them as human rights. As has been established above, health cannot be a human right, because it has no influence on a person's ontological dignity; the only factor, which influences ontological dignity, is life. Furthermore, human rights are those moral rights of human beings, which are justified with reference to the dignity of human beings. However, the rights to health outlined in the preceding paragraphs are not justified with reference to dignity, but are deductions and interpretations of the strict-sense human right to have one's life observantia-respected (which in turn is justified with reference to ontological dignity). Therefore, they cannot be human rights. But, even though they are not human rights, they are still moral in nature as they are derived from a moral right. As moral rights, they can only be a passive negative claim-right in rem or in personam. The question, whether they are in rem or in personam rights, can be settled rather easily: they are both. Human rights are rights held against everybody; they are thus in rem by nature. This, however, makes them in personam, as well; if a right is held against everybody, it is also held against any specific group, which necessarily is a part of 'everybody'. A right in personam is a subset of and logically included in a right in rem. As the right to life and the right to live are derived from a human right (which is in rem and in personam by definition), they are in rem as well in personam, too. In order to keep things simple, I take the liberty of neglecting the in rem/in personam-distinction and speak only of rights in rem. The rights to life and live are moral passive negative claim-rights in rem, which amounts to saying that they are moral passive rights with a corresponding duty of forbearance. But, since they are negative rights, they cannot be rights to the

establishment of a health care system, to treatment or to the restitution of a perfect or at least normal state of health. They only establish that a person's health must not be harmed, i.e. made worse, but not that it must be improved. Understood like this, the two moral rights to health deriving from the human right to life can be combined. In fact, they are not two distinct rights (one against lethal harm to life by means of harm to health and one against any other form of harm to health) but only one, namely the passive negative claim-right in rem not to have one's health harmed in any way (as this includes the right against lethal harm to life by means of harm to health).

Having established this, there is one last step to take: we have to clarify which aspects of health this moral passive negative claim-right to health in rem actually comprises. We have heard that health is a norm, a state as well as a habit. I do not think that it makes sense to think of the passive negative claim-right in rem to not have one's health harmed in any way as a right to health as norm; I do not even know what such a right would actually look like. We can thus exclude this dimension of health from our considerations. What about health as state and habit? To my mind, the latter can be excluded, too. Health as habit refers to the dispositions underlying a person's directly or at least indirectly influenceable health behaviour and which make him behave and act healthy. A passive negative right to health – and this is the right to health just introduced – does not, however, fit the idea of 'habit'. A passive right is a right of reciepience, whereas the reciepience consists in some negative forbearing action. In contrast, a habit necessarily implies an active principle; it is about acting and behaving. Health as habit and the concept of a negative claim-right are incommensurable. The right compatible with the notion of 'habit' would rather be some sort of liberty-right. We can, therefore, confidently leave aside health as habit, too. The last remaining dimension for our right to health is health as state. And this dimension is a fit: as has been said, the moral passive negative claim-right to health in rem identified above is the right not to have one's health harmed. Harm, however, always implies the worsening of some state; harm to health means that a person's state of health is worsened. The right to health grounded in the right to life thus is the moral passive negative claim-right in rem not to have one's state of

health harmed or worsened. How can one's state of health be worsened? As has been said above (cf. chapter 2.3.1), health as state depends on the so-called determinants of health, some of which can be influenced (directly or indirectly) and some of which cannot (whereas the influenceable determinants are referred to as health behaviour, which in return is dependent on health as habit). Since health as habit – and thus health behaviour – is not covered by the right in question, this right can only cover the uninfluenceable determinants of health.²⁶⁴ It is the right that those who have an influence on, shape or manage those determinants of health, which the individual right-holder cannot influence, exert their influence in a way, which is at least less harmful to the individual right-holder's health as state as if such influence had not been exerted. In consequence, the moral passive negative claim-right in rem to health as state (i.e. the moral passive negative claim-right not to have one's state of health worsened) is the right not to have one's health harmed by the behaviour, actions (including inaction) or decisions of those, whose behaviour, actions or decisions have an influence on those determinants of health, which cannot be influenced by the right-holder. Consequently, it corresponds with the duty on part of those, whose behaviour, actions or decisions have an influence on those determinants of health, which cannot be influenced by the right-holder to exert this influence in a way, which does not harm or worsen the right-holder's state of health. Put differently: those whose behaviour, actions or decisions have an influence on those determinants of health, which cannot be influenced by the right-holder must not engage in or choose behaviours, actions or decisions, which harm or worsen the right-holder's state of health.

I am well aware that this result seems to be rather complicated and deserves deeper treatment; nevertheless, I deem the discussion sufficient for our purposes. Any further immersion would lead us astray and further away from the core topic of this book. I thus ask the reader to content himself with what has been said in this chapter.

²⁶⁴ 'Uninfluenceable' does not mean that they cannot be influenced at all but only that they cannot be influenced by any single individual right-holder.

3.2 A Moral Right to Health grounded in the Duty to Health

Some pages above, it was stated that it is also possible to conceive of health as a moral right grounded in duty. After having successfully attempted to justify a moral right health by deriving it from the human right to have one's life observantia-respected, I shall now outline an argument proposing that a moral right to health can be justified by reference to the concept of duty. In order to do so, I take the liberty of reminding the reader of the fact (cf. chapter 2.2.1) that a certain form of moral claim-right – to be precise: a moral negative claim-right – can be justified with reference to a pre-existing moral duty. A duty logically and always implies the negative claim-right, i.e. one of non-interference, on part of the duty-bearer to do what is necessary to fulfil his duty.²⁶⁵ So, although there is no such thing as a human right to health grounded in dignity, there still might be a negative moral claim-right to health grounded in a moral duty to health. In order to establish a moral right to health (which necessarily is a negative moral claim-right), we have to first find an answer to the question, whether there is such a thing as a duty to health. The idea and belief that there is, has a long history (cf. Reiser, 1985; Sigerist, 1996) and has played an important role in medicine and philosophy alike until today. In his essay 'The Responsibility of the Individual', John Knowles (1977)²⁶⁶ broke a lance for health as a duty: if individuals accepted their responsibility for prudent health choices, societies "would be strengthened immeasurably, and we could divert our

²⁶⁵ The negative claim-right to fulfil one's duty must not be confused with the claim-right corresponding to a perfect duty; such a right exists for both perfect as well as imperfect duties.

²⁶⁶ This is a side-note for those who are familiar with Knowles' article: While I agree with Knowles' analysis of an exaggerated individualism and lack of emphasis on personal responsibility when it comes to health, I do not agree with some of his suggestions of how to keep national health systems' down, such as selected abortions.

energies – human and financial – to other pressing issues of national and international concern” (Knowles, 1977: 75). According to Knowles,

“the idea of individual has been submerged to individual rights – rights, or demands, to be guaranteed by government and delivered by public and private institutions. The cost of sloth, gluttony, alcoholic intemperance, reckless driving, sexual frenzy, and smoking is now a national, and not an individual responsibility. This is justified as individual freedom – but one man’s freedom in health is another man’s shackle in taxes and insurance premiums. I believe the idea of a ‘right’ to health should be replaced by the idea of an individual moral obligation to preserve one’s own health – a public duty if you will. The individual then has the ‘right’ to expect help with information, accessible services of good quality, and minimal financial barriers.”(1977: 59)

In what follows, I want to take up Knowles’ general statement of health as duty²⁶⁷ and offer an account of a duty to health as moral duty based on natural law theory – a theory which can be traced back to ancient ideas on natural morality as found in Aristotle or Cicero, for example, and whose key theorist is St. Thomas Aquinas²⁶⁸. According to Murphy (2008), natural law theory is a “label that has been applied to theories of ethics, theories of politics, theories of civil law, and theories of religious

²⁶⁷ Knowles’ statement holds that health is owed to the public because it is the public which – based on a social contract and insurance mechanisms – has to pay for the consequences of an individual’s unhealth. This argument, however, is slightly flawed when it comes to establishing health as a moral duty; the only kind of right that such reasoning can establish is a conventional or positive right.

²⁶⁸ Mark Murphy (2008) even considers St. Thomas Aquinas’ theory of natural law as the hallmark for every other theory: “It would seem sensible [...] to take Aquinas’s natural law theory as the central case of a natural law position: of theories that exhibit all of the key features of Aquinas’s natural law view we can say that they are clearly natural law theories; of theories that exhibit few of them we can say that they are clearly not natural law theories; and of theories that exhibit many but not all of them we can say that they are in the neighbourhood of the natural law view but nonetheless must be viewed as at most deviant cases of that position.”

morality”. Before we proceed, we have to clarify this book’s understanding of ‘natural law’.²⁶⁹

3.2.1 A Primer on Natural Law Theory

In order to understand what is meant by ‘natural law’ we have to first gain an idea of what St. Thomas Aquinas names “lex aeterna”, i.e. eternal law (cf. I^a-IIae q. 91 a. 1 and q. 93). Based on his proof that the world as well as the whole community of the universe is ruled by the reason and providence of God (as He is the cause of its being; cf. I^a q. 22 a. 1 and 2), St. Thomas Aquinas concludes that God has an idea by which He governs his creation. Everything is subject to His idea for the governance of things, which also serves as the end toward which things are ordered.²⁷⁰ This idea is the eternal law; the eternal law “nihil aliud est quam ratio divinae sapientiae, secundum quod est directiva omnium actuum et motionum” (I^a-IIae q. 93 a. 1 co.), i.e. is nothing else than the reason of divine wisdom or the divine reason of God²⁷¹ according to which all actions and movements are directed. Divine reason and eternal law orders all things of the universe to their end. As such, the eternal law comprises all physical and metaphysical laws by which the universe is ordered and, consequently, is the measure of all other laws, too: “in temporali lege nihil est iustum ac legitimum, quod non ex lege aeterna homines sibi derivaverunt” (cf. I^a-IIae q. 93 a. 3 co.). Finnis sums up St. Thomas Aquinas’ teachings on the eternal law as follows:

²⁶⁹ According to St. Thomas Aquinas there are four kinds of law (cf. I^a-IIae q. 91): eternal, natural, human and divine. Since only eternal and natural law are relevant to the argument presented here, I shall not elaborate on human law (i.e. positive law; cf. I^a-IIae q. 91 a. 3 and q.95) nor divine law (which is concerned with those standards that must be satisfied by a human being to achieve eternal salvation; cf. I^a-IIae q. 91 a. 4 and q. 98-108).

²⁷⁰ This ordering is called divine government and God’s plan of government divine providence.

²⁷¹ St. Thomas Aquinas even holds that the eternal law is God itself (cf. “nec eius lex est aliud ab ipso” (I^a-IIae q. 91 a. 1 co.))

“God envisages and freely chooses the whole order of things, prescribing (so to speak) that order by impressing its principles (the ‘laws of physics’, the ‘laws of logic’, and so forth) onto or into the various orders of created entity and process. And this act is to the common benefit of the whole (and thus of its parts). So we can think of this supreme act of government as legislative, and its rational content as a law which, like its author, is timeless (even though that content is freely chosen, not necessary, and regulates creatures which are all within time).” (Finnis, 1998: 307)

Having understood this, we are now in a position to determine what is meant by ‘natural law’ (also cf. Messner, 1960 as well as Maritain, 1998: 84ff). St. Thomas Aquinas conceives of man and all creatures as governed by final causes or ends (their essence or nature), which they naturally seek and which are implanted in them by their Creator. They derive their proper ends (final cause) and thus acts from the eternal law that is written into their nature. Non-rational creatures actively seek their proper ends out of instinct; but although man has proper ends, too, his reason gives him the freedom to act against them. Man differs from any other being “in hoc, quod est suorum actuum dominus [...] per rationem and voluntatem” (I^a-IIae q. 1 a. 1 co.), i.e. therein that he is master of his own acts by means of his reason and will. Man is not only passively subjected to eternal law²⁷², but can actively partake of a share of Divine providence by being provident both for himself and for others (cf. I^a-IIae q. 91 a. 2 co.). Reason allows man to act and choose freely and he can do so according to his nature or against it.

Natural law (cf. I^a-IIae q. 91 a. 2 and q. 94) is comprised of those precepts of the eternal law, which govern the behaviour of beings endowed with reason and free will and which are meant to keep man from acting against his nature. It, therefore, is not different from the eternal law, but the part of the eternal law, which is applicable and inherent to rational human

²⁷² cf. Murphy (2008): “Nonrational beings have a share in the eternal law only by being determined by it – their action nonfreely results from their determinate natures, natures the existence of which results from God's will in accordance with God's eternal plan.”

beings. In this sense, natural law can be said to be the participation of the eternal law in the rational being: “*participatio legis aeternae in rationali creatura lex naturalis dicitur*” (I^a-IIae q. 91 a. 2 co.). Man partakes somewhat of the eternal law of God by its being imprinted on him. As something to which man must conform himself if he is to realise his proper end as human being natural law “constitutes a set of naturally binding and knowable precepts of practical reason” (Murphy, 2008; also cf. I^a-IIae q. 94 a. 4 as well as 6). Maritain adds that natural law is “an order or a disposition that the human reason may discover and according to which the human will must act to accord itself with the necessary ends of the human being” (Maritain, 1943: 35). The core of natural law theory is the claim that precepts of morality are in some sense derived from or entailed by the nature of the world and the nature of human beings; natural law is “*das allgemeine Gesetz, das sich aus der von Gott geschaffenen Natur des Menschen ergibt*” (Hüntelmann, 2007: 5). Seifert (2004: 76) shares this understanding: “The fact that we are not God, that we are not the Creator of life and that we are not lords over life and death, in other words, our metaphysical situation and metaphysical limits, impose special moral calls and obligations on us.”

Natural law does not say that certain actions or behaviours are in accordance with man’s nature, are thus good for him and that he consequently has a right to them. Although this is how most modern law theorists conceive of natural law (Oderberg (2004) calls this line of thought an agent-centred/static natural law theory), this position – unfortunately – gets it wrong. The core message of natural law is that everything has a final cause and that – as rational and free beings – we are to act and behave according to that final cause: “*praeceptum legis, cum sit obligatorium, est de aliquo quod fieri debet. Quod autem aliquid debeat fieri, hoc provenit ex necessitate alicuius finis*” (I^a-IIae q. 99 a. 1 co.), i.e. a precept of law, since it is obligatory, is about something, which must be done; and that something must be done, arises from the necessity of some end. Instead of being primarily concerned with moral rights, natural law “lays down our most fundamental duties” (Maritain, 1998: 95). It imposes “upon the rational creature the obligation of living in conformity with his nature, and thus with the universal order established by the Creator” (Fox, 1910).

Furthermore, it “constitutes a set of naturally binding and knowable precepts of practical reason” (Murphy, 2008; also cf. I^a-IIae q. 94 a. 4 as well as 6). And finally, it is “an order or a disposition that the human reason may discover and according to which the human will must act to accord itself with the necessary ends of the human being” (Maritain, 1943: 35). The core of natural law theory, therefore, is the claim that precepts of morality are in some sense derived from or entailed in the nature of the world and the nature of human beings. Generally speaking, natural law obliges us to employ the necessary means to obtain an end, which must be obtained, namely our end as human beings, which has been determined by our Creator. We have to become what we are. Man is granted moral rights as he is under a moral duty to fulfil and live according to his nature and the resulting precepts; we have moral rights to perfect our essence as we have a duty to do so. But, what does natural law actually ask from us? What are our natural and thus moral duties?

Although there are different levels of precepts or commands entailed in the natural law, “radically, the natural law consists of one supreme and universal principle, from which are derived all our natural moral obligations or duties” (Fox, 1910). This first principle or precept is based on the insight that “bonum habet rationem finis” (I^a-IIae q. 94 a. 2 co.), i.e. that good has the nature of an end. If what is good for man has the nature of his end and if natural law commands us to realise our end, this allows for the conclusion that we are to realise what is good in general as well as what is good for us: “Das Gute schlechthin ist demnach die einem Dinge gemäße Vollkommenheit” (Messner, 1960: 35) – whereas perfection (‘Vollkommenheit’) is to be taken in an ontological rather than a moral sense²⁷³. Consequently, the first precept of law – which St. Thomas Aquinas takes as self-evident and indemonstrable (“per se nota” (I^a-IIae q. 94 a. 2 co.)) as the principle that the same thing cannot be affirmed and denied at the same time²⁷⁴ – commands that “bonum est faciendum et

²⁷³ Also cf. St. Thomas Aquinas: “In hoc enim consistit uniuscuiusque rei bonitas, quod convenienter se habet secundum modum suae naturae” (I^a-IIae q. 71 a. 1 co.).

²⁷⁴ This does not mean, however, that such precepts are innate or “data-less intuition, or felt certainties, or that one cannot be mistaken about them, or that they cannot be

prosequendum, et malum vitandum” (I^a-IIae q. 94 a. 2 co.; also cf. II^a-IIae q. 79 a. 1), i.e. that good is to be done and pursued and that evil is to be avoided.²⁷⁵ These considerations can be summarised by a three-word formula, which captures the essence of natural law theory: good implies ought. However, as St. Thomas Aquinas realised and as Murphy (2008) rightly points out, “no one can in acting simply pursue good – one has to pursue some particular good”. If we are to pursue good, we have to know what it is first; the first precept has to be specified and operationalised. But, what we are looking for is not just what is good in an instrumental sense, but what is good intrinsically.²⁷⁶ So, what is good for its own sake? Throughout history, many natural law theorists have undertaken the task of formulating and suggesting a list of intrinsic goods or “*existentielle Zwecke*” (Messner, 1960: 39). In what follows, I want to give a short overview of several of these lists of basic and intrinsic goods, which are to be pursued (also cf. Oderberg, 2004: 129 as well as Murphy, 2008):

- St. Thomas Aquinas (I^a-IIae q. 94 a. 2 and a. 3; also cf. Finnis, 1998: 80ff as well as Messner, 1960: 39f): life (preservation of being), procreation (“*coniunctio maris et feminae, et educatio liberorum, et similia*” (I^a-IIae q. 94 a. 2 co.)), knowledge, love and

defended by rational considerations” (Finnis, 1998: 87). Rather, it means that they are not deduced from some more evident proposition but that they are based on experience (cf. Finnis, 1998: 88f; Messner, 2004).

²⁷⁵ This precept deductively unfolds in a variety of derivative precepts, such as ‘man must not harm anyone’ (“*nulli debet homo malefacere*” (I^a-IIae q. 100 a. 3 co.)), the precept of charity (“*Gottes- und Nächstenliebe*”; I^a-IIae q. 99 a. 1 ad 2; “as to love a person volitionally (not simply emotionally) is to will that person’s good” (Finnis, 1998: 127)) or the golden rule (I^a-IIae q. 99 a. 1 ad 3), which merely is an explanation of the precept of charity.

²⁷⁶ What is intrinsically good – as opposed to extrinsically or instrumentally good – is good for its own sake, in itself, as such or in its own right “as opposed to being valuable *for the sake of something else* to which it is related in some way” (Zimmerman, 2007). Intrinsic and instrumental goods are not mutually exclusive categories, since some things can be both good as such as well as for something; such goods are then called mixed good.

worship of God ('Gottesliebe'), living in society and furthering the harmonious and peaceful functioning of society ('Nächstenliebe'), developing our rational and moral capacities by growing in the virtues.

- William K. Frankena (1973: 87f): life, consciousness, and activity; health and strength; pleasures and satisfactions of all or certain kinds; happiness, beatitude, contentment, etc.; truth; knowledge and true opinions of various kinds, understanding, wisdom; beauty, harmony, proportion in objects contemplated; aesthetic experience; morally good dispositions or virtues; mutual affection, love, friendship, cooperation; just distribution of goods and evils; harmony and proportion in one's own life; power and experiences of achievement; self-expression; freedom; peace, security; adventure and novelty; and good reputation, honour, esteem, etc.
- John Finnis (1982: ch. IV): Life; knowledge; play; aesthetic experience; sociability or friendship; practical reasonableness; religion.
- Germain Grisez (1983: 121f): self-integration; practical reasonableness; authenticity; justice and friendship; religion; life and health; knowledge of truth; appreciation of beauty; playful activities.
- Timothy Chappell (1998: ch. 2): Life; truth, and the knowledge of truth; friendship; aesthetic value; physical and mental health and harmony; pleasure and the avoidance of pain; reason, rationality and reasonableness; the natural world; people; fairness; achievements; the contemplation of God (if God exists).
- David S. Oderberg (2000: ch. 2): Life; knowledge; friendship; work and play; the appreciation of beauty; religious belief and practice.
- Mark C. Murphy (2001: ch. 2): Life; knowledge; aesthetic experience; excellence in play and work; excellence in agency; inner peace; friendship and community; religion; happiness.
- Alfonso Gómez-Lobo (2002: ch. 2): Life; the family; friendship; work and play; the experience of beauty; knowledge; integrity.

- Martha C. Nussbaum (2006: 76f): Life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; control over one's environment.

These basic goods represent the ends or goods to which all human activity is directed and which are desired and valued for their own sake and not merely as a necessary means to some unspecified and freely chosen end. As one can see, there is agreement on some items of the list of goods (e.g. life and some form of knowledge or reason), but, unsurprisingly, there is also quite a bit of disagreement (e.g. inner peace or emotions). As this is not the place to settle the dispute over the final contents of a list of intrinsic goods and ends, I shall not dwell any further on this subject. Luckily, I do not have to do so, since the aspect that I shall use for further argumentation is one, which all authors agree upon, namely life. We can thus put on record, that natural law theory establishes that life is an intrinsic good; and as the good has the nature of an end and as natural law demands that we realise our end, we are, therefore, under a pre-conventional and pre-positive duty to realise life. This amounts to saying that we have a moral duty to preserve life and to avoid doing anything that has a detrimental effect on it. In what follows, I shall argue for the position that a moral duty to health can be deduced from the just mentioned duty to life.

3.2.2 Natural Law and Health

As has been mentioned several times, life and health are inextricably linked. Health and unhealth only happen within and are confined to an individual's lifetime; without life, there is no health. On the other hand, health is an attribute or quality of life, which, if lacking, can lead to death. Therefore, health – as no one will doubt – is a good, which is instrumental to the preservation of life as well as of a life in integrity. As such, the instrumental good, which is health, is included in the intrinsic good, which is life, as well as the duties related to the latter. If we are under a moral duty to preserve life and not to harm it, we are also under a moral duty to preserve health and not to harm it. If we are to preserve life in general, we

are to preserve our own life as well; if we are to harm no one in general, we are also not to harm ourselves. Consequently, if we are to be concerned about ourselves, we are to preserve and not harm our health. The duty to health, therefore, is a direct outflow of the duty to life, i.e. the preservation of being.²⁷⁷

The moral duty to health is tantamount to a behavioural constraint to preserve or bring about health and hence prescribes only to engage in actions, which have a health-neutral or health-supporting outcome.²⁷⁸ It is, therefore, the same as the moral duty to stay or become healthy. Being under such a duty requires an agent to not engage in actions, which lead to health-damaging outcomes and is equal to the moral duty to avoid unhealth, i.e. to not get unhealthy or, in case one is already unhealthy, to become healthy again. Furthermore, having a duty to ϕ means not to have a liberty to not ϕ . If A has the duty to wash B's car, he does not have the liberty to not do so; similarly, if one has a moral duty to rid one's lifestyle of threats to one's health, then one does not have a liberty-right to unhealth.

Health, as has been previously established, has three aspects and can be understood as habit, state or norm. To my mind, the duty to health is primarily concerned with health as habit and consequently partially with health as state. In order to understand this, we have to remind ourselves that health as state is brought about by the uninfluenceable determinants of

²⁷⁷ According to Knowles (1977), the next major advances with respect to the health of our societies will be determined by what a person is willing to do (both for himself, as well as for society), i.e. whether he acknowledges the fact that health is his individual duty. If he is not willing to do anything, he should stop complaining about the steadily rising costs of medical care and the disproportionate share of the GNP that is consumed by health care. "This is his primary critical choice: to change his personal bad habits or stop complaining." (Knowles, 1977: 78) We can either remain the problem or become the solution to it. At the end of the day, health care systems are only as good as the people inhabiting them.

²⁷⁸ And in doing so, at least observe the set of simple prudent rules relating to sleep, exercise, diet, weight, drugs (e.g. alcohol and smoking), stress and regular medical examination and screening procedures as outlined in chapter I. 2.3.2.

health (uninfluenceable salutogens and pathogens) as well as health behaviour (behavioural salutogens and pathogens or determinants) that is the result of health as habit. As ought implies can, the duty to stay healthy can only extend to that aspect of our health status that we have actual control over, namely our health behaviour, which in return depends on health as habit. Since we have no direct or indirect control over the salutogens and pathogens we cannot influence, the only duty we can perform is to adapt our health behaviour and thus health as habit in such a way that preserves our health and does not harm it. Given these preconditions, the moral duty to health – understood as individual duty – is a duty to health as state in a partial sense, namely that aspect of health as state we are responsible for and can influence by health as habit and our resulting behaviour. As far as the third aspect of health is concerned, it would not make any sense to speak of a moral duty to health as norm (at least I do not see where the sense would be) or a moral duty to health as state in an all-out sense, since our health status is never under our complete control.²⁷⁹

As stated above, a moral duty logically and always implies the moral negative claim-right on the part of the duty-bearer to do what is necessary to fulfil one's duty. In the preceding paragraphs, it has been established that health is an individual moral duty to adapt one's health habit in a way, which is (at least) not detrimental to one's health; it is thus a duty to health as state in a partial sense. Now, if one is under the moral duty to stay healthy or become healthy, this means that one has the moral negative claim-right to actually do so. And because there is such a duty, there is such a right also. Trying to ground a moral right to health in natural law theory has yielded the result that there is a moral negative claim-right to health as habit grounded in the duty to health as habit.

This conclusion allows us to go one step further. The moral negative claim-right to health as habit is justified as the right to fulfil one's duty to

²⁷⁹ As far as the positive/negative-specification of this moral duty is concerned, it is hard to say, which category this duty belongs to. Preserving or restoring one's health can require taking both positive and negative action.

health as habit; but does that mean that the moral duty necessarily corresponding to the moral negative claim-right to health as habit is the duty to health as habit? No, it does not. The duty corresponding to the moral negative claim-right to health as habit is different from the duty it is grounded in. The duty to health as habit, which has been identified with reference to natural law theory might be the justificatory mechanism, but it does not say much about the content of and the duty corresponding to the moral negative claim-right to health as habit it grounds. So, what can we say about the duty corresponding to the moral negative claim-right to health as habit? First of all, we know that it is a duty of forbearance. But who is to abstain from action? Who are the duty-bearers? That it is other persons, who must be the duty-bearers, and not the right-holder himself, should be rather obvious. This is so, since the duty to health as habit cannot be characterised as a merely negative duty of forbearance, but requires active shaping of one's life and behaviour; this contradicts the very idea of a negative duty. Such a claim-right must be held against other people. The moral negative claim-right to health as habit should thus be considered a moral negative claim-right in rem, which entails that others refrain from interfering with the performance of one's moral duty to health as habit. This means that others must refrain from interfering in those right-holder's habits, behaviours and actions, which better his health status (while, of course, not harming the health status of others).

3.3 The Moral Right to Health: A Summary

Despite that fact that health cannot be conceptualised as a human right, i.e. a moral right held by all human beings, which is justified with reference to ontological dignity, this chapter has nevertheless come to a reconciliatory conclusion (especially for those who were disappointed by the answer to this book's research question). The reconciliatory result consists in the finding that there are two ways of establishing health as a moral right, i.e. a right, which is not justified with reference to dignity: we can either conceive of it as derivative from the human right to life or we can conceive of it as being derived from the moral duty to life and health – whereas both rights are independent of each other.

I must, however, caution the reader that the rights thus established above are merely moral negative claim-rights, i.e. rights to be left alone, but cannot be used for any arguments aiming at positive or welfare duties.²⁸⁰ In particular, the two moral rights to health can be spelled out as follows:

- The moral negative claim-right in rem to health as state deriving from the human right to life gives the right-holder the following claim-right: those whose behaviour, actions or decisions have an influence on those determinants of health, which cannot be influenced by the right-holder, must not engage in or choose behaviours, actions or decisions, which harm or worsen the right-holder's state of health.
- The moral negative claim-right in rem to health as state deriving from the moral duty to life and health as habit gives the right-holder the claim-right that others refrain from interfering with the performance of one's moral duty to health as habit.

The latter right aims at the directly and indirectly influenceable determinants of health, while the former aims at the uninfluenceable determinants of health. In combination, both rights give the right-holder a moral negative claim-right to health as state and all its determinants.

²⁸⁰ That health cannot be a positive claim-right has also been seen by Kass(1985: 183):“It no more makes sense to claim a right to health than a right to wisdom or courage. These excellences of soul and body require natural gift, attention, effort and discipline on the part of each person who desires them. To make my health someone else's duty, is not only unfair; it imposes a duty impossible to fulfil. [...] The theory of a right to health flies in the face of the good sense, serves to undermine personal responsibility and, in addition places obligation where it cannot help and be fulfillable.”

4 Epilegomena: Concluding Remarks and Implications

“It is not enough for peace and concord to be preserved among men by precepts of justice, unless there be a further consolidation of mutual love.”

St. Thomas Aquinas (ScG, lib. 2 cap. 28 n. 3)

This book has set out to find an answer to the question of whether – assuming that human rights are the moral rights of all human beings of all times and are directly grounded in human dignity – health can be conceptualised as a human right from a philosophical perspective. As our enquiries have shown, the answer to this question is that health cannot be a human right. Health has nothing to do with that aspect of our dignity, which alone is capable of grounding unconditioned human rights, namely ontological dignity. Stating the opposite would be wishful thinking or an empty political formula and would mean to arbitrarily neglect philosophically sound evidence to the contrary. The stipulation that “health is a fundamental human right” (CESCR, General Comment No. 14), which “derive(s) from the inherent dignity of the human person” (ICESCR, Preamble) is thus – from a philosophical point of view – nonsensical and untenable.

However, our enquiries have also shown that health can be thought of as a moral passive negative claim-right to health as state which combines a moral negative claim-right to health as habit as well as a moral negative claim-right that those, whose behaviour, actions or decisions have an influence on those determinants of health, which cannot be influenced by the right-holder, must not engage in or choose behaviours, actions or decisions, which harm or worsen the right-holder’s state of health. The relationship between health and (moral) rights is, therefore, a multidimensional one. Given its passive negative nature, the moral right to health just mentioned is rather limited in scope; it is not a right to a minimal amount of health or the improvement of health but imposes on the duty-bearers the behavioural constraint to not worsen or harm the health of the right-holder or hinder his salutogenic health habits. Essentially, it is a right to be left alone and cannot be used to demand any positive welfarist action on the part of the corresponding duty-bearer.

These findings do not only open up the space for philosophical discussion, but are also of practical relevance. Accepting the argument developed in this essay must necessarily result in the concerted effort of politicians, philosophers and health care professionals to rethink the foundation of our health care policies and systems as well as the organisation of global health in general. In order to shape them in a sustainable fashion, we need to be aware of what we reasonably owe to each other when it comes to health; and this requires us to comprehend what we are saying when we use words like ‘right’, ‘duty’, ‘dignity’, ‘person’ or ‘health’. Politics must not be a music request programme (‘Wunschkonzert’), which expands the list of human rights in an uncontrolled fashion, but must rather orientate by certain moral guidelines. In addition, if international and national law wants human dignity to be one of these guidelines, it has to aim at understanding the concept of dignity and – once understood – stick to it and its implications. Human rights law can only command moral power if it is not only legally, but also philosophically sound; presently, this soundness is rather doubtful and must be reconstructed. How such reconstruction could look is a salient topic for further research.

Another point worthy of further discussion and research is every person’s duty to health. The existence of this duty forces us to think about ways by which to hold a person morally accountable for violations of this duty and how to attribute the (treatment) costs for unhealth resulting from such violations. Doing so requires an understanding of the relationship and differences between the concepts of duty and responsibility – or as Birnbacher (2001) calls them ‘ex ante responsibility’ (= duty) and ‘ex post responsibility’ (= responsibility). As has been said, a duty is a behavioural constraint, which is meant to regulate our behaviour by prescribing what we ought to do or refrain from doing. However, it does not deprive us of behavioural choices; it is a constraint, but not duress or coercion. We are free to fulfil or not fulfil our duties and in a position to choose from among the various means of fulfilment. Strange as it may sound, a duty implies choice. And where there is choice, there is responsibility, which is nothing

else than bearing the consequences of one's actions and choices.²⁸¹ Subsequent work could apply existing accounts of exemptions from (ex post) responsibility (e.g. Erk (2009b) or Scanlon (1998: 280ff)) to the concept of health as duty: When and under which circumstances can someone be held accountable for his health status and behaviour? When and under which circumstances can someone be exempted from bearing the costs of unhealthy behaviour? These are the questions, which would have to be addressed in such an endeavour. Given our rising healthcare costs, higher burdens of chronic unhealth as well as undeniable and increasing evidence about the contribution of behavioural factors to unhealth, the issue of personal responsibility for health is here to stay and most important.

However – and this is very important – all the talk about rights and duties must not make us forget that rights talk – though important – only captures a fracture of what is important in our moral relationships with each other and runs the risk of compromising the common good. That this is so can easily be seen by the fact that the first hospitals have not been multi-billion dollar enterprises, but institutions of Christian charity (cf.

²⁸¹ Although the terminology varies, philosophers generally think of such moral responsibility as having two aspects. They draw a distinction between responsibility understood as attributability (or “substantive responsibility” in Scanlon’s (1998: 248) or “causal responsibility” in Williams (2009) terms) and responsibility as accountability (or ‘appraisability’ according to some terminologies). The former is concerned with ascribing an agent a causal role in bringing about what is then to be evaluated from the standpoint of accountability, i.e. moral appraisal. (cf. Watson, 1996; Scanlon, 1998: 248ff; Eshleman, 2009). We are responsible in a substantive sense for the outcome and consequences of our actions if and precisely because we have chosen them. This is the burden of the value and significance we attribute to our freedom to choose. However, the fact that somebody has chosen an action and is substantively responsible does not automatically imply ‘responsibility as accountability’. (Nota bene: Instead ‘responsibility as accountability’ Scanlon uses “responsibility as attributability” (Scanlon, 1998: 248).) We can ascribe a chosen action to somebody (i.e. make him responsible in a substantive sense), but still hold that he is not morally blameworthy. For a discussion of these exceptional cases cf. Erk (2009b).

Crislip, 2005), and that the idea of health insurance was not a product offered by a profit seeking insurance company, but has its roots in the mediaeval guild system and the mutual care of a guild's members (cf. Oberender, Hebborn & Zerth, 2002: 20f). What we call 'health system' has formerly not been about rights and claims, but other values, such as charity, friendship, kindness, solidarity and cooperation.

“A line must be drawn between what we can expect and demand from others and what we can merely hope for and receive with gratitude when we get it; duty falls on one side of this line, and other acts with moral value on the other, and rightly so.” (Urmson, 1958: 213)

There might not be any moral positive claim-rights obliging others to give away some of their honestly earned resources, but there nevertheless are other moral motivators, which can goad us to actively help others and voluntarily devote some of our resources to them – actions, which Urmson (1958: 211, 215) calls “higher flights of morality”.²⁸² Maybe living in society is not so much about the rights and duties, but much more about the spirit in which the rights and duties are performed and whether the individuals comprised by it are willing to rise above the moral minimalism, which is expressed by moral rights and duties. We should not aim at maximising rights or at trying to get rid of our reasonably justified duties, but rather try to become heroes and saints.



²⁸² Such actions are usually called ‘supererogatory’ or ‘opera supererogationis’. The term ‘supererogation’ derives from the Gospel according to Luke and its Parable of the Good Samaritan (10, 30-35), where we can read the following sentence: “Curam illius habe, et quodcumque supererogaveris ego cum rediero reddam tibi.” (This translates as: Care for him; and if you spend more than I have given you, I shall repay you when I return.) A supererogatory work is therefore done if one carries out one’s duty in abundance or even super-abundance, i.e. does more than he is obliged to do (also cf. Heyd, 2006).

INDICES

List of Abbreviations

BST	Biostatistical Theory of Health
CESCR	Committee on Economic, Social, and Cultural Rights
e.g.	exempli gratia / example given / for example
ICESCR	International Covenant on Economic, Social, and Cultural Rights
i.e.	id est / this means / that is
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN	United Nations
WEF	World Economic Forum
WHO	World Health Organization

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I ^a -IIae:	Summa Theologiae, Secunda secundae	
III ^a :	Summa Theologiae, Tertia pars	

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