JAKOB WEISSINGER

Content and Competence

Rechtstheorie · Legal Theory
1

Mohr Siebeck

Rechtstheorie · Legal Theory

herausgegeben von

Thomas Gutmann, Tatjana Hörnle und Matthias Jestaedt

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Jakob Weissinger

Content and Competence

A Descriptive Approach to the Concept of Rights

Mohr Siebeck

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Cologne, December 2018 Jakob Weissinger

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I. Methodological Remarks & Clarifications

What is a right? As simple as it may seem at first glance, that is the underlying and overarching question of this thesis. Undoubtedly, we are all familiar from everyday life with the notion of rights. We suppose that we, as human beings, generally have rights, we use them as arguments in normative discourse, we claim them, we argue (sometimes fiercely) about who or what has or ought to have which rights. In short, the language of rights is "pervasive […] in politics, law and morality"[1]. Accordingly, knowing that there are rights as an essential part of our normative practice, at first glance, at least from the point of view of someone inexperienced in legal and moral philosophy, it should not be too hard to clarify what rights actually *are* then. Yet, it is this seemingly straightforward issue upon which philosophers and jurists have failed to reach even a basic agreement literally for ages. Why is that so? Taking a closer look, it is not just the nature of rights, but the nature of the initial question itself that appears problematic. Essentially, we must ask ourselves: does it suffice to confine oneself to the question 'what is a right?' in that form? Are we looking into the nature, the essence of rights then? How can we determine the nature of a normative term like 'rights' anyway? In short, is the epistemological interest specified enough by the initial question to possibly get a clear and meaningful result? Unsurprisingly, to ask this last question is to negate it. The reason for negating it lies not only in the vast amount of literature on the topic itself, sometimes seeming like an impenetrable and dense jungle to any new arrival, but also the fact that in this jungle all sorts of ideas on rights from all sorts of perspectives, scientific disciplines and cultural backgrounds have been lumped in with one another and grown together to make it appear to the interested reader as impermeable as well as opaque.[2] Thus, starting any treatise on rights – arguably, with this topic even more so than in general – it seems absolutely vital to point out very clearly the exact epistemological interest, the aim and method of an endeavour like the one ventured here. To the sophisticated reader with a philosophical background, some of the following remarks might thereby seem self-evident and as such superfluous; yet, hopefully, it can and will be demonstrated that it is flaws and

[1] Tom Campbell, *Rights: A Critical Introduction* (London/New York: Routledge, 2006), 3.

[2] Karl Llewellyn, *The Bramble Bush* (New York: Oceana Publications, 1930), 30: "Rights is a term that drips confusion". Cf. Markus Stepanians, introduction to *Individuelle Rechte* (Paderborn: Mentis, 2007), vii.

inaccuracies in the involvement with these fundamental questions that make quite a lot of current and traditional literature on rights defective. In this respect, to point out the importance of methodological clarity at the beginning of any treatise on rights seems more than just appropriate but actually a vital necessity.

To begin with, the ultimate aim of this thesis will be to formulate a suggestion for a concept of rights which captures the essence of the term and, most importantly, can serve as a common basis for substantive normative debate and theory design due to being *normatively neutral*. We shall look into the meaning of 'normative neutrality' presently. Beforehand, it is important to note that a central aim of this thesis is to thoroughly explore and describe the path which leads to the determination of such a concept. In other words, the goal is not only or primarily to produce an independent concept of rights, but also and especially, to clear the way a bit for future discussions about rights. Hence, this book is supposed to be just as much a work about rights as it is one about the theory of rights. Or, once more figuratively speaking: the main aim is to cut a small swathe through the jungle of rights theory and rights talk. By doing so, this book will at best not only shed a little light on a few of the darker spots in there, but also, by letting some fresh air into some of the denser parts of the forest, let out some heat from a few longstanding debates in the context of rights. Specifically, our interest will be on the debate about the proper concept of rights, focusing on the two major theory families: Interest (or Benefit) Theory and Choice (or Will) Theory.

One more remark before proceeding: The cutting of a swathe straight through a wide range of areas of moral and legal philosophy has the advantage of connecting knowledge that is too often left unconnected, thus enabling us to gain a better theoretical overview. Naturally, it is accompanied by great disadvantages as well, which can only be named and have to be accepted as such. Because the goal is theoretical clarification, synthesis, and exegesis, a number of highly problematic theoretical issues will have to be dealt with throughout this work, and a few self-developed ideas will have to be sketched, most of which cannot be explained to a full or (even vaguely) satisfying extent in a thesis like this. In most parts, highly controversial theoretical issues will be dealt with rather cursorily or even only be touched on *en passant*. Naturally, this might give rise to accusations of superficiality, which are equally naturally hard to rebut. Thus, to a certain degree, I will have to rely on the indulgence of the reader, and especially of all those scholars whose works, though related to the overall topic of rights, I could not incorporate into this thesis.[3] A famous quote ascribed to *Ger-*

[3] In this respect, I share a general aim, if not necessarily the quality of his work, with the great legal theorist Herbert Lionel Adolphus Hart, who in the preface to his seminal book 'The Concept of Law' noted that one of his goals was to "discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain. So long as this belief is held by those who write, little progress will be made in the subject; and so long as it

trude Stein is: "I like a thing simple but it must be simple through complication. Everything must come into your scheme, otherwise you cannot achieve real simplicity"[4]. This somehow dialectical relation between simplicity and complication appears inevitable for our purposes as well. And albeit the aim of this thesis is to simplify the idea of rights, a mere sense of reality forces us not even to try to explain every problem associated with rights. Even though I am fully aware that this might in parts result in a lack of comprehensiveness, we shall nevertheless try to lunge out as far as possible in terms of investigating theoretical problems/disputes linked with the notion of rights and consequently connect the dots. Such a kind of endeavour, despite its obvious weaknesses, is believed to be able to play a valuable part in this – as in any – debate in legal theory.

1. Approaching Rights

Thus, what exactly is our epistemological interest with regard to 'rights'? And how can we distinguish it from other possible approaches? *G. E. Moore* put it in a nutshell when he wrote that generally "in Ethics, as in all other philosophical studies, the difficulties and disagreements […] are mainly due to a very simple cause: namely to the attempt to answer questions, without first discovering precisely *what* question it is which you desire to answer."[5] If as much is true, we should clarify at first what exactly the question is that we are trying to answer.

a) Conceptual versus Justificatory

Thus, let us dwell on the possible concrete aims of a theory concerning rights. In discussing rights, it is widely acknowledged – and often too uncritically adopted, for that matter – that one can and should distinguish between two kinds of approaches: an analytical, conceptual, or meta-ethical one in search for an answer to the question 'what *are* rights?'; and a justificatory, normative one aiming at a satisfactory answer to the question 'what rights *should* there be?',[6] i. e. how a normative system containing rights should be substantively shaped.

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is held by those who read, the educational value of the subject must remain very small." See H. L. A. Hart, preface to *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012 [1961]), vii.

[4] As quoted by Robert Haas, afterword to *What Are Masterpieces*, by Gertrude Stein (New York/London: Pitman Publishing, 1970).

[5] George E. Moore, preface to *Principia Ethica* (Cambridge: Cambridge University Press, repr. 1968 [1903]), vii.

[6] See inter alia: William Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2004), 119; Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, repr. 2002 [1975]), 10; Richard Brandt. "The Concept of a Moral Right and its Function," *The Journal of Philosophy* 80 (January 1983): 29; George Rainbolt, *The Concept*

As indicated above, ours is supposed to be a *conceptual inquiry*[7], i. e. in general we are looking for some kind of definition or explanation of the term 'right'. More precisely, we are planning to find and acquire an adequate understanding of the term 'right' – as in statements like 'A has a right to do X', 'A has a right towards B that B not do Y' or similar ones – which ought to make the term compatible with or viable for any conceivable and coherent substantive normative theory. The general goal of a conceptual inquiry thus understood is as basal as it is vital for any theoretical discourse. It is nothing but terminological clarity, i. e. a clear and commonly agreeable understanding of a central term used in a certain field of interest. The idea is to find and define the term in question in a way so that everyone participating in a substantial discourse can *a priori* agree on its basic meaning. Yet, is this the same kind of endeavour that other scholars undertook, who examined the concept, the meaning or the nature of the term 'rights'? Quite clearly not, as there are various ways to approach 'rights' as a social phenomenon. To begin with, one could approach the term from an empirical, descriptive[8] perspective, analysing only the actual usage of the term. Furthermore, one could be interested in the historical dimension, the tradition and genesis of the term, examining the origins of usage and the way the term developed over time. Finally, one could choose a more philosophical approach and try to acquire the best possible understanding of the term 'rights' in a given social context, i. e. a certain linguistic practice of a certain group of speakers, with the main goal of producing a consistent definition. Are the respective products of these approaches all different kinds of 'concepts'? Accordingly, what exactly is meant by 'conceptual' and what is meant by 'justificatory'? However clearly the distinction between conceptual and justificatory approaches is sometimes stated, it is at least as common in theoretical discourse to assume a blurring of lines between the above-mentioned two levels. For instance, both Choice Theory and Interest Theory are regularly believed to function on both levels alike.[9] Thus, it appears advisable to examine the exact relation between

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of Rights (Dordrecht: Springer, 2006), 14; Neil MacCormick, "Rights, Claims and Remedies," *Law and Philosophy* 1 (August 1982): 356; Jules Coleman, *Markets, Morals and Law* (New York: Oxford University Press, 1988): 33–34; Leif Wenar, "Rights," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/fall2015/entries/rights/. Critical: Andrew Halpin, *Rights and Law* (Oxford: Hart Publishing, 1997): 19–23.

[7] The term 'conceptual analysis' is consciously avoided here, because our aim shall not be a mere *analysis* of the term 'rights', i. e. a decomposition of the factual usage of the term. This thought will be clarified presently. See also below sec. I, fn. 19.

[8] Descriptive in the sense of 'referring to facts', not in the sense of 'normatively neutral', see presently sec. b), aa).

[9] Edmundson, *Rights*, 119 ff. Cf. also Matthew Kramer, "Rights without Trimmings," in *A Debate over Rights*, ed. Matthew Kramer, Nigel Simmonds, and Hillel Steiner (Oxford: Clarendon, 1998), 91 (hereafter cited as *RWT*). Here Kramer claims that every concept of rights at least has some 'thin evaluative stance' to it.

these two levels – the conceptual and the justificatory – and the two respective epistemological questions as a first step.

aa) Definitions: Some Introductory Remarks

Preliminarily, a few brief, and I suppose for philosophers of language unnervingly shallow remarks about definitions or specification of linguistic terms in general appear necessary. Some introductory thoughts, again based on classical remarks by *G. E. Moore*, shall lead the way. In his seminal work 'Principia Ethica' he described three different ways of defining a term:[10] the arbitrary verbal definition, the verbal definition proper and a third one, which he gives no specific name. The arbitrary verbal definition is purely stipulative, not (necessarily) taking into account the actual usage of a term. An example is, 'I define a table as a piece of furniture with a flat top and three legs'. Given the relativity of language, such a definition is possible, of course, but in effect it is more or less senseless. It can be regarded as common sense that language is alive, that it is generally developable, and thus improvable, but also that it is a mere social fact. A definition which entirely loses its reference to the actual usage of the term that is being defined is bound to fail. On the other hand, the aim of a strict verbal definition proper is to describe *only* the actual usage of a term, like in the sentence: "All English speaking persons understand a 'table' as being X." A subset of this kind of definition is the dictionary definition; in our example the Oxford Dictionary defines a table as "a piece of furniture with a flat top and one or more legs, providing a level surface for eating, writing, or working at"[11]. As we can already see in comparison to the arbitrary definition above, this kind of approach bears the advantage that it is properly linked with language as a factual phenomenon. For example, we all know tables with just one leg, which no one under normal circumstances would deny the quality of being a table. However, from mere experience we know that the common usage of a term can often be irregular, by times inconsistent.[12] So, taken for granted that a general aim (if not *the* general aim) of philosophical enquiries is to reduce and at best eliminate inconsistencies in language usage, this kind of definition is not conclusively helpful either, as it only refers to facts irrespective of the correctness or cogen-

[10] Moore, *Principia Ethica*, 8; William Ross, *The Right and The Good* (Oxford: Clarendon, repr. 1973 [1930]), 1.

[11] *Oxford Dictionary*, s. v. "table," accessed December 28, 2016, http://en.oxforddictionaries.com/definition/table.

[12] It appears almost trivial to state that, even with a relatively clear example like this one, there will always be marginal cases. How high does an object have to be to still be qualified as a table? How large does the surface have to be? One does not unduly have to stress his or her imagination to come up with examples in which people could and would most probably disagree about the table-quality of an object. However, these are problems of interpretation of a general definition, not so much of correctness of the definition as such.

cy of a certain concept. In other words, if we simply analyse the factual usage of a term, we may work out certain common features, but we are unable to determine whether the usage was or is sensible in the first place. Finally, *Moore* continues by explaining a third way of defining a term. With this one "we may mean that a certain object, which we all of us know, is composed in a certain manner: (…)."[13] Thus, if we understand this statement correctly, an ideal definition of a term would be equivalent to a conclusive list of all elements (including their interdependent relations) of a certain object – their 'defining' features. Yet, this kind of precision can in practice hardly ever be expected. There will always be objects which could fall under a term but need not necessarily do so. There will always be marginal cases.[14] Once more, not *all* elements of a definition are a matter of controversy. In our example, there are elements in the definition of a table which, I presume, are undisputed amongst all members of a linguistic community. Such 'core features' of a table could for instance be 'an object with a flat top and at least one leg for people to stand or sit at'. So, it is presumed that, when various speakers discuss the features of a table, they might disagree on some features, e. g. the height or the number of legs, whilst they would most probably all agree on the features object, flat top, leg(s) and standing or sitting opportunity.[15] Thus, it appears sensible to divide the definition process into two separate steps: First, one can work out *factual minimum requirements* which the investigated term has to meet, i. e. such conditions which every reasonable speaker of a certain language would still agree upon, leaving aside those conditions that cause or could cause disagreement between different speakers within the same community. If these minimal conditions are found, we have found what we shall henceforth call the *scope*[16] of a term. As an intensional definition[17] the scope is as such not viable for practical usage. For a start, it is merely

[13] Moore, *Principia Ethica*, 8.

[14] Whether something falls under a definition is a matter of interpretation then, a normative task. See esp.: H. L. A. Hart, "Problems of the Philosophy of Law," in *Essays in jurisprudence and philosophy* (New York: Oxford University Press, 1983), 89; John Finnis, *Natural Law and Natural Rights (*Oxford: Clarendon, 1980), 9 ff. Cf. also Timothy Endicott, "The Irony of Law," *Oxford Legal Studies Research Paper* No. 42 (2012), https://ssrn.com/abstract=2091043, 1–3.

[15] As such it is not far from the dictionary definition, see above fn. 11. Even if they were equivalent in this case it would not ruin the more general point, though. In that case the dictionary definition would simply restate the core elements; that is, it would somewhat *incidentally* be just as wide as the scope of the term 'table'.

[16] What is called the scope of a term here should by no means be confused with the similar notion of a prototype, see e. g. Eric Margolis and Stephen Laurence, "Concepts," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/spr2014/entries/concepts/, sec. 2.2. A regular dinner table with four legs would for example most probably be called a prototype of a table (as everyone would agree on the table quality of the object), which does not imply that all tables need to have four legs. The minimal definition is wider. It includes all *possible* understandings of a term.

[17] Cf. Anil Gupta, "Definitions," in *Stanford Encyclopaedia of Philosophy*, ed. Edward

equivalent to the widest *possible* understanding in a given linguistic context, i. e. within a certain group of speakers. Methodologically, we use pure analysis in order to gain the scope. Hence, the scope does not have to rely on any value judgements. It is purely descriptive. As a second, consecutive step we are now able to gain a proper *concept* by evaluating the scope with respect to such quality features that might make it a good – that is, valuable and viable – concept. Thereby we might find additional definitional features for the term in question. Yet, importantly, a concept in this sense does not necessarily have to be narrower than its scope with regard to cases of application. That is, the second evaluative step should not be confused with a critical evaluation of those definitional features which are or could become a matter of controversy or with a decision in these controversies either way. To do as much would mean stipulation. Yet, a concept as presented here merely *can* be stipulative – it does not have to be. In other words, although a concept can be just as wide as the scope and consist of only its necessary core features, there need to be good reasons (or at least *a* good reason) for such a wide concept. Thus, the difference between scope and concept lies not in critical or marginal cases, which, as one may assume, could be excluded by the former and somewhat included by the other, but rather in the way each of the two is won. The scope is won by means of a pure, descriptive analysis of actual language use. It represents the smallest common denominator of various, possibly divergent ways in which a certain term is actually used. Whether this scope makes a good concept is an entirely different matter. In order for something to be a good concept there have to be reasons for why we should apply this concept and not some other one. In case of the scope applied as a concept, it has to be at the very least the pragmatic reason that speakers do not have to adjust their usage of the term (or at least reduce necessary adjustments to a minimum).[18] However, there might be different reasons why another, narrower concept could be preferable. What these reasons are in particular with respect to a concept of rights shall be investigated in much detail in sec. III, 2., e). For now, we shall just establish that the task of gaining a practically viable concept should be divided into two steps: a purely descriptive analysis with the result of gaining the scope of a term, and a subsequent (evaluative) decision for or against a concept, which can but does not have to be congruent with the scope depending on the significance of the reasons voting in favour of the respective concept. The advantages of such a two-step conceptual inquiry[19] as

N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/sum2015/entries/definitions/.

[18] With respect to quality features of a concept of rights this reason represents the feature 'practical adequacy', cf. below sec. II, 2., e), cc), (1).

[19] Cf. above fn. 7. The common term 'conceptual *analysis*' is purposefully not used, because what is proposed is just not a plain analysis, but a methodological approach which is in search of the best possible term to be used as a basis for further (substantive) inquiries. Only to

just described are supposedly evident: It combines positive aspects of both of the first two approaches concerning definitions described by *Moore*. It is evaluative and thus (at least possibly) stipulative, i. e. it is aimed at a somewhat good or better language, and it is not just a delineative inventory. However, due to the prior descriptive, analytical step it is thus only to an extent where inconsistencies and irregularities in language use are ruled out, and the concept still meets the fundamental understanding of a term in everyday usage, i. e. of all relevant speakers involved. Hence, the concept is regenerated with language as a factual phenomenon. Such a bipartite kind of conceptual inquiry takes into account not only the contingency of language, but also its actual existence as an undeniable social fact to cope with.

Importantly, the foregoing remarks do not imply that one should in any case proceed the way proposed here when examining a certain term. It is simply the way we shall proceed in this context. Undoubtedly, there are other possible theoretical designs, other kinds of analyses.[20] Ours is the project of finding a concept which shall serve a specific purpose, namely to structure and linguistically harmonise the debate about rights but without losing connection to language as a factual phenomenon. As such it is presumably most closely linked to *Haslanger*'s notion of an *ameliorative analysis*, combining strictly analytical and evaluative elements.[21] Thereby it is neither strictly descriptive, nor historical, albeit it does not per se disregard historical aspects nor such aspects regarding the term's factual usage.[22] Also it should not be mistaken with the goal of the 'philosophical' approach sketched earlier, in search for a consistent usage of the term, for the best possible understanding in a given context. Such a 'concept' would not have to rely on any kind of evaluative judgement, which represents a decisive difference in comparison to our approach. That is, if consistency were the only criterion to mark the quality of a 'concept', we could reach our goal simply by means of (pure) analysis.[23] Apart from these rather crude explanations, the cogency of the idea of a combination of purely descriptive and evaluative elements in order to reach the goal proposed earlier will have to be axiomatically presupposed for the ensuing work. Unfortunately, a further development of this matter is not possible in this context.

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the degree of implying step (1.1) is this endeavour truly analytical. Beyond that it is evaluative and thereby possibly – even though not necessarily – stipulative.

[20] See e. g. Sally Haslanger, "What Good Are Our Intuitions? Philosophical Analysis and Social Kinds," *The Aristotelian Society* 80 (June 2006). http://www.mit.edu/~shaslang/papers/HaslangerWGOI.pdf, 6 ff. Page reference refers to the online version.

[21] Ibid, 7.

[22] Cf. below sec. III, 2., e), cc).

[23] We shall return to this thought much later, in sec. III, 2., e), dd), when actually making a decision between the merits of Choice Theory and Interest Theory.

bb) The Scope of Rights

Let us transfer the foregoing ideas about the kind of 'concept' we are looking for to our problematic initial question, 'what is a right?' To begin with, we ought to determine the scope of the term 'rights'. In order to do so we need to ask ourselves: What out of all things could possibly be called a right? Like in the example above, we cannot rely on mere prototypes or typical examples.[24] A table with one leg can be a table just as well as one with six or eight legs. Accordingly, we have to examine all the relevant ways in which the term is used and consequently derive the core features by method of elimination. To start with, here are a series of statements containing the notion of 'a right', all of which I presume are most common and recognisable from everyday usage of the term.[25]

(I) I have a right to bodily integrity.
(II) My friend Q has a right not to be insulted by you.
(III) Babies have a right not to be abused or harmed in any way.
(IV) A has a right to claim the money out of a sales contract with B.
(V) C has a right to attend demonstrations and express his opinion on the government.

As our aim is to find those features that every reasonable speaker[26] would agree upon, we can now continue asking: Which possible features of rights can already, only from investigating these examples, be excluded from the scope? Given the statements above were all commonly accepted we can infer:

(1) Rights are not necessarily only active, i. e. regarding one's own actions, see (IV) and (V), but possibly also passive, i. e. regarding the actions of others, see (II) and (III).

(2) The ability to have rights is not necessarily linked with the ability to make one's own decisions, i. e. with moral or legal agency, see (III).

(3) Rights do not even necessarily have to be associated with a certain action, see (II) – (IV), but they can also be abstract, see (I).

What is then left to positively extrapolate from the five rights statements above are three core features, all of which I believe would be agreed upon by

[24] It is questionable whether there are any prototypes for 'rights' at all. Show people a regular dinner table and they will happily agree that they are standing in front of a table. Show them even the most basic statement containing information about a right or rights and they are probably going to argue about it.

[25] Surely, it is possible that singular speakers could disagree at this point. It is impossible ever to exclude this possibility entirely. Our aim is therefore to name certain general and generally accepted cases of applications, which can be regarded as overall accepted and understandable.

[26] Despite its obviously problematic implications, the idea of 'reasonable' speakers will have to be presupposed at this point in order to deduce the respective core features.

both Interest and Choice theorists as well as proponents of any other theory concerning the nature of rights. Essentially, rights are normative, they are generally advantageous[27], and they are appendant, i. e. they are bound to specific entities.[28] In detail:

(1) Rights are an essentially normative phenomenon. This first point is supposedly indisputable.[29] The fact that rights are a (possibly integral) element of normativity[30], which is to say that that their nature cannot ever be fully captured

[27] Arguably, one could also refer to this feature of rights as being 'beneficial'. Yet, the notion of 'beneficence' appears to be too strongly pre-shaped by substantive theories; especially, it evokes associations with consequentialist theories, not least with the substantive tradition of interest/*benefit* theories of rights, see therefore below sec. III, 2., e), bb). Due to our goal of producing a normatively neutral concept, such associations shall be avoided by using the supposedly more neutral terms 'advantage', 'advantageous', 'advantageousness' henceforth. For a more detailed exposition of this point cf. below sec. III, fn. 183.

[28] Undoubtedly, the choice of example-statements determines the result with regard to the features of the scope. Thus, the objection lies at hand that they were chosen just in order to produce this result. In other words, the (allegedly) purely descriptive nature of the scope might nevertheless have a covert, evaluative stance to it due to the conscious selection of only a few, certain examples and not all actual manifestations of a term. On the contrary, I assume that it is impossible to actually find example-statements that could foil the result found here. The three features are constant and could only be refuted by means of pure stipulation, i. e. by claiming "There is a non-personal right to peace", "For A to have rights is detrimental for her" or even "I ride my right to work". These propositions would surely not be generally agreed upon.

[29] Cf. Brian Orend, *Human Rights: Concept and Context* (Ontario: Broadview Press, 2002), 17–19.

[30] The much debated notion of normativity arguably asks for some clarifications at this point: First, it is supposed there is a fundamental difference between the normative as referring to reasons (see therefore in more detail presently in sec. I, 1., b), aa)) and the descriptive as referring to fact. Implied is the common idea of a strict separation of 'is' and 'ought', at least to the extent that one cannot derive any normative conclusions merely from a set of facts. For the origin of considering the is-ought-relation as a problem, which is related to, but ought to be clearly distinguished from Moore's commonly known (and terminologically misleading) notion of a "naturalistic fallacy" (Moore, *Principia Ethica*, 13), see David Hume, *A Treatise of Human Nature* (Oxford: Oxford University Press, repr. 2009 [1738]), 302. Cf. also: Hans Kelsen, *Hauptprobleme der Staatsrechtslehre*, 2nd ed. (Reinheim: Scientia Aalen, 1960 [1923]), 6–10; id, *Reine Rechtslehre*, 2nd rev. and extended ed. (Wien: Verlag Österreich, 2000 [1960]), 196. Secondly, especially legal theory is often concerned with the notion of normativity, namely with what is often regarded as the 'problem of normativity' of the law in contrast to the normativity of morality. For introductions on this problem (with further references) see: Torben Spaak, "Kelsen and Hart on the Normativity of Law," in *Perspectives on Jurisprudence: Essays in Honour of Jes Bjarup*, ed. Peter Wahlgren (Stockholm: Stockholm Institute for Scandinavian Law, 2005), esp. 398–401; id, "Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification," *Ratio Juris* 16 (December 2003): 478–481; Andrei Marmor and Alexander Sarch, "The Nature of Law," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/fall2015/entries/lawphil-nature/, sec. 1.2. Even though hardly sufficient to match the level of sophistication of the debate, a few arguments for why the normativity of law should not be regarded as a problem at all, i. e. why we should not deny the undoubtedly normative nature of legal rules (therewith denying structural differences between legal and moral rules), will be laid out below in sec. II, 5., d).

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