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Human and Socioeconomic Rights: A Duty-Based Account

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In memory of my father who first taught me the meaning of duties to others

'I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done.'

Mohandas Gandhi¹

¹Gandhi's response to the English evolutionary theorist and director-general of UNESCO, Huxley, who, in 1947, wrote to Gandhi to ask him to contribute an essay to a collection of philosophical reflections on human rights. See Moyn (2016).

Abstract

The thesis addresses a question of contemporary philosophical debate: What is the philosophical basis of human and socioeconomic rights? This is an important question given the indeterminacy of rights, and the suspicions regarding their universal validity. What I suggest then is the determination of their philosophical basis. Such a philosophical task would provide the grounds for the clarification of the concept of these rights revealing their true nature, and it would show whether or not these rights are universally valid. Further, through the philosophical justification of human and socioeconomic rights we can explain many of the rights found in the Universal Declaration of Human Rights, as well as in the International Covenant on Civil and Political Rights, and in the International Covenant on Economic, Social, and Cultural Rights. At the same time, through such a justificatory account we can see why some rights are not genuine human rights. Additionally, we can explain why some new rights can be included in the major documents. Finally, such a task brings philosophy at the heart of rights discourse connecting the two disciplines of philosophy and law. Within this context I build my (Kantian) duty-based argument for the justification of human and socioeconomic rights indirectly: 1) by presenting the weaknesses of a number of noteworthy contemporary accounts of how rights are justified, including the justification of them based on the concept of human dignity, and 2) by justifying duties, and then explaining how human and socioeconomic rights can afterwards be generated, or developed, from them. Ultimately, I argue that in our dominant 'rights era', although we should not reject the moral, legal, and political ideas of human and socioeconomic rights, we should put these ideas aside for a while, in order to strengthen the old category of duties, so that eventually both rights and duties could be seen as equal parts in a future account of international justice.

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² Part of chapter 2 has been published under the title: **'Why Dignity is not the Foundation of Human Rights'** *Public Reason*, 2017, Vol. 8, Issues 1-2 – This paper challenges the popular arguments according to which dignity is the basis of human rights, offering a new duty-based argument. Also, section 4 (chapter 4) has been published under the title: **'Why we have the duty to treat the dead with dignity?'** *Philosophy Now*, 2018 – This article challenges four popular explanations of why dead should be treated with dignity, offering an alternative explanation. Finally, section 3 (chapter 5) will be published by the end of 2019 as a chapter in edited volume under the title: **'A Duty-Based Approach to Children's Right to Freedom from Extreme Poverty'**, in Brando, N. and Graf, G. Eds. (2019). *Philosophy and Child Poverty*, published as part of the Springer Book Series 'Philosophy and Poverty'.

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1. The main research question

The thesis addresses a question of contemporary philosophical debate: What is the philosophical basis³ of human and socioeconomic rights? Such a philosophical task, if successful, should provide the grounds for the clarification of the concept of these rights revealing their true nature. It should also clearly show whether or not these rights are universally valid. Further, through the philosophical justification of human and socioeconomic rights we could explain many of the rights found in the Universal Declaration of Human Rights, as well as in the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. At the same time, through such a justificatory account we could see why some rights are not genuine human rights. Additionally, we could explain why some new rights can be included in the major documents. Finally, such a task, if successful, could bring philosophy at the heart of rights discourse connecting the two disciplines of philosophy and law.

Within this context, I build my (Kantian)⁴ duty-based argument for the justification of human and socioeconomic rights indirectly: 1) by reporting the deficiencies of a number of noteworthy contemporary rights-based accounts of how rights are justified; also, the justification of them based on the concept of human dignity, and 2) by justifying duties, and then explaining how human and socioeconomic rights are afterwards generated or developed from them. Ultimately, I argue that in our dominant ‘rights era’, although *we should not reject the moral, legal, and political ideas of human and socioeconomic rights, we should put these ideas aside for a while, in order to strengthen the old category of duties, so that*

³ As it is mentioned several times throughout the thesis, the words: justification, foundation, derivation, grounding, basis, etc. are used interchangeably to denote that x’s source is y

⁴ In chapter 4, is thoroughly explained why sometimes the word ‘Kantian’ in the text is put in parenthesis, while some other times it is not. Here I briefly mention that the phrase ‘a Kantian duty-based justification of rights’, refers only to ‘human rights’; while, the phrase ‘a duty-based justification of rights’, refers both to ‘human rights’ and ‘socioeconomic rights’

eventually both rights and duties could be seen as equal parts in a future account of international justice.

After addressing the main content of the thesis, in what follows I focus on its basic structure. Initially, the thesis consists of three main parts. In the first part, I discuss other contemporary justifications of rights. This part consists of chapters 1 and 2. In chapter 1, which is only introductory, I present the two traditional families of rights-based justifications, namely the ‘naturalistic’ and the ‘political’, or ‘practice-based’, justificatory accounts. In chapter 2, I examine whether the popular notion of ‘human dignity’ is the genuine basis of rights.

Further, the second part of the thesis consists of chapter 3, that is, the ‘bridging’ chapter between the first, or ‘negative’, part of the thesis, in which I report the deficiencies of the **rights-based** and the **dignity-based** justificatory accounts, and the third, or ‘positive’, part of it, in which I develop my own **duty-based** account for the philosophical foundation of human and socioeconomic rights. In this ‘bridging’ chapter, along with the examination of two more popular contemporary **Kantian-based** justifications, that is, Arthur Ripstein’s and Katrin Flikschuh’s accounts, I present and analyse the starting point of my new (Kantian) duty-based justification, namely the Kantian concept of autonomy.⁵ Within this context, I attempt the conceptual analysis of the Kantian moral concept of autonomy via the Kantian aesthetic category of the sublime.

Finally, the third part of the thesis consists of chapters 4 and 5. In chapter 4 I first present the main points of the new (Kantian) duty-based philosophical account; second, I respond to four possible objections against the new Duty-Based Approach; and, third, I attempt the application of the new duty-based justificatory account to a controversial case, that is, the case of the rights of the dead. In chapter 5, along with

⁵ What I mean by ‘rights-based’ and ‘dignity-based’ justifications, is that these accounts put rights and dignity first, respectively. Also, what I mean by ‘Kantian-based’ justifications, is that these justifications are inspired by the Kantian opus. Finally, what is meant by my own ‘(Kantian) duty-based’ justification, is first, that it is inspired by the Kantian opus, and, second, that it puts duties rather than rights first.

the review of the whole thesis, I discuss some further implications of it, especially in the areas of law and politics. Additionally, I apply the new duty-based argument to an indeterminate and unstated right, yet a right of crucial importance today, namely the right of children to be free from extreme poverty. Ultimately, at the end of chapter 5, the grounds are prepared for a future duty-based account of international justice.

2. Introduction to the main issues

After the overview of the main content and structure of the thesis, I provide a brief overview of the basic issues discussed throughout, in order to roughly guide the reader into the main contents of each chapter.

2.1 Chapter One

In the first chapter of the thesis, which has an introductory and historical character, I initially offer a concise account of the history of human rights starting from their first appearance, during the European Enlightenment, moving on to their decline in the nineteenth century, and their re-appearance after the end of the Second World War. Within this context, special attention is given to: 1) the Universal Declaration of Human Rights (UDHR), which was adopted by the Third United Nations General Assembly on December 10, 1948, 2) the International Covenant on Civil and Political Rights (ICCPR) with its two optional Protocols, 3) the International Covenant on Economic, Social and Cultural Rights (ICESCR), 4) the nine core international human rights treaties, which also have a monitoring body within the UN human rights system that controls the implementation of the treaty provisions by its State parties,⁶ 5) some other universal 'instruments' relating to human rights, such as: the Declaration on the Rights of Indigenous People, the Convention against Discrimination in Education, the Declaration on the Elimination of Violence Against

⁶ Available from: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>
[accessed 1 November 2017]

Women, and the Worst Forms of Child Labour Convention, and 6) the 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (1950)⁷, as well as the 'American Convention on Human Rights' (1969).⁸ Along with all the aforementioned documents, I also stress the importance of the 'Human Rights Movement', namely the non-governmental social movement with international force engaged in activism related to human rights issues.

Following the history of rights, I indicate the fact that in spite of their wide acceptance and their ratification by most of the countries, still a great number of human rights violations and abuses occur worldwide. Within this context, the two main problems of human rights are observed, namely the problem of their indeterminacy and the problem concerning their universal validity. It is true that one cannot easily explain what human rights *are*, and whether they are *universal* or just a Western product. I conclude that mainly because of these two problems human rights have come under increasing attack in recent years. Hence, I discuss the reaction against the idea of human rights in theoretical as well as in practical level.

Contrary to the negative stance towards human rights today, arising mainly from the two aforementioned problems, my claim is that we should not reject the idea of human rights; but instead focus on and work on their philosophical foundations. This will help us to identify their true nature, and respond to the suspicions regarding their universal validity. Within this context, in this chapter of the thesis, I start from the presentation of the two historical families of 'rights-based' justificatory accounts, namely the naturalistic, or traditional, or orthodox justifications, and the so-called political or practice-based justifications.

On the one hand, according to the Orthodox theorists any account for the justification of human rights must not overlook the fact that human rights are effectively moral rights that all human beings possess by virtue of their humanity. On

⁷ Available from: http://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed 1 November 2017]

⁸ Available from: http://www.hrcr.org/docs/American_Convention/oashr.html [accessed 1 November 2-17]

the other hand, the political accounts for the justification of human rights are built upon the idea that the nature of these rights is to be understood in light of their role or function in international practice. After this, I discuss the deficiencies of both types of justifications, as they have been reported in the current literature.

2.2 Chapter Two

After the discussion of the 'rights-based' naturalistic and political justifications of human rights, in chapter 2 I discuss the justification of human rights based on the moral concept of 'human dignity'.

Within this context, in the first section of chapter 2, I provide a concise account of dignity's development throughout history and some critiques of it. More specifically, I focus on the two main types of dignity throughout history, namely dignity as 'status' and dignity as 'value'. After the observation of the meaning and grounds of these two types of dignity in the archaic societies, in the Roman world, in the medieval world, in the 18th century, and finally in the 20th century, I move on to the presentation of some of the most vehement attacks against the notion of dignity. Within this context, I examine the critiques against it expressed by Arthur Schopenhauer, Friedrich Nietzsche, Oscar Schachter, Ruth Macklin, David Albert Jones, and Costas Douzinas. Ultimately, I focus on two more claims: first, that the imprecision of the concept of dignity might be an asset or an advantage within the contemporary human rights discourse; and, second, that the metaphysical character of the Kantian moral concept of human dignity, specifically, renders it impossible to be applied to the modern, or post-modern, or meta-modern secular terrain of human rights.

Further, in the second section of chapter 2, I examine four of the most significant recent dignity-based accounts for the justification of human rights, based on the two historical conceptions of dignity (status and value). More specifically, I discuss: 1) Jeremy Waldron's dignity-based account for the justification of human rights, according to which dignity as 'legal status' might be the basis of human rights,

2) John Tasioulas's dignity-based account for the justification of human rights, according to which dignity as 'moral status' is the genuine basis of rights, 3) the Catholic dignity-based justification, according to which dignity is an 'intrinsic' value possessed by all (human) beings, and, finally, 4) the so-called 'mainstream' Kantian conception of human dignity as the basis of human rights, according to which dignity is an 'intrinsic' or 'inherent' value that is possessed by all rational (human) beings, and can never be lost.

Eventually, apart from the particular criticisms against all the aforementioned dignity-based justifications of human rights, I also indicate that the main flaw of all these accounts is actually the mistaken interpretation of the concept of 'dignity' itself, and the subsequent mistaken application of it to the contemporary rights terrain. At the end of chapter 2, after concluding that dignity is not the genuine basis of human rights, as it is argued by a number of prominent thinkers today, I propose that we should further explore the true meaning of this important moral concept, in order to ascribe to it the role and place it deserves within the contemporary rights discourse. This proposal takes me to the less descriptive, more philosophical part of the thesis.

2.3 Chapter Three

In chapter 3, with the intention of not abandoning a Kantian perspective as regards the philosophical foundations of human rights, I ask whether there can be a truly Kantian theory of human rights.

More specifically, in the first part of chapter 3 two more Kantian human rights justificatory accounts are discussed. These are: 1) Arthur Ripstein's argument according to which human rights are grounded in the Kantian notion of the 'innate right to freedom', in the Doctrine of Right, the *Rechtslehre*, in the *Metaphysics of Morals*; and 2) Katrin Flikschuh's *transcendental* approach to the justification of human rights. Along with the Kantian dignity-based argument for the justification of

human rights, in chapter 2, these accounts are considered to be the three most important Kantian-based justificatory accounts for rights today.

After the evaluation of these two Kantian justifications of human rights, namely Ripstein's and Flikschuh's accounts, in the second part of chapter 3, that is, the 'bridging' chapter of the thesis, I gradually move on to the formulation of a genuine (Kantian) duty-based philosophical foundation of human and socioeconomic rights, aiming to overcome the obstacles of all the aforementioned accounts. Within this context, I counter-argue Andrea Sangiovanni's thesis that there cannot be a truly Kantian theory of human rights. My claim here is that there is still room in the Kantian opus for the formulation of a truly Kantian justification for *human*⁹ rights capable overcoming the obstacles arising from all the aforementioned (Kantian and non-Kantian) justificatory accounts. Hence, I turn my attention to what I regard as the proper starting point of a truly (Kantian) duty-based justification of human rights, namely the Kantian supreme principle of morality, that is, the moral concept of 'autonomy of the will', as it is presented by Kant in 4:440, in the *Groundwork of the Metaphysics of Morals*.¹⁰

Given the abstractness of the Kantian moral concept of autonomy of the will, and in order to shed more light on it, in the second part of chapter 3 I attempt its conceptual analysis through the Kantian aesthetic category of the sublime. Here, I focus on the *Critique of Judgment*, in Book II, in the 'Analytic of the sublime', especially in paragraphs: 23-29.¹¹ After the aforementioned conceptual analysis, the initial obscure Kantian definition of the autonomy in the *Groundwork* is transformed. Here is Kant's indeterminate definition of autonomy: 'Autonomy of the will is the property of the will by which it is a law to itself (independently of any property of the objects of volition). The principle of autonomy is, therefore: to choose only in such a way that the maxims of your choice are also included as universal law in the same

⁹ Yet not socioeconomic rights, as explained in more detail in chapter 4.

¹⁰ Gregor (1996), p. 89.

¹¹ Kant (1987), pp. 97-140

volition...'¹² After the conceptual analysis of autonomy via the sublime, in chapter 3 of the thesis, Kant's definition is transformed to:

Autonomy of the will is both the judgment and feeling of autonomous moral agents who, although they feel humiliated by the omnipotence of the moral law, they abandon 'volition', that is, their inclinations, ideologies, wishes and so forth, and, freely self-legislating –yet requiring the same legislation from all others– respect the moral ideas of reason, such as the fulfillment of their moral duties, realizing their higher self as autonomous moral agents (self-approbation¹³), while feeling (and being considered by others), at the same time, that they are persons with dignity.

At the end of chapter 3, I show how the analysis of the two main characters in Woolf's novel *Mrs. Dalloway*, namely Clarissa Dalloway and Septimus Warren Smith, aids our understanding of the Kantian autonomy of the will, as interpreted via the aesthetic concept of the sublime. In the same section, more light is shed on the distinction between the Kantian moral concept of 'autonomy' and the Kantian notion of 'heteronomy'. Additionally, after the appraisal of Woolf's novel, I focus on and examine a piece of modern video art: Bill Viola's 'five angels for the millennium'. This contributes to a better understanding of the Kantian autonomy, as analysed via the Kantian sublime.

2.4 Chapter Four

After the conceptual analysis of the Kantian moral concept of autonomy of the will, via the Kantian aesthetic category of the sublime, space is opened up in chapter 4 for my proposal that the Kantian supreme principle of morality should be the starting point for a new (Kantian) duty-based justification for human and socioeconomic rights.

¹² Gregor (1996), p. 89

¹³ See 5:81, in the *Critique of Practical Reason*, Gregor (1996), p. 205

In this chapter, I initially present my thesis: the new (Kantian) duty-based account for the justification of human and socioeconomic rights, or the new Duty-Based Approach (DBA), according to which both human and socioeconomic rights are straightforwardly derived from moral duties. That is to say, duties are the ‘straightforward’ grounding basis of rights; hence in the absence of the (owed) duties, from which they derive, the relevant (claim) rights alone *do not exist*. Additionally, it is explained how rights are *further* grounded in the autonomy of the will, the CI, and the moral law (‘deeper’ justification of rights), as well as, ultimately, in our pure practical reason (‘ultimate’ justification of rights).

More specifically, the new justification is formulated *indirectly*, that is, by justifying moral duties first, and then explaining how human and socioeconomic rights are afterwards generated, or developed, from them. Having as my starting point the Kantian moral concept of autonomy of the will, and focusing in particular on the basic characteristic of the autonomous person, that is, her ethical lawgiving function of morality, I gradually move on to the fulfillment of her external moral duties, namely of: 1) her moral universal perfect duties of right to others, and 2) her moral specific perfect duties of right to others, from which, through the 6:239 passage in the *Metaphysics of Morals*, 1) human rights and 2) socioeconomic rights, respectively, are afterwards developed or generated. Eventually, it becomes clear why a *truly Kantian* justification can be supported and proposed only for *human* rights; while for socioeconomic rights we can speak only of a *duty-based* justificatory account simply inspired by the Kantian opus.

Additionally, apart from the justification of human and socioeconomic rights, in chapter 4 I explain why from our moral universal *imperfect* duties of virtue to others, and 2) our moral specific *imperfect* duties of virtue to others, *no* rights are derived. Also, I clearly show the role and place of the Kantian moral concept of ‘human dignity’ within the new justification of human and socioeconomic rights. Overall, the new (Kantian) duty-based justification of human and socioeconomic rights –including the division between universal imperfect and specific imperfect duties, as well as the moral concept of human dignity– is represented in the following diagram.

Autonomy of the will > ethical lawgiving



Dignity (internally)



Moral duties (externally)



- 1. Universal perfect duties of right to others → Human rights**
- 2. Specific perfect duties of right to others → Socioeconomic rights**
- 3. Universal imperfect duties of virtue to others → No rights**
- 4. Specific imperfect duties of virtue to others → No rights**

Following the presentation of the new Duty-Based Approach (DBA), I respond to four possible objections against it, namely that: 1) it degrades the idea of rights, 2) it wrongly distinguishes between human and socioeconomic rights, 3) it is not correct because it is based on the idea that Kant was a moral foundationalist; while he was actually a moral constructivist, and 4) it is not correct because it considers the Kantian moral and legal/political philosophy as two domains with some degree of continuity and coherence between them.

Finally, at the end of chapter 4 I focus on our duties and rights in a case which differs from other cases such as the cases of a normal adult human being, an embryo, a baby, a child, a comatose patient, a mentally disabled person, an immigrant, a refugee, an 'apatris', a poor person, a homosexual, and so forth. In particular, I discuss our duties and rights in the case of *non-living* human beings. Within this context, I attempt an application of the new duty-based justificatory account to the case of a corpse. What it is ultimately argued here is that we have the duty to treat the dead with dignity because this is the morally right thing, independently of any other considerations.

2.5 Chapter Five

After the presentation and analysis of the new (Kantian) duty-based account for the justification of human and socioeconomic rights, I move on to the final, 'summary and implications', chapter of the thesis. My purpose in this last chapter is twofold: first, to review the findings presented in chapters 1 to 4 and, second, to discuss some further practical implications of them, especially in the areas of **law** and **politics**.

Also, in this chapter I attempt the application of the new duty-based justificatory account to one of the most urgent, yet indeterminate and still unstated, rights today, namely **the right of children to freedom from severe or extreme poverty**. It is argued that a duty-based justification is preferable in the case of children rather than a rights-based approach; and that contrary to the popular claim that children's right to freedom from extreme poverty is a *human* right, this is actually a moral *socioeconomic* right.

Finally, at the end of chapter 5, before the general conclusions of the thesis as a whole, I take a step further arguing that the new (Kantian) duty-based justification for human and socioeconomic rights may be the starting point for the formulation of a future duty-based account of international justice, in the form of a new 'Bill of Duties'. I explain why is necessary the drafting of a new international Bill of Duties, e.g. a new Universal Declaration of Human Duties, aiming effectively at the reinforcement of the implementation of human rights stated in the Universal Declaration of Human Rights (UDHR). Such a new Bill of Duties would not only render duties equal to rights, but it would also enable a fairer discussion of both in parallel.

3. Methodology

Having provided an overview of the whole thesis in order to guide the reader into the main contents of each chapter, I present now my main methodological tools. In order to effectively deal with the main question of the thesis, that is, the question of 'what is the philosophical basis of human and socioeconomic rights', I have studied

the history of human rights, and kept track of their violations worldwide on a weekly basis, during the last three years, by following Human Rights Watch. Further, I have collected and examined some of the most vehement critiques against rights, as well as collected and examined some objections regarding: 1) the two historical families of rights-based justifications, 2) the dignity-based accounts, and 3) the two Kantian-based justificatory accounts. While discussing these accounts, I do not only focus on theoretical sources, e.g. books, research papers, and articles, but also on: 1) a number of legal documents, e.g. Declarations, Conventions, treaties, 2) specific case law, and 3) some political initiatives, e.g. the Human Rights Movement, NGOs' activities, and so on. Moreover, I have attempted a 'conceptual analysis' of the Kantian moral concept of autonomy via the Kantian aesthetic category of the sublime. Also, in order to show the difference between the Kantian autonomy and the Kantian heteronomy, I have provided a concise analysis of Virginia Woolf's *Mrs. Dalloway*. Additionally, I have examined a contemporary artwork in the area of the sublime, that is, Viola's 'five angels.' Furthermore, I have formulated the new (Kantian) duty-based justification for human and socioeconomic rights through a thorough textual analysis of the two major Kantian works, namely the *Groundwork of the Metaphysics of Morals* and the *Metaphysics of Morals*. Ultimately, in the last chapter of the thesis, I have first attempted the 'application' of the thesis to the unstated 'right of children to freedom from extreme poverty', and, second, outlined a future duty-based account complementary to the current UN's rights-based account of international justice.

If the readers want a detailed, yet concise, sense of all the aforementioned claims and ideas, please turn to the fifth section of chapter 5 (*Conclusions*), where they will find 54 short propositions.

Part One

Chapter One

The problem of human rights

1. Introduction: The history of human rights

As mentioned in the introduction, the thesis addresses a question of contemporary philosophical debate: What is the philosophical basis of human rights? In the first two chapters of the thesis, as well as in the first part of chapter 3, my aim is not to provide a detailed, systematic, and rigorous critique of some human rights' justificatory theories. Rather, my aim is more limited, namely to offer an adequate overview of the aforementioned 'rights-based', 'dignity-based', and 'Kantian-based' theories, which shall further enable me 1) to stress the fact that we still do not have positive definite solutions to the two main problems of human rights, namely the problem of their indeterminacy, and the question of whether or not they are universally valid (see below); and 2) to position my new claims concerning a (Kantian) duty-based justification of human and socioeconomic rights, in chapter 4 of the thesis.

In the present chapter, I outline the main problems and criticisms against human rights throughout history. Also, I question the two historical families of 'rights-based' accounts that attempt to justify human rights. I focus first on the family of accounts often called naturalistic, or traditional, or orthodox, and then on the family of accounts called political or practice-based. However, before this, I present a brief history of human rights.

The 'history of human rights' was not always ubiquitous as it is today. As Samuel Moyn states, the enterprise of *writing* the 'history of human rights' has become a widespread activity only in the last two decades.¹⁴ Specifically, the search

¹⁴ Moyn (2014), p. 1

for the background of human rights began in the 1990s, 'after', as Moyn writes, 'their romantic veneration' and their 'rude vilification for their entanglements with power'.¹⁵ Eventually, as Moyn points out in his *Last Utopia*, the true history of human rights matters most of all so that we can confront their prospects today and in the future.¹⁶

However, Moyn continues, although the writing of the 'history of human rights' is a recent phenomenon, human rights themselves are not at all a recent invention, but a phenomenon drawing on prior languages and practices.¹⁷ In particular, equality as obligation of social justice came into view in the eighteenth century, the age in which the need for fair commercial processes arose as a result of the belief that commerce expands hierarchies of wealth.¹⁸ Thus, it is often argued that human rights (*les droits de l'homme*) first appeared during the era of the European Enlightenment; in spite of the fact that their *idea* might have been around long before their expression in specific moral, legal, and political language.¹⁹ Specifically, the time of the European Enlightenment was the time of the English Bill of Rights (1689), which set limits on the Monarch's powers, the American Declaration of Independence (1776), which announced the separation of 13 North American British colonies from Great Britain, the French Declaration on the Rights of Man and Citizen (1789), which reflected the idea that human beings had 'natural' rights that should always be protected, and, finally, the US Constitution and Bill of Rights (1791), which set out a series of personal freedoms.²⁰

¹⁵ Moyn (2018), pp. ix-x.

¹⁶ Moyn (2012)

¹⁷ Moyn (2014), p. 18.

¹⁸ Moyn (2018), p. 19

¹⁹ More on this, in chapter 4 of the thesis

²⁰ See further the British Institute of Human Rights, available from: <https://www.bihhr.org.uk/history> [accessed 24 November 2018]

After the Enlightenment, the idea of human rights declined. But human rights again became prominent after the end of the Second World War, and the extermination by Nazi Germany of over six million Jews, Sinti and Romani, homosexuals, and people with disabilities.²¹ As a result of this, the Universal Declaration of Human Rights (UDHR) was adopted by the Third United Nations General Assembly on December 10, 1948 with the aim of launching a new era of international relations. In article 1 of the UDHR, it is stated that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.²²

Further, in order to establish mechanisms for enforcing the UDHR and ensuring that state parties will accept both the legal and the moral obligation to promote and protect human rights, the UN Commission on Human Rights drafted two more treaties which are considered to be the institutional backing of the Universal Declaration of Human Rights. Both of them were entered into force in 1976, and have been ratified by a number of nations already. Along with the UDHR they make up the International Bill of Rights.

The first treaty, adopted by the United Nations General Assembly in 1966, is the International Covenant on Civil and Political Rights (ICCPR) with its two optional Protocols. Countries who sign this Covenant guarantee to protect fundamental rights, such as freedom from arbitrary arrest or detention, all considered as derived 'from the inherent dignity of the human person'.²³ The rights the Covenant protects belong to every man, woman and child on earth, and may be asserted against any authority on earth. For instance, according to the Covenant, every human being has an 'inherent right to life'. The Covenant further prohibits torture, and any other cruel, inhuman and degrading treatment, slavery, and forced labour. It also

²¹ Ishay (2004)

²² Available from: <http://www.un.org/en/universal-declaration-human-rights/> [accessed 1 November 2017]

²³ Available from: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [accessed 1 November 2017]

guarantees freedom to move around and choose where to live, fair trials, and privacy.

In the similar vein, the second treaty, adopted by the General Assembly in 1966, that is, the International Covenant on Economic, Social and Cultural Rights (ICESCR), recognises that human rights 'derive from the inherent dignity of the human person'.²⁴ The ICESCR commits its parties to work toward the granting of economic, social and cultural rights to people in communities who are in need. Among other things, the Covenant protects the right to an adequate standard of living, the best possible physical and mental health, education, work, join trade unions, participate in cultural life, marriage, family, and the well-being of pregnant women, as well as those who have recently given birth.

Moreover, there are nine core international human rights treaties, which also have a monitoring body within the UN human rights system that controls the implementation of the treaty provisions by its State parties.²⁵ These core treaties are:

1. The International Convention on the Elimination of All Forms of Racial Discrimination
2. The International Covenant on Civil and Political Rights
3. The International Covenant on Economic, Social and Cultural Rights
4. The Convention on the Elimination of All Forms of Discrimination Against Women
5. The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
6. The Convention on the Rights of the Child
7. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

²⁴ Available from: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [accessed 1 November 2017]

²⁵ Available from: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> [accessed 1 November 2017]

8. The International Convention for the Protection of All Persons from Enforced Disappearance
9. The Convention on the Rights of Persons with Disabilities

Additional to the International Bill of Rights and the nine core human rights treaties just mentioned, there are many other universal 'instruments' relating to human rights, such as: the Declaration on the Rights of Indigenous People, the Convention against Discrimination in Education, the Declaration on the Elimination of Violence Against Women, the Worst Forms of Child Labour Convention, the United Nations Principles for Older Persons, the Convention on the Rights of Persons with Disabilities, the Basic Principles for the Treatment of Prisoners, the Declaration on Social Progress and Development, the Slavery Convention, the Convention on the Reduction of Statelessness, the Convention on the Prevention and Punishment of the Crime of Genocide, and so on.²⁶ Further, there are some significant regional documents for the protection and promotion of human rights. For instance, there is the 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (1950)²⁷, and also the 'American Convention on Human Rights' (1969).²⁸ Last but not least, along with all the aforementioned international and regional documents, one should mention the 'Human Rights Movement', namely the non-governmental social movement with international force engaged in activism related to human rights issues arising from totalitarian regimes, war atrocities, crimes against humanity, terrorism, and so forth.²⁹

Overall, one could speak of: 1) the **idea** of human rights, existing even before their expression into specific language, e.g. in the Christian tradition preceding the Enlightenment era,³⁰ 2) their **expression** into specific moral, legal, and political

²⁶ All available online

²⁷ Available from: http://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed 1 November 2017]

²⁸ Available from: http://www.hrcr.org/docs/American_Convention/oashr.html [accessed 1 November 2-17]

²⁹ For the Human Rights Movement, see for instance: Neier (2012)

³⁰ See further chapter 4

language from the Enlightenment onwards,³¹ and 4) their ‘written **history**’ during the last two decades.³²

2. Main problems and criticisms

Since 1948, when the Universal Declaration of Human Rights (UDHR) was adopted by the Third United Nations General Assembly, the moral, legal, and political concept of human rights has been widely accepted.³³ The relevant rights have further been ratified by most of the countries contributing to a great extent to the establishment not only of our contemporary international and regional legal orders, but also of our constitutional institutions.

Nevertheless, still a great number of human rights violations and abuses occur worldwide. One need only read the ‘Human Rights Watch’ reports to see how many infringements occur on a daily basis.³⁴ Even if there is a broad human rights framework, as it has been showed above, this framework seems to be non-effective. For example, the 1951 UN refugee convention says that asylum seekers have the right not to be expelled without examining their claims individually.³⁵ However, this provision has arguably not been taken seriously into consideration in the case of the massive influx of Syrian refugees in Greece in 2015-2016. The question then arises why is such a rich human rights framework not efficient and effective enough to ensure the protection of our fundamental human rights? Among all other problems of human rights, which have occasionally been stated, e.g. the ongoing multiplication of human rights, or the fears that these rights have fuelled judicial overreach, and/or

³¹ See previous analysis

³² See above

³³ Why I consider human rights as a moral, legal, and political concept is explained thoroughly in chapters 4 and 5

³⁴ Available from: <https://www.hrw.org/publications> [accessed 1 November 2017]

³⁵ Available from: <http://www.unhcr.org/1951-refugee-convention.html> [accessed 1 November 2017]

have damaged democracy,³⁶ a number of more specific problems are often stated. Here, I report two main problems that many see as crucial:

The first problem regarding human rights is said to be their **indeterminacy or abstraction**. Classical attacks regarding the abstractness of human rights start from Burke and Bentham.³⁷ But even today, the core human rights documents, namely the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights (ICESC), are described in extremely abstract terms. But, I think, for human rights to be respected by ordinary people, they have first to be fathomed. This is helped if the expression of such rights is clear, specific and made concrete.

Here it might be said that the abstractness of legal concepts, in general, enables judges and legal practitioners to exercise judgment in light of specific facts and circumstances. However, at the same time the vagueness of these concepts is holding back the relevant judgments. That is to say, a non-clarified concept within the legal order, e.g. the concept of human rights, cannot easily be *interpreted* in courts; hence it cannot be properly *enforced*, despite the variety of enforcement mechanisms. One example here is the interpretation of the right to freedom of religion. As Rivers claims: ‘There is no doubt in the minds of the Strasburg judges that freedom of religion is important but exactly what it is... remains elusive.’³⁸ Eventually, an abstract concept can hardly be *implemented* by political institutions. That is to say, the overall lack of specificity in the notion of human rights has negative effects not only on everyday life (see above *ordinary people*), but also on the *legal* and *political* terrain.

The second problem of human rights is often said to be their difficulty to be universally accepted. This is often called the problem of the **universal validity** of

³⁶ From Onora O’Neill’s talk on 22 February 2018 in QUB Symposium with C. McCrudden and O. O’Neill, see <https://www.qub.ac.uk/International/global-challenge-debates/human-rights-age-trump-brexit/> [accessed 1 March 2018]

³⁷ See: Burke (1999) and Bentham (2007)

³⁸ Rivers (2013), p. 405.

human rights. The universality of human rights has been a subject of intense debate throughout the 20th century, and is still one of the major problems of human rights today. These rights are typically seen as a ‘western product’ imposed top-down by western circles unto the rest of the world.³⁹ Within this context, it is argued that human rights, as we understand them in our western societies, are not applicable to other, non-western cultures, which have different values, customs, and mores.⁴⁰ For example, it might be said that Saudi Arabia women do actually prefer to be inferior to men. Hence, not all countries in the world are obliged to *respect* human rights. Examining this issue, Michael Ignatieff, in his recent micro-ethnographic research, has found that human rights are not a concept shared by all. While rights are the language of the states and liberal elites, this language is not actually shared by ordinary people all over the world.⁴¹ The question arises as to why human rights are not shared by all? Here are my thoughts:

Initially, people in some countries do not even get the opportunity of learning what human rights are, namely that they are not something *constructable* by the western world, but something *discoverable*, namely something that does really exist, if we carefully (and philosophically) examine our human nature.⁴² For example, Saudi Arabia is a state that does not foster the human rights education.⁴³ The question here arises as to why some states do not foster the human rights education? One reason might be that some of them do not have the means to run such educational programs. In this case, it could be argued that the wealthy countries have the duty to support them financially.

But there is, also, another reason why human rights education is not fostered. There are some states in the world which could be called ‘murderers-

³⁹ See also Marx (1844)

⁴⁰ See Mutua (2002), p. 15; also: Tierney (2004), pp. 1-13

⁴¹ Ignatieff (2017)

⁴² This is explained further in chapter 4.

⁴³ See for instance the European Saudi Organisation for Human Rights, available online from:

<http://www.esohr.org/en/?p=590> [accessed 17/1/2019]

states'; for example, North Korea, where tens thousands of people are enslaved and tortured.⁴⁴ In such totalitarian states, or 'murderers-states', as I call them, human rights are violated by the 'murderer-state', and it is the 'murderer-state' itself that does not foster human rights education for its own unwholesome reasons. Following Rawls, in such cases, I think, the rest of the world has the duty to intervene and protect the innocent people, who are in danger under these established killing territories.⁴⁵

Mainly because of the two main problems of human rights, these have come under increasing attack in recent years. More specifically, the opponents of rights not only argue that rights are currently in some crisis, but also that, because of the two aforementioned problems, rights have actually failed to accomplish their objectives, that there may not be such things as human rights, and, eventually, that we should reject the idea of human rights. For instance, Alasdair MacIntyre has declared that 'there are no such rights and belief in them is one with belief in witches and in unicorns.'⁴⁶ Also, Costas Douzinas has claimed that there is at least a kind of paradox in the case of human rights: Even though the 20th century was the 'century of human rights', yet, in that century, we had the greatest number of violations and abuses of these rights in world history, genocides, and, of course, the Holocaust.⁴⁷ Further, Eric Posner, in his *Twilight of Human Rights Law*, has evinced a high controversial skepticism about human rights law.⁴⁸ Incidentally, what must be pointed out is the fact that all these critiques against human rights come from across the political and ideological spectrum. For instance, Douzinas is a leftist critical legal scholar, while Posner is a conservative international lawyer.

⁴⁴ https://www.amnesty.org.uk/issues/north-korea?&gclid=Cj0KCQjA7IDiBRCLARIsABIPohj9SsfEmZdGFN-JkTOX5rxYekN8XQIettPU8kUBgVKFpS6WPiR-AOoaApJPEALw_wcB [accessed 17/1/2

⁴⁵ See Rawls (1999), pp. 79-81. More on this issue ('intervention') at the end of chapter 1 (Conclusion)

⁴⁶ MacIntyre (2007), p. 69; see also, Posner (2014)

⁴⁷ Douzinas (2000), p. 2

⁴⁸ Posner (2014)

Contrary to nihilism or scepticism towards human rights, yet recognising their deficiencies, it cannot be claimed, I think, that there are not such things as human rights, or that we should completely reject the idea of human rights. Such radical views have little to offer to the world today, in which numerous violations of human and socioeconomic rights are taking place daily, and we have the duty, either as individuals or as states and organisations, to act with urgency. Consequently, despite the vagueness of the concept of human rights, despite the fundamental criticisms regarding their universal validity, despite the disappointment derived from their practice in several cases, I argue that we should keep a more modest stance and not reject or underestimate the idea of human rights. Besides, how can we overlook other cases which show that human rights have succeeded? For example, the women's rights movement has succeeded in gaining many rights for women, such as the right to vote. The same applies to children and their rights.

However, this does not mean that we are not allowed to question the contemporary human rights practice. Recently, the human rights activist Mutua Makau has questioned Africa's human rights culture.⁴⁹ Yet, in his talk, he has argued that a new moral language has to be found to fill the vacuum resulting from the inadequacy, or the failure, of the western human rights language, but –and this is of great importance– without de-appreciating or devaluing the idea of human rights. Also, Professor Samuel Moyn has recently claimed that, in spite of the Human Rights Movement failure, policymakers, politicians and the rest of the elite must keep human rights in perspective.⁵⁰ I am sympathetic to Makau's and Moyn's views. Hence, in chapter 4 of the thesis, I thoroughly explain **why nihilism with regard to human rights must be avoided, why human rights do not simply *matter*, but they do morally *exist*, and why the establishment of a new moral language based on the idea of 'duties', is absolutely necessary to fill the vacuum resulting from the inadequacy of rights.**

⁴⁹ See <https://rekordeast.co.za/161584/africa-abandoning-human-rights-expert/> [accessed 21 February 2018]

⁵⁰ See <https://www.nytimes.com/2018/04/23/opinion/human-rights-movement-failed.html> [accessed 24 April 2018].

3. The two historical families of human rights justificatory accounts

As mentioned above, there are two main problems of human rights: their indeterminacy and the suspicions regarding their universal validity. I think there is solution to both problems. The solution is the determination of the philosophical grounds of human rights. Now, the problem is that the idea of the philosophical foundations of human rights is not an idea which is accepted by all thinkers.⁵¹ For instance, legal positivists typically argue that we do not need to determine the grounds of human rights philosophically; and that we do not need to know what the nature of law is, and whether it applies universally. Specifically, legal positivists' position is that judges should focus on legislation and previous decisions (common law or case law), when they have to decide upon a particular case. They also argue that we must all respect law just because it is law, independently of any other moral considerations.⁵² Here two crucial issues arise.

First, judges often face difficulties while they are trying to interpret legislation or/and previous decisions entailing indeterminate concepts, such as the concept of human and socioeconomic rights. An example here is the right to freedom of religion. As Rivers says: 'There is no doubt in the minds of the Strasbourg judges that freedom of religion is important, but exactly what it is and why it matters remains elusive'.⁵³ Apparently, in such cases, looking at human rights 'legislation' and other human rights 'decisions' does not offer much. It seems then that the law itself, the article 18 of the UDHR in this case, does not provide the grounds for the understanding of the relevant right. But there must be an exact and correct interpretation of rights because, without prior interpretation, there cannot be proper application of law.⁵⁴

To the aforementioned argument, according to which human and socioeconomic rights, as they appear in legislation and case law, are indeterminate

⁵¹ I use the four words 'justification', 'foundation(s)', 'basis', and 'grounds' interchangeably.

⁵² See for instance, Hart (1994), pp. 124-154; Dworkin (1986), pp. 36-37; Luban (1988), pp. 20-21.

⁵³ McCrudden (2013), p. 405

⁵⁴ McCrudden (2013), p. 381

concepts, a legal positivist would respond that law might be unfinished at its 'margins', for example in the details concerning its enforceability, but it is never indeterminate in its 'core', or its 'nature', or its 'meaning' –as it is argued, for instance, by the so-called legal realists, or 'judicial activists'.⁵⁵ To this counter-argument by legal positivists, my response is that human and socioeconomic rights, *in particular* –not necessarily all other rights– are indeterminate in their core, or their nature, or their meaning. That is the reason why sometimes they are called 'moral' rights, while some other times, they are called 'legal' or 'political' rights. Apparently, this shows that there are at least three different views regarding their nature or meaning; hence, the need for the determination of their basis or their source, from which they derive and 'get' their meaning.⁵⁶

Moreover, not only legal positivists, but also some other thinkers have explicitly argued *against* any philosophical account for the foundation of human rights claiming, in particular, that politics are generally better off the notion of good. For instance, Rawls has claimed that the historical foundation provided by the liberal tradition is good enough.⁵⁷ In the same vein, Ignatieff has argued that the formulation of a justificatory account for human rights is a futile task in the context of the post-modern multicultural age.⁵⁸

On the contrary, my claim is that the historical justification of human rights suggested by Rawls is unevenly constrained to the liberal tradition, excluding the rest of the world. Also, Ignatieff's claim, according to which the formulation of a

⁵⁵ Hart, H.L.A. (1994). *The Concept of Law* 2nd ed. Clarendon Law Series, p. 147. More on the history of legal realism, or 'judicial activism', as a theory of law, as well as the examination of the position of some prominent legal realists, see Green, M.S. (2005). Legal realism as a theory of law. In: *William and Mary Law Review*. 46(6): 1915-2000. A prominent example of the renewed interest in legal realism is Leiter, B. (2001). Legal realism and legal positivism reconsidered. In *Ethics*, 111(2): 278-301.

⁵⁶ More on this in chapter 4, in which the main justificatory argument of the thesis is presented and discussed.

⁵⁷ More on this, in the section 'political and practice-based justifications' below. See also Rawls (1999), p. 15; Birmingham (2006), p. 2.

⁵⁸ Ignatieff (2001), p. 83.

justificatory account for human rights is a futile task, within the post-modern multicultural age, cannot easily be accepted, given the fact that, especially in today's postmodern, multicultural world, in which all great narratives have fallen apart, and people feel strangers even within their own countries, a universal ideal, such as the ideal of human rights based on a common ground, is needed more than ever to unite us all.

Consequently, I think some non-legal basis of rights (if there is one) must be discovered; hence I argue in favour of supplementing the body of rights in the major human rights documents by their philosophical grounding. Incidentally, at this point, it must be stressed that, throughout the thesis, I use the verbs: 'come from', 'derive', 'grounded in', and 'based on', as well as the nouns: 'grounding', 'justification', and 'foundation(s)' **interchangeably**. Such a foundational task would provide the grounds for the clarification of the concept of rights revealing their true *nature*, and answer the question of whether they are *universally* valid; hence why they should effectively be *respected* by all.⁵⁹ Ultimately, given that the number of rights violations unfortunately has not been decreased during the last decades, and the institutions, e.g. the United Nations, have in many cases failed to protect and secure them,⁶⁰ their justification becomes even more urgent.⁶¹ Within this context, the present thesis aims to offer a new argument concerning the philosophical foundations of human and socioeconomic rights. Before the presentation of my thesis in chapter 4, I have to examine first a number of noteworthy justificatory accounts. I start with the 'rights-based' accounts, in the sense that, under these justifications, rights are being put first. Generally, they are categorised into two families: On the one hand, there

⁵⁹ More on this in the last two chapters of the thesis.

⁶⁰ See for instance, 'The Observer view on the UN failure to stop slaughter in eastern Ghouta', available from: <https://www.theguardian.com/commentisfree/2018/feb/25/observer-view-un-failure-stop-slaughter-eastern-ghouta> [accessed 4 November 2018]

⁶¹ For a similar claim see O'Neill (2015), pp.71-72

are the naturalistic, or traditional, or orthodox justifications; and on the other hand, there are the so-called political or practice-based justifications.⁶²

Initially, the Orthodox theorists claim that any account for the justification of human rights must not overlook the fact that human rights are effectively moral rights that all human possess by virtue of their humanity. It is also argued that these moral rights are the necessary background of a contemporary theory of International *Legal* Human Rights (ILHR).⁶³ On the contrary, the political accounts for the justification of human rights are built upon the idea that the nature of these rights 'is to be understood in light of their role or function in modern international legal practice.'⁶⁴ Hence any justificatory approach has to pay attention to the *practical* role of human rights within the international relations today. Eventually, the aim of political theorists is to systematize the existing international legal human rights practice without drawing on prior moral considerations.

In what follows, I discuss both families of rights-based justifications, that is, the naturalistic and the political, as well as a 'mixed' justification with naturalistic and political elements. My aim is twofold: first, to show that in spite of the richness of all these theories, we still do not have positive definite solutions to the two main problems of human rights; and, second, to position my new claims, concerning a (Kantian) duty-based justification, in chapter 4 of the thesis, in relation to this broader field of research.

3.1 Naturalistic, or traditional, or orthodox accounts

The first family of 'rights-based' justifications goes under various labels or terms. Some call them *naturalistic*, while some others *traditional*, or *orthodox*. According to

⁶² See also: Follesdal (2017) and Etinson (2018)

⁶³ See for instance, Griffin (2008); Tasioulas (2012c), 1-30; Tasioulas (2013), 1-25.

⁶⁴ See for instance, Cruft, R., Liao, S.M., Renzo, M. (2015), pp. 1-14; Beitz (2009); Buchanan (2013); Rawls (1999)

these justifications, human rights are typically seen as moral rights that all human beings possess at all times and in all places simply in virtue of being human. This view comes from the concepts of natural law (*ius naturale*) and natural rights. In recent years, John Finnis is one of the most prominent defenders of the orthodox conception of human rights. In particular, Finnis considers rights as a contemporary idiom for natural rights.⁶⁵ All the naturalistic, or traditional, or orthodox justifications of human rights are effectively based on the idea that these rights are grounded in a distinguishing aspect of human nature, or a fundamental element of human existence. There are four features of human life in which rights are, in principle, grounded in this case: 1) the notion of agency, 2) the notion of good life, 3) the notion of basic needs, and 4) the notion of capabilities.⁶⁶ In the following analysis, I offer an overview of these accounts, along with what I regard as their main flaws.

In his book, *On Human Rights*, James Griffin, does not only offer one of the most significant justificatory accounts for human rights, but also one of the most important contemporary accounts of human agency.⁶⁷ Initially, Griffin claims that the justification of human rights is a quite important issue. Even if we agree on a list of human rights, there are still different opinions concerning their foundations. According to Griffin, the convergence on the *justification* of any list of rights produces ‘more wholehearted promotion of human rights, fewer disagreements over their content, fewer disputes about priorities between them, and more rational and more uniform resolution of their conflicts— all much to be desired.’⁶⁸

Griffin starts the formulation of his foundational account with the notion of ‘personhood’. More specifically, he argues that personhood is something more than one being a member of the species *homo sapiens*. To exercise our personhood is to choose our own path through life autonomously (autonomy), to be able to act having at least the minimum provision of resources and capabilities that it takes, and

⁶⁵ Finnis (2011), p. 1a98; Tuck (1979); Tasioulas (2012), pp. 17-60; see more on Finnis’s account below.

⁶⁶ For a similar division, see also: Cruft, R., Liao, S.M., Renzo, M. (2015), pp. 11-18.

⁶⁷ Griffin (2008)

⁶⁸ Griffin (2008), p. 26.

to be free, that is to say, not to be forcibly stopped by others from pursuing what we see as a worthwhile life (liberty); in other words, to have a human standing or human status as agents. This is the concept of normative agency, which Griffin further contrasts with the agency that is common to higher animals as well.⁶⁹ Eventually, considering human rights as moral rights that we have simply in virtue of being humans, Griffin argues that these rights should be grounded in the notion of 'normative' agency. Incidentally, Griffin relates the notion of normative agency to the notion of dignity arguing that it is in the terms of the former, namely of the capacity of human beings to form a personal conception of life and to pursue it without interference, that we should understand the latter. Hence, any violation of our rights is to be understood as 'targeting' our dignity, that is, our normative agency.

Furthermore, John Finnis is an advocate of an 'objective list' account of human rights based on our well-being. That is to say, he builds his human rights foundational account on the notion of 'well-being'. More specifically, Finnis has enlisted seven basic 'goods', which serve as protectors of conditions for our well-being.⁷⁰ These goods are: 1) life, 2) knowledge (for its own sake), 3) play (for its own sake), 4) aesthetic experience, 5) sociability (friendship), 6) practical reasonableness i.e. the ability to reason correctly about what is best for yourself, and to act on those decisions, and 7) religion, i.e. a connection with, and participation with, the orders that transcend individual humanity. The value of these seven basic goods stems, in Finnis's view, not from the fact that *we* desire them, but from *their* being basic aspects of human well-being; hence the characterization of his list as 'objective'. Eventually, following Aquinas, Finnis treats these basic goods as part of the 'common good', that is, the interest of all members of the community to bring about a state of affairs where everyone, and not only the few, will be able to enjoy the basic goods in their life.⁷¹ Ultimately, according to Finnis, human rights are grounded in these seven

⁶⁹Griffin (2008), ch. 2

⁷⁰ Finnis (2011), pp. 85-90

⁷¹ Aquinas, T. *Summa Theologiae*, II-I, q 95, art 2

fundamental goods, in the sense that they function as a kind of ‘safety valves’ which ensure their (rights’) fulfillment.

Moreover, there are the so-called ‘basic needs’ accounts regarding the philosophical foundations of human rights.⁷² Within this context, it is argued that there is a class of basic needs that we have in virtue of our humanity, independently of any other goals. Such needs are, for example, our need to food, water, air, medical aid, home, health, and social relations, that is, conditions that human beings require in order to have a minimum of a healthy biological, and psychological existence, or a ‘minimally decent life’.⁷³ According to the basic needs accounts, without these basic needs being fulfilled we cannot have a decent human life; so that human rights are in effect the principles which guarantee them. Consequently, human rights are grounded in this class of basic needs. What is further pointed out is that the advantage of this approach is that not only the fully rational human beings, but also children, the mentally disabled, and so forth, are protected. Ultimately, the basic needs account is typically seen as neither too *narrow* as Griffin’s agency account, nor too *expansive* as Finnis’s seven fundamental goods account above.

Finally, there is the Capabilities Approach. This approach has recently been connected by Martha Nussbaum with human rights. According to Nussbaum, capabilities are answers to the question ‘What is this person able to do and to be?’⁷⁴ Capabilities, Nussbaum argues, ‘are not just abilities residing inside a person but also the freedoms or opportunities created by a combination of personal abilities and the political, social, and economic environment.’⁷⁵ Similarly to Finnis’s seven fundamental goods, Nussbaum argues that a decent political order must secure to all citizens at least a threshold level of ‘ten’ Central Capabilities of particular importance, which are entailed by the idea of a life worthy of human dignity. These ten central capabilities are: 1) life, 2) bodily health, 3) bodily integrity, 4) senses,

⁷² Cruft, R., Liao, S.M., Renzo, M. (2015), pp. 570-587.

⁷³ Miller (2007); also: Miller (2012), 407-27

⁷⁴ Nussbaum (2011), p. 20

⁷⁵ Nussbaum (2011), p. 20

imagination and thought, 5) emotions, 6) practical reason, 7) affiliation, 8) relations to other species, 9) play, and 10) control over one's environment.⁷⁶

Eventually, Nussbaum emphasizes the close link between these capabilities and human rights. In particular, she claims that 'the common ground between the Capabilities approach and human rights approaches lies in the idea that all people have some core entitlements just by virtue of their humanity, and that it is a basic duty of society to respect and support these entitlements.'⁷⁷ In other words, all human beings are entitled to these capabilities, which eventually function as the foundations of their rights; or, human beings have rights that guarantee these ten central capabilities.

After this concise presentation of some of the most important naturalistic, or traditional, or orthodox 'rights-based' justificatory accounts, I turn to their main flaws. Here, I admit that I generally favour the naturalistic, or traditional, or orthodox view, according to which human rights are *moral* rights that all human beings possess at all times and in all places in virtue of their *humanity*. My new Duty-Based Account (DBA) might be seen as an account belonging to some extent to this family of justifications. Yet, as I shall explain in chapter 4, *rationality*, which lies above *humanity*, is, in my view, the crucial factor that guarantees our human and socioeconomic rights. In what follows, I move on to the discussion of some of the most serious deficiencies of the naturalistic, or orthodox, or traditional accounts. I start with Griffin's theory for the justification of human rights. I repeat here that this is not an exhaustive discussion of these accounts; rather my aim is to present some of their deficiencies, most of which are already highlighted in the existing literature.

Initially, Griffin's account is a significant philosophical account. The notion of normative agency, as he calls it, is quite important for human beings, as, without it, they wouldn't be able to bring about any rational action at all in their lives. In this sense, agency should be protected with human rights. Additionally, the strengthening of the notion of agency is an important task in our 'human rights era',

⁷⁶ Nussbaum (2011), pp. 33-34

⁷⁷ Nussbaum (2011), p. 62

in which the spirit of *giving* and respecting others (*activity*) is of lesser importance than the spirit of *getting* more and more, and asking for respect from others (*passivity*). That is to say, Griffin's focus on the notion of 'agency', which is identified with the notion of 'acting', is important because only through 'acting' may we become more active in an era in which what generally dominates is lethargy. However, there are two main problems with Griffin's account that cannot be overlooked.

First, the argument based on the notion of normative agency encounters problems with respect to human beings who lack the capacity to act as autonomous moral agents. The problem with Griffin's account is that is focused only on the *actual*, rather than the *potential*, normative agency of human beings. But not all human beings are actual agents. For instance, children, the severely mentally disabled, dementia sufferers, and so forth, are not actual agents. Children are potential agents, while the mentally disabled and dementia sufferers *used to be* actual agents, but they are not any more. Hence, the acceptance of an agency-based account for the justification of human rights may lead us to the implausible conclusion that all these human beings have no rights. Griffin himself admits that 'only normative agents bear human rights – no exceptions: not infants, not the seriously mentally disabled, not those in a permanent vegetative state, and so on.'⁷⁸

But is this actually something that we can accept lightly? I think this is something that neither morality nor law can accept. It is not by accident the fact that not only the former, but also the latter attributes human rights both to children and the mentally disabled. There are many legal documents drafted upon this idea, e.g. the United Nations Convention on the Rights of the Child.⁷⁹ Consequently, as has been addressed in the relevant literature, contrary to what they assert, agency-based accounts, such as Griffin's, do not understand human rights as rights that all *human beings* have in virtue of being human. Instead, human rights are seen as

⁷⁸ Griffin (2008), p. 92.

⁷⁹ Available from <https://www.unicef.org.uk/what-we-do/un-convention-child-rights/> [accessed 11 April 2018].

rights that all *persons* have in virtue of being persons, that is, of being agents.⁸⁰ But when we are talking about *human* rights we typically refer to and mean rights possessed by *human* beings, not just *persons*, namely citizens or members of a certain society.⁸¹

Second, Griffin's account is regarded as a 'reductive' account, in the sense that it constrains the human rights violation factors only to the concept of agency. But even though agency is a crucial factor in considering a particular action as a violation of a human right, there are cases in which it is not the only one. For example, the limitation of our agency in the case of torture is not the only reason why 'not to be tortured' is a human right.⁸² Liao argues that torture's creation of great pain to human beings could also be considered as a crucial factor in considering 'not to be tortured' as a human right.⁸³ But Griffin's foundational account does not entail all the factors; hence it may be considered as an incomplete and reductive account.

Surprisingly, Griffin himself allows other elements to influence and contribute indirectly to the determination of the content of human rights. In particular, he says that the two core values that constitute the notion of agency, namely autonomy and liberty, do not exhaust all the elements of a good life. He then mentions other elements, such as accomplishing something in the course of one's life, understanding certain moral and metaphysical matters, deep personal relations, enjoyment, and so on, as forming a good life.⁸⁴ The question then arises as to why Griffin does not mention these factors when considering a human rights violation in the first place?

Moreover, Finnis's 'seven basic goods' account, within the context of his defense of natural law theory in his *Natural Law and Natural Rights*,⁸⁵ has generated

⁸⁰ Cruft, R., Liao, S.M., Renzo, M. (2015), p. 12.

⁸¹ For the distinction between human beings and persons, see: McHugh, J. (1992).

⁸² Griffin (2008), pp. 52-3.

⁸³ Liao (2010), 15-25; see also Tasioulas (2010), 647-78, 663-6

⁸⁴ Griffin (2008), p. 36.

⁸⁵ Finnis (2011)

a very considerable and sophisticated body of scholarship.⁸⁶ However, as has been clarified at the beginning of this chapter (Introduction), my aim is not to provide a detailed and rigorous account of the naturalistic and the practiced-based theories for the justification of human rights. Rather, my aim is more limited. Hence, here I focus on what has been considered to be the main problem of Finnis's seven fundamental goods account, namely the fact that, although it does promote our well-being and a good life, it favours a *plurality* of goods for the justification of human rights.

To be more specific, I agree with those who point out that we must be careful with accounts favouring the *plurality* of goods for the justification of human rights. As has been pointed out, the problem is that such accounts produce a broad list of human rights.⁸⁷ But it is not plausible to turn everything we might require for our personal well-being into a human right. For instance, the fact that, besides my husband and my daughter, I need the presence of a friend in my life for the purpose of my well-being does not mean that that could, or should, become a human right. Paradoxically, Finnis himself has admitted that there are countless aspects to human self-determination and self-realization.⁸⁸ However, he still does not seem to offer a treatment to this flaw. Incidentally, the same problem appears on the 'interest-based' accounts for the justification of human rights. For instance, Raz argues that human rights are held to be grounded in human interests.⁸⁹ Yet, as in the case of

⁸⁶ Among those who have been influenced by John Finnis theory of law is, for instance, John Tasioulas; see Tasioulas, J. (2011). On the nature of human rights. *Contemporary Controversies*, 17–60. For a more detailed critique of Finnis's 'New Natural Law' than I can offer here, see for instance, Crowe, Jonathan. (2011). Five questions for John Finnis. *Pandora's Box*, Vol. 18 (11-12): 11-17, available from SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1943926 [accessed 3 November 2018]; Chartier, G. (2010). Natural law and animal rights. In: *Canadian Journal of Law and Jurisprudence*. 23:33; Macedo, S. (1996). Against the old sexual morality of the new natural law'. In: George, R.P. Ed. *Natural Law, Liberalism, and Morality*; see further Alexy, R. ((2002). *The Argument from injustice, a reply to legal positivism*. Oxford University Press

⁸⁷Cruft, R., Liao, S.M., Renzo, M. (2015), p. 13.

⁸⁸Finnis (2011), p. 90. I am thankful to John Finnis for mentioning this point to me in his KJuris: King's Legal Philosophy Workshop 'The nature of law', King's College London, Wednesday 15 February 2017.

⁸⁹ Raz (1988), ch. 7

fundamental goods, such interest-based accounts favour the plurality of interests producing further an implausible broad list of human rights. The question then arises whether it makes sense to produce countless rights corresponding to each one of those interests? As in the case of the plurality of goods, the answer I think must be negative.

Ultimately, one can object to both fundamental goods and interest-based accounts that what effectively distinguishes rights from goods and interests is the fact that, in contrast to rights, goods and interests do not involve duties. Goods and interests can be impaired without any wrong being committed. For example, my interest in being someone's lover can be unsatisfied, or 'violated', without any wrongdoing. But this is not the case for rights, which are typically seen as closely connected with duties. This is a point of significance within the context of the formulation of the new (Kantian) Duty-Based Account for the justification of human and socioeconomic rights in the present thesis.⁹⁰

Furthermore, the 'basic needs' accounts promise to be neither too narrow as Griffin's agency account, nor too expansive as Finnis's seven fundamental goods account. Hence, it could be argued that they might avoid many of the problems of both the agency and the good life accounts which have been discussed above. However, as has been stressed in the current literature, a number of other significant rights, such as civil and political rights, remain unsupported within the constrained context of a basic-needs justificatory type; for example, there is no room left for the justification of rights such as the right to fair trial.⁹¹ Generally, I do not think that a basic needs account does offer a satisfactory answer to these two categories of rights (civil and political), which are part of the International Bill of Rights.

Finally, the main problem of Nussbaum's approach, as Liao has argued, is the *language* she uses in the case of children.⁹² Because of their cognitive immaturity,

⁹⁰ More on the relation of rights and duties in chapter 4

⁹¹ Cruft, R., Liao, S.M., Renzo, M. (2015), pp. 14-15

⁹² Liao (2015), p. 60.

Nussbaum argues, children do not have the real opportunities to choose and act (capabilities). For example, a child cannot actually choose to have, or not to have, a name or nationality. Thus, Nussbaum claims that the language of *functionings*, rather than the language of *capabilities*, is the appropriate language for children. That is to say, the achieved functionings matter in their case, and not their capabilities, namely their real opportunities to judge and act in relation to a set of functionings.⁹³ Within this context, Nussbaum further argues in favour of compulsory education, compulsory health care, and other aspects of compulsory functioning. Ultimately, these functionings, as Nussbaum argues, can further help children to develop adult capabilities.⁹⁴

Now, it is true that children, as well as the mentally disabled, the comatose patients, and so forth, are cognitively immature or deficient. Hence, that is the reason why, according to the main argument of the thesis (chapter 4), in these cases, particularly, the language of *duties*, rather than the language of *rights*, is appropriate. However, the choice of the language of duties, rather than the language of rights, within the context of the new (Kantian) Duty-Based Approach (DBA), is not a choice that degrades children, the mentally disabled, the comatose patients, and so forth. On the contrary, it is a language that highlights the special level of protection required in these and other similar cases. Unluckily, Nussbaum's distinction between the *functionings* and *capabilities*, and her decision to choose the pejorative language of former rather than the latter in the case of children, the mentally disabled, comatose patients, and so forth, straightforwardly degrades them. Ultimately, by arguing that these functionings can further help children to develop adult capabilities, Nussbaum seems to ignore the fact that many children, unfortunately, do not live to adulthood in order to develop adult capabilities; hence the disparaging language of functionings never actually turns into the advanced language of capabilities for them.

⁹³ Nussbaum (2011), pp. 20-26.

⁹⁴ Nussbaum (2011), p. 26; also: Nussbaum (2006), p.172

Overall, one might say that most of the rights-based naturalistic, or orthodox, or traditional justificatory approaches present the relations: agency-rights, or good life-rights, or interest-rights, or basic needs-rights, or capabilities-rights, in such a way that if one's rights have been violated, she is also deprived of her agency, or good life, or interests, or basic needs, or capabilities. But there are examples in history that show that people, though deprived of their human rights, they still had some sort of agency, or a good life, or their interests satisfied, or their basic needs and capabilities fulfilled; so that they were eventually considered to enjoy a minimal decent life. For instance, despite the violations of most of his rights during the Second World War, in Greece, my grandfather has several times told me that his life was a *good life* after all. Also, recently, Buchanan has said that 'a woman or a person who is gay or lesbian may be subjected to discrimination in the workplace or in various other social settings, yet may be able to achieve high levels of well-being'.⁹⁵

Ultimately, as has been mentioned in literature, all the justifications above have a consequentialist, or instrumental, or utilitarian character, ascribing human rights to human beings only on the basis of the contribution of the rights to the realization of a specific aspect of humanity worthy of protection (e.g. agency).⁹⁶ One might argue here that a consequentialist, or instrumental, or utilitarian aspect is important in order for us to determine more precisely the exact content of a right. Besides, the determination of the content of rights is a *conditio sine qua non* for the formulation of a substantive theory of rights. For example, in the case of the rights to speech, a legal reasoning based on consequentialist, or instrumental, or utilitarian considerations would possibly explain why we ascribe broader rights to political rather than to commercial speakers.⁹⁷

Nevertheless, I think that, in this particular case, an *instrumentalist* would struggle to show why a politician has broader speech rights than a commercial speaker. A *consequentialist* would similarly struggle to provide the adequate 'effects

⁹⁵ Buchanan (2010), 687

⁹⁶ Cruft, R., Liao, S.M., Renzo, M. (2015), p. 16

⁹⁷ Wenar (2005), pp. 179-209

information' upon which to build his or her legal reasoning. Finally, a *utilitarian* would struggle even more to show the benefits of restricting the speech rights of commercial speakers in favor of the relevant rights of political speakers. Thus, my proposal, in chapter 4 of the present thesis, is that we should better see human rights in *deontological* terms, namely as something that human beings hold *independently* of whether these rights promote and protect some valuable aspects of humanity such as agency, interests, needs and so forth.⁹⁸

3.2 Political and practice-based accounts

The advocates of the second family of rights-based justifications consider human rights, in principle, as legal and political rights generated within the international political practice.⁹⁹ According to this type of justifications, human rights are typically seen as based on: a) the public reason within a liberal constitutional democratic regime, or a decent hierarchical society (e.g. Rawls), or b) the international 'practice' (e.g. Raz, Beitz), or c) an 'overlapping consensus' among holders of different religious, philosophical and moral views (e.g. Nussbaum). I will first present some of the most important political and practice-based justifications of human rights, and then I will point out some of their weaknesses.

One of the most prominent theorists of the 'political move' who has challenged the naturalistic conception of human rights is John Rawls. More specifically, Rawls has claimed that because of the fact that people hold different religious, philosophical and moral views, we should avoid grounding human rights on 'a theological, philosophical, or moral conception of the nature of the human person'.¹⁰⁰ Given the wide range of positions, and the consequent disagreements among peoples, on such issues, Rawls has claimed that the use of such forms of

⁹⁸ For a deontological perspective concerning the justification of rights, see further: Nagel (2002), pp. 31-52, 87; Kamm (1992), 354-389; Kamm (1995); Kamm (2004); Quinn (1993), pp. 149-174.

⁹⁹ See Rawls (1999); Beitz (2009); Raz (2010a), pp. 321-38; Raz (2010b), pp. 31-47.

¹⁰⁰ Rawls (1999), pp. 68, 81

'ordinary moral reasoning' are problematic and unacceptable to ground human rights for *all* people. Hence, contrary to the naturalistic conceptions, according to which human rights are grounded in a distinguishing aspect of human nature, or a fundamental element of human existence, Rawls has argued that an account of the justification of human rights should be based on what he has called 'public reason', that is, the reason of free and equal peoples, of which (reason's) principles are not derived from any particular religious, philosophical, and moral doctrines, but from the values and ideas that can be shared and freely agreed by all within a liberal democratic or a non-liberal democratic yet decent hierarchical society.

Under this position, public reason is solely based on the idea of the 'politically reasonable' addressed to citizens as citizens.¹⁰¹ Overall, in this view, well-ordered people, that is, liberal people, as well as non-liberal but decent people who are members of non-aggressive hierarchical societies, agree on human rights derived from a kind of public reason, of which principles come from the ideas that have previously been agreed by all. Finally, according to Rawls's theory, the principles derived from the values and ideas that can be shared and agreed by *all*, at the international level, refer to:¹⁰²

1. People's freedom and independence, and the respect of them by other people.
2. The observance of treaties and undertakings.
3. The equality of people, and the fact that they are parties to the agreements which bind them.
4. The observance of a duty of non-intervention.
5. People's right of self-defence but not of their right to instigate war for reasons other than self-defence.
6. The honor of human rights.
7. The observance of certain specified restrictions in the conduct of war.

¹⁰¹Rawls (1999), p. 55

¹⁰²Rawls (1999), p. 37

8. The duty of assistance of other people living under unfavorable conditions that prevent their having a just or decent political and social regime.

Furthermore, in order to justify human rights, Raz focuses on the international practice, or what he calls the 'Practice', in the international world order.¹⁰³ More specifically, he claims that 'human rights are in principle moral rights held by individuals only when the conditions are appropriate for governments to have the duties to protect the interests which the rights protect'. In particular, Raz calls human rights 'synchronically universal', by which he means that they are possessed only by people alive today.¹⁰⁴ He then gives as an example the right to education to show that this right exists only where the social and political organization of a country makes it appropriate to hold the state to have a duty to provide education.¹⁰⁵ Within this context, Raz claims that there cannot be a right to education for cave dwellers.¹⁰⁶ Overall, (moral) human rights are, in Raz's view, not independent from the conditions of the international community that guarantees them or not; but they exclusively depend on the contingencies of the current system of international relations.¹⁰⁷

In a similar vein, Beitz believes that a coherent notion of human rights is derived from observing their practice. Beitz further argues that human rights are intended to play a role only within a certain range of societies.¹⁰⁸ More specifically, he claims that these societies are those that have at least some of the defining features of modernization: for example, a minimal legal system including a capability for enforcement, an economy that includes some form of wage labour for at least some workers, some participation in global cultural and economic life, and a public institutional capacity to raise revenue and provide essential collective goods.¹⁰⁹ Beitz

¹⁰³ Raz (2010a), p. 327

¹⁰⁴Raz (2010a), p. 335.

¹⁰⁵Raz (2010a), p. 335-336

¹⁰⁶ Raz, J. (2010b), p. 40

¹⁰⁷ Raz (2010a), p. 336

¹⁰⁸ Beitz (2009)

¹⁰⁹Beitz (2009)

also claims that states are responsible for satisfying certain conditions in the treatment of their own people, and that failure, or prospective failure, to do so may justify some form of remedial or preventive action by the world community or those acting as its agents.¹¹⁰

Last but not least, there are some other practice-based justifications which ground human rights in the fact that they are the object of an 'overlapping consensus' among holders of different religious, philosophical and moral views. According to these justifications, despite the different conceptions of the 'good', different cultures could at least reasonably agree about unacceptable violations of fundamental human rights.¹¹¹ Within this context, human rights are considered to be norms for international practice reachable from a variety of incompatible positions. What should be stressed here though is that, in spite of the fact that the idea of an overlapping consensus is a Rawlsian idea, Rawls himself never used it to describe human rights; that is to say, he never connected his overlapping consensus view with human rights.¹¹² Instead, other writers, such as Nussbaum, have related it to human rights.¹¹³ More specifically, Nussbaum has argued that the basic point of the central capabilities account, which has been discussed in the previous section, is 'to put forward something that people from many different traditions, with many different conceptions of the good, can agree on as a necessary basis for pursuing their good life'.¹¹⁴ Within this context, Nussbaum's list of the ten capabilities could, in effect, be seen as an attempt to answer such a broad cross-cultural inquiry.

Most of the political and practice-based justifications, which have been presented above, are very popular within the context of the human rights discourse today. However, there are some weaknesses, which cannot be ignored. Again, I must stress here that my critique is not extensive; rather it is focused on the deficiencies which have already been recognised in the current literature. I start from Rawls's

¹¹⁰Beitz (2009), p. 13

¹¹¹ Bauer, Bell (1999); see also: Donnelly (2002), ch. 5

¹¹²Beitz (2009), p. 76.

¹¹³Nussbaum (1997), pp. 273-300; Taylor (1999)

¹¹⁴Nussbaum (1997), pp. 66, 286

account, which might be seen as problematic in the sense that only liberal, and some decent hierarchical societies, are included in his argument concerning the justification of human rights.

The Law of Peoples, in which Rawls discusses the issue of human rights, has been developed within the narrow horizon of the political system of liberalism, and is strictly restricted to it. However, not all countries in the world are liberal democracies. But even liberal democratic societies are, today, pluralistic societies consisting of many social groups. Hence, Rawls's account could at most provide a limited, communitarian justification, far from the standards of international and global justice. In addition, it could be claimed that a conception of justice operating in a bounded society, e.g. in a liberal society, typically operates under a power, e.g. a liberal state, of which main goal is to keep that society bounded in a Weberian sense, that is, monopolised by the 'legitimate' power of the liberal state.¹¹⁵

Consequently, I think human rights should be discussed within a wider, more universal, scope than the limited scope of a liberal democracy, which would guarantee their protection all over the world. Only under this condition, we could further speak of a conception of justice freely operating in a pluralistic environment. Hence, our considerations about the justification of human (and socioeconomic) rights should not be restricted to and express a western moral order, but a wider moral order. Otherwise, human rights could unluckily be seen as an infliction or imposition of the western moral values towards other forms of civilization; hence one could contemptuously, yet justly, speak of the 'globalization of human rights.'¹¹⁶

Moreover, as regards Raz's argument for the justification of human rights, it could be said that if human rights existed only when the states had the *means* or the *volition* to protect them, then, in many cases, rights would remain unprotected. We must not ignore the fact that there are many states in the world that do not have the means to protect human rights, e.g. they do not have the resources to construct the appropriate institutions. Also, we must not overlook the fact that there are states which do not have the volition to protect human rights in their territories e.g. North

¹¹⁵ O'Neill (2015), p. 84.

¹¹⁶ Mutua (2002)

Korea. Additionally, it might be argued that given that the right to education is part of the general right to knowledge, which is not restricted only to particular societies, but it is applied to all times and all places, the right to education could be seen as a right which does actually exist in the Stone Age, as well as in all un-contacted tribes in the world today. Here Liao makes an interesting distinction between: 1) the *aim* or *goal* of a right, and 2) the *object* or the *means* to achieving the relevant goal of a right. Within this context, it could legitimately be claimed that although the latter may indeed vary across time and location, the former are timeless and independent of the specific *loci*.¹¹⁷

Furthermore, concerning Beitz's thesis, according to which human rights' theoretical conception can be grasped only through interpreting their practice, has been claimed that the current deep confusion about the *use* of human rights in practice in several cases, indicates a deeper confusion about their meaning;¹¹⁸ so that one should start from analyzing the *concept* of human rights, and then move on to the examination of their *practice*.¹¹⁹ Also, regarding Beitz's claim that human rights exist and are grounded only in 'societies of modernity', which have been structured in a way that favours their fulfilment, one might counter-argue that human rights actually do not play a role only in modern societies. Apparently, this would leave open the possibility of people unprotected in other states which do not have the characteristics of modernity. For example, there are over a hundred tribes in the world today, which have not even the minimum contact with the 'outside' world.¹²⁰ I think it is difficult one to think that people belonging to these tribes, or to other civilizations in the past, or to future communities with other characteristics, do not possess rights.

In addition, Beitz's main idea that only states are responsible for satisfying certain conditions aiming at the fulfilment of human rights renders the issue of rights' responsibility too narrow. On the contrary, the UN's Declaration of Human

¹¹⁷ Liao (2015), p. 66.

¹¹⁸ See for instance, *The German Airliner Case*, BVerfGE 115, 118 ff, 15 February 2006.

¹¹⁹ Cruft, R., Liao, S.M., Renzo, M. (2015), p. 653.

¹²⁰ [Online] Available from: <https://bigthink.com/scotty-hendricks/there-are-more-than-100-uncontacted-tribes-in-the-world-who-are-they> [accessed 19 January 2019]

Rights, in its Preamble, proclaims that ‘every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction’.¹²¹ Consequently, the responsibility for the protection of human rights is not and cannot be restricted only to governments, but it applies to all: individuals, e.g. ordinary people, legal practitioners, politicians, governments, organisations, corporations, and so forth.

Ultimately, one might respond to Beitz that the international practice regarding human rights is not sufficiently homogenous to warrant that any case of domestic harmful conduct of governments shall be subject of international concern. Hence, failures in domestic level are not prevented or remedied in international level in most cases. The ascertainment of cases of international concern is quite difficult or impossible, given the disagreements among societies as to which human rights are genuine, and hence as to the contours of the practice that should be followed in certain circumstances. Even if there is a growing body of documents to which we can point in articulating what the international practice of human rights is, there is always the problem of the interpretation of the abstract human rights in these documents. Eventually, a good interpretation presupposes the clarification of the obscure concept of human rights. Hence, one of the main goals of the present thesis is the elucidation of the abstract concept of human (and socioeconomic) rights through the philosophical determination of their grounds.

Finally, as regards the ‘overlapping consensus’ views regarding the justification of human rights, I would first like to stress the fact that one can hardly ignore the attractiveness of the thought that rights can be objects of an intercultural consensus. One of the main reasons, among others, why one should advocate such an agreement across a range of relatively stable societies is that it ‘serves to confirm that the rights we identify as “human” are, in fact, conditions for legitimation, and

¹²¹ [Online] Available from: <http://www.un.org/en/universal-declaration-human-rights> [Accessed 23 January 2017]

that our confidence that they have this character is not distorted by our experience living in one rather than another kind of society with one rather than other kinds of institutions'.¹²² Another (perhaps more pragmatist) reason is that an agreement regarding international human rights is important to elicit the willing support of governments and other agents.¹²³ Eventually, each and all individuals, governments, and other agents might more easily accept human rights as binding, if they see and understand them as objects of an intercultural agreement.

Nevertheless, the 'overlapping consensus' approaches to human rights have to respond to the following counter-argument: human rights, as has already been mentioned above, are, in most cases, seen as a Western product imposed by the Western world to non-Western countries only to serve the interests of the Western world. Within this context, it could be claimed that the idea of 'right' does not look at all familiar to the non-Western world. In his recent micro-ethnographic research, Michael Ignatieff examined the claim whether human rights are a concept shared by all. What he found is that while rights are the language of the states and liberal elites, this language is not actually shared by ordinary people all over the world.¹²⁴

Consequently, arguments such as Martha Nussbaum's, which are based on the idea of an 'overlapping consensus' are problematic in this respect. So, apart from the main problem of Nussbaum's 'capabilities approach', which has been discussed above, namely its difficulty to explain many rights, e.g. children's rights, her (mixed naturalistic and political) account is not satisfactory in the sense that it is not thoroughly explained how an overlapping consensus can be achieved in a world, which does not share the same views either concerning the ten central capabilities in relation to human rights, or concerning human rights themselves.

Ultimately, most of these intercultural agreements, which are based on the idea of an overlapping consensus, seem to have been built upon a constructivist base, without any other moral considerations rather than the construction of the intercultural agreement itself. The question then arises as to how human rights can

¹²² Beitz (2009), p. 79.

¹²³ An-Na'im (1999), p. 315.

¹²⁴ Ignatieff (2017)

effectively be respected by individuals if they can only be seen as the product of a technical or constructed agreement without a deeper moral background. I think morality should not be excluded within the contemporary human rights discourse. Morality is effectively the 'ballast' of legality, without which (morality), legality cannot effectively work. Eventually, one can more easily *respect* something if she does have a moral reason to do so. This is part of the nature of human beings, and it is indeed the way most of them act in real life circumstances.

Concluding the discussion of the political and the practice-based justifications, I add that in all these accounts, the practice of recognizing, claiming, and enforcing universal human rights is based on the international practice, or just the 'Practice'. But it is overlooked the fact that the international practice is ailing today. By an 'ailing' practice, I point to all the suspicions and criticisms, without or not logical base, against states, governmental, and non-governmental organizations, which are typically seen as responsible for the protection of human and socioeconomic rights. It is well-known, for example, the critique against the structure and operational mechanisms of the UN Security Council.¹²⁵ The question then arises as to how a practiced-oriented justification of human rights based on ailing grounds can be a successful one.

At this point, it might be argued that the political and practice-based accounts could be combined with the naturalistic, or orthodox, or traditional accounts. A synthesis, as Buchanan claims, might offer us the solutions to the problems arising from the two types of justification when they are functioning separately. In what follows, I examine the plausibility of a synthesis between the naturalistic and the political perspectives in the philosophy of human rights. Incidentally, it might be said that Nussbaum's theory and, to some extent, Raz's theory do fall within the scope of both types of justification.¹²⁶ Eventually, one could claim that things might not be black or white, but there might be a grey area as well. Buchanan does examine this grey area.

¹²⁵ See for instance, <http://www.inss.org.il/publication/criticism-of-the-un-security-council-veto-mechanism-ramifications-for-israel/> [accessed 4 November 2018]

¹²⁶ Gilabert (2013), 299-325.

More specifically, combining characteristics of both of the two types of justification, namely the naturalistic and the political, Buchanan's complex account aims to show that the gap between them is not unbridgeable. What is addressed at *The Heart of Human Rights* is the question of the moral justifiability of international legal human rights (ILHR).¹²⁷ Initially, Buchanan argues for taking international human rights as a legal practice, or a legal phenomenon, constituted solely by legal rights which are owed to the right-holders without reference *only* to corresponding moral human rights.¹²⁸ There are, as he says, a number of prominent international legal human rights that cannot be justified only by appeal to corresponding moral rights. He gives, then, as an example the right to health care, arguing that 'no individual's interest in health is morally sufficient to justify the great costs that such large-scale policies entail and the significant restrictions on many individuals' liberty that they would inevitably require'.¹²⁹ Instead, there are a number of different grounds for having this right. If we do not appeal solely to a corresponding moral right, the right to health care can be justified, for example, by appealing to the fact that it promotes social solidarity, that it contributes to economic prosperity, or that it is an important ingredient of a decent society. Of course, Buchanan does not exclude the possibility of justifying an international legal human right in a moral way. Rather, he argues that international legal human rights should be justified in a pluralistic way, namely by appealing to a variety of justifications, *including* moral considerations.¹³⁰

Eventually, Buchanan formulates a *moral* account for the justification of international *legal* human rights (as he understands them). However, there is a problem in his account which cannot be overlooked. By giving emphasis solely to the *legal* character of international human rights or, in Luban's words, only to the 'jurisdictional decision about which institutions will define, codify, monitor, and

¹²⁷Buchanan (2013), pp. 5-6

¹²⁸Buchanan (2013), p. 10

¹²⁹Buchanan (2013), p.61

¹³⁰Buchanan (2013), p. 19

enforce human rights',¹³¹ Buchanan seems to disregard the fact that *not all* human rights are legal. There are, indeed, a number of rights, included in treaties and bilateral and multilateral agreements between states, which have binding legal effect between the parties that have agreed to them. There are also other international human rights instruments, such as the Conventions under international law, which are legally binding e.g. the Convention on the Rights of the Child (1989).

However, there are other documents, which, even though they are, in principle, not legally binding, they contribute to the implementation and the development of international human rights law by being a *source* of political obligation. For instance, and most importantly, the Universal Declaration of Human Rights (UDHR) was designed as a non-legally binding document. Indirect arguments for the binding force of the UDHR, based on customary or treaty law, are piecemeal and cannot make obligatory what is mentioned in this Declaration. Also, rules of law derived from the consistent conduct of states acting out of the belief that the law required them to act that way, known as 'customary international law', are non-legally binding as well. Finally, NGOs and human rights activism are non-legal aspects within the practice of human rights today; yet they do play a significant role within the contemporary international human rights arena, in general. Eventually, one could argue with Nickel that a full account of the 'Practice' should encompass law, philosophy, politics, activism, and even journalism.¹³²

Further, I do not understand Buchanan's claim that there are a number of different grounds for having a human right. It is not only that such a justificatory plurality would complicate even more the controversial and obscure notion of human rights in the minds of ordinary people, as well as in legal reasonings in courts, and in international politics, but also that, following the examination of the grounds of human (and socioeconomic) rights, within the context of the present thesis, I have concluded that these rights are actually grounded in a *moral* basis solely. This is thoroughly developed in chapter 4, as an essential part of the thesis.

¹³¹ Luban (2015), p.263

¹³² Nickel (2014), pp. 213-223

Finally, I point out that, despite its attractiveness, a synthesis between the naturalistic and the practice-based perspectives in the philosophy of human rights is quite difficult to be achieved. These two perspectives represent two quite different philosophical insights. However, this does not mean that, generally, morality and legality cannot be reconciled, as George Letsas has argued.¹³³ In spite of their differences, my view is that morality and legality can indeed be considered as ‘two hearts beating as one’ within the (Kantian) duty-based ethics. Light is shed on this proposition in the last two chapters of the thesis.

4. Conclusion

In this first chapter of historical and introductory character, I started with the presentation of a brief history of human rights, before I discuss their two main problems and, also, some criticisms against them today. In addition, I offered an overview of some of the most significant contemporary ‘rights-based’ justifications of human rights. More specifically, I focused on: 1) the naturalistic, or traditional, or orthodox accounts; and 2) on the political and practice-based accounts. Apart from their specific problems, which have already been highlighted in the relevant literature, in this concluding paragraph, I claim that in all these accounts there seems to be an emphasis on and **priority of rights over duties**. Indeed, all these accounts seem to be in line with our so-called ‘human rights era’. Hence, I call them ‘rights-based accounts’ for the justification of rights.

Nevertheless, as has been discussed in section two above, there are two main problems of human rights, which cannot be ignored: First, the idea of human rights is not something that can be deeply understood (problem of indeterminacy); and, second, human rights are not accepted by all (problem of universal validity). As has already been mentioned, it might be argued that other countries have the duty to assist those countries which either do not understand, or/and accept human rights. The question here arises as to what extent a ‘Rawlsian-type’ intervention is

¹³³ See Letsas (2014)

‘innocent’ and acceptable.¹³⁴ That is to say, do other countries have the right to intervene, or not? My view, on this controversial issue (intervention), which has troubled legal philosophers for ages, is that any kind of intervention is, in principle, unacceptable. Hence, I am against the idea of one country intervening to another, except from exceptional circumstances (e.g. ‘murderers-states’ such as North Korea). The reason why I do not generally favour interventionism is that, to some extent, I see countries as rational human beings, that is, as autonomous entities. Only in exceptional circumstances (e.g. children, mentally disabled, and so forth) does one have the right to make decisions on behalf of someone else. Similarly, only in exceptional circumstances, for example, in the case of prison camps in North Korea, do have other countries a right to intervention.

The fact that I am, in principle, against the idea of intervention has forced me to find another way of justifying human rights. Hence, instead of developing a ‘rights-based’ justificatory account, such as those discussed above, in the present thesis, I have seen things from another point of view, namely from the scope of duties. Consequently, the general view, upon which the present thesis (fully developed in chapter 4) has been built, that is to say, its overarching narrative, is that, although the language of rights has (but should not) come to an end, the emphasis on and priority of duties over rights must be shown somehow; and a **‘duty-based account’** for the justification of rights should be examined that might be better understood and more easily accepted by the non-western world. We must not ignore the fact that most non-western countries’ ethics is duty-based. For example, African ethics is ethics of duties not of rights. It is the African communitarian society that mandates a morality weighted on duties rather than on rights.¹³⁵ Further, even the most radical Islamist terrorist justifies his crimes through the invocation of a higher sacred/ailing ‘duty’, according to which he must fulfill the wishes of a ‘God’. Ultimately, this is, I think, the main problem of all the ‘rights-based’ accounts which have been discussed in this chapter: none of them gives

¹³⁴ See Rawls (1999), 79-81

¹³⁵ I believe the western individualistic world has a lot to learn from these communities. See further <https://plato.stanford.edu/entries/african-ethics/#EthDutNotRig> [accessed 17/1/2019]

emphasis on and prioritise the idea of duties over the idea of rights. I explore this idea further in later chapters.

Chapter Two

Is dignity the foundation of human rights?

‘So many roads, so much at stake
so many dead ends, I’m at the edge of the lake
sometimes I wonder what it’s gonna take
to find dignity’

Bob Dylan, *Dignity*

1. Introduction: A brief history of dignity and some critiques

Before I fully develop my (Kantian) duty-based argument for the justification of human and socioeconomic rights, I consider it necessary to examine a few more significant arguments for the justification of human rights, particularly, those based on the concept of ‘dignity’. This is something that has to be done not only because the number of the dignity-based accounts is increasing more and more day by day, and most of them are quite popular,¹³⁶ but also because dignity is regarded by many, say judges in courts, as the ‘official’ justification of human rights, as a result of the fact that is actually mentioned as the grounding basis of rights in the major human rights documents, e.g. in the Universal Declaration of Human Rights.¹³⁷ Thus, along with the weighty and influential ‘rights-based’ justificatory accounts, which have been examined in the previous chapter, I think it is important to discuss the ‘dignity-based’ accounts too.

Initially, dignity appears in the major human rights documents, in the Constitutions of many democratic countries, as well as in a number of legal decisions

¹³⁶ See for instance, Moyn (2013), p. 95; Waldron (2007), pp. 201-237; Rosen (2012); Kateb (2011); McCrudden (2008), p. 655-724

¹³⁷ See the Preamble of the Universal Declaration of Human Rights, available from <http://www.un.org/en/universal-declaration-human-rights/> [accessed 4 November 2018]

in courts today. What dominates in all these documents, Constitutions, and decisions is the idea that all rights, to which they refer, are grounded, either explicitly or implicitly, in the notion of human dignity. For example, in the Preamble of the Universal Declaration of Human Rights (UDHR) we read that the ‘...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’, and then, in article 1, that ‘all human beings are borne free and equal in dignity and rights...’.¹³⁸ Also, in the Preamble of the International Covenant on Civil and Political Rights (ICCPR), it is recognized that human rights ‘derive from the inherent dignity of the human person’.¹³⁹ In addition, in the Preamble of the International Covenant of Economic, Social, and Cultural Rights (ICESCR), once more, it is recognized that human rights ‘derive from the inherent dignity of the human person’.¹⁴⁰

Moreover, the conception of dignity appears in the Basic Law of the Federal Republic of Germany (1949). In particular, in article 1 of the German Basic Law, is stated that ‘human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority’.¹⁴¹ Incidentally, the German Constitution has been a model for the construction of many other Constitutions around the world, for example the Greek Constitution. According to the Greek Constitution, ‘torture, any bodily maltreatment, impairment of health or the use of psychological violence, as well as any other offence against human dignity are prohibited and punished as provided by law’.¹⁴² Finally, dignity has several times been invoked as the foundation of human rights in a number of legal decisions in courts. For example, dignity was

¹³⁸ See the Preamble and Article 1 of the UDHR, available from: <http://www.un.org/en/universal-declaration-human-rights/> [accessed 4 November 2017]

¹³⁹ Available from: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [accessed 4 November 2017]

¹⁴⁰ Available from: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [accessed 4 November 2017]

¹⁴¹ Available from: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [accessed 4 November 2017]

¹⁴² See the ‘Constitution of Greece’, especially Part II, article 7, 2. Available from: <http://www.hri.org/docs/syntagma/artcl25.html#A7> [accessed 23 November 2017]

invoked by the German Court in order to protect hijacked airliners from a law permitting shooting down an airplane to save other peoples' lives on earth.¹⁴³ In the same vein, the European Court of Human Rights in a number of cases presents dignity as the justification of human rights.¹⁴⁴ Eventually, all these legal decisions have been influenced by the relevant human rights documents in which dignity appears as the foundation of human rights.

However, dignity is not expressed in precise or accurate terms in the aforementioned documents. That is to say, the way dignity appears in these documents cannot reassure us that it is indeed the foundation of human rights. For instance, while in the two Covenants dignity appears to be the basis of human rights, in the Universal Declaration of Human Rights it doesn't. In the UDHR, in particular, as Jeremy Waldron correctly indicates, dignity and rights seem to be 'coordinate ideas rather than deriving one from the other'.¹⁴⁵ Also, in the Basic Law of the Federal Republic of Germany, is not clearly expressed that dignity is the foundation of human rights. Hence the question arises as to whether dignity is *indeed* the foundation of human rights as it is implied or declared depending on the document?¹⁴⁶

In order to answer this question, one has to put aside the *textual* analysis, and attempt a *conceptual* analysis of the concept of dignity. The reason is that most of the times documents, as Waldron claims, are not noted for their philosophical depth; rather, they represent political compromises.¹⁴⁷ In many cases, framers intentionally leave the concepts diffuse in order to render them flexible objects of reconciliation in the political domain. Jacques Maritain, who had participated in the drafting of the Universal Declaration of Human Rights, has said that the drafters

¹⁴³ See: The German Airliner Case BVerfGE 115, 118 ff, 15 February 2006.

¹⁴⁴ See Rivers (2013), p. 405.

¹⁴⁵ Waldron (2015), p. 118.

¹⁴⁶ In Cruft, R., Liao, S.M., Renzo, M. (2015), p. 118

¹⁴⁷ Cruft, R., Liao, S.M., Renzo, M. (2015), p. 118; see also, Morsink (1999), 281ff

could 'agree about the rights but on condition that no one asks us why'.¹⁴⁸ Consequently, only through a philosophical analysis of the *concept* of dignity we can determine its true nature, and further affirm or not the claim that it is the foundation of human rights. This is something attempted within the context of the conceptual analysis of the moral concept of 'autonomy' in chapter 3. Here, I focus on 1) the history of the concept of dignity and some critiques against it and 2) on four noteworthy contemporary dignity-based justifications of human rights.

To begin with, I consider it important to provide a concise account of the *development* of the notion of dignity, given that it is not a static concept, but a concept which has been used in different ways throughout history. Given that it is impossible to offer here a thorough piece of historical analysis, I've made a selection of sources which offer an *adequate* understanding of the two main types of dignity, throughout history, namely dignity as 'status' and dignity as 'value'.¹⁴⁹ On these two notions of dignity are based some of the most important contemporary dignity-based accounts for the justification of human rights.

The starting point of this brief historical analysis is the meritocratic concept of dignity in archaic societies. In Homeric epics dignity is accorded to persons with high status.¹⁵⁰ This is the status arising from the possession of characteristics regarded as meritorious. Special characteristics such as family and friendships determine where one stands. Dignity, in this sense, is determined by the *place* people hold in the social hierarchy, and is ascribed only to those of high rank. Those beneath someone else in the hierarchy of merit recognize and offer their respect to the high-ranked. Eventually, among those of high status, there is an ongoing

¹⁴⁸ Maritain (1949), p.9

¹⁴⁹ For a deeper analysis and understanding of the notion of dignity throughout history see: Moyn, S. (2014)

¹⁵⁰ See further: Myrsiades, K., Pinsker, S. (1976)

competition of who is ‘the best of the best’. For example, Agamemnon and Achilles must constantly prove that they really deserve their dignity or high-ranking status.¹⁵¹

In the same vein, we see dignity as status (*dignitas*) in the Roman world, in which it is associated with the respect and honour due to a person with an important position.¹⁵² In Cicero’s *De Inventione*, dignity denotes one’s role in the society, as well as the honours and the respectful treatment that are due to whoever has this role. Here, one possesses an elevated social status in the social order if he or she belongs, for example, to the nobility or to the church.¹⁵³ This kind of status conception of dignity continued to exist until the Enlightenment, in the 18th century, when it started gradually to fade away, as a result of the abolition of aristocratic ‘dignities’ associated with aristocratic ‘status’.¹⁵⁴

Contrary to the ‘meritocratic dignity’ in *De Inventione*, Cicero also developed the opposite type of dignity, namely the conception of *intrinsic* human dignity, that is, the idea that each human being *inherently* possesses dignity. In his last treatise *De Officiis (On Duties or On Obligations)*, in which Cicero expands his notion on moral obligations emphasizing the meaning of them in relation to ourselves and our communities, he describes *dignitas* as going beyond merely describing an elevated status of individuals. Specifically, in this work, Cicero understands dignity as a *value* shared by all human beings in virtue of their humanity.¹⁵⁵

Following Cicero’s definition of dignity, traditional Catholic thought generally understands dignity as an *intrinsic* value possessed by all human beings because of the fact that they incarnate God’s image. For instance, for Thomas Aquinas, dignity is an intrinsic value; yet a value possessed by human beings who are not only created

¹⁵¹ Düwell, Braarvig, Brownsword, Mieth (2015), p. 53.

¹⁵² Ober, J. (2014), pp. 53-63.

¹⁵³ Available from ‘The Latin Library’: <http://www.thelatinlibrary.com/cicero/inventione.shtml>
[accessed 5 November 2017]

¹⁵⁴ Tu (1996): 58-75

¹⁵⁵ Cicero (1991), p. xlvi

by God, but also capable of having goodness on account of themselves.¹⁵⁶ In particular, Aquinas claims that the dignity of persons is what worsens rather than lessens a sin, or wrongdoing, committed by them.¹⁵⁷ Eventually, Aquinas associates, or connects, dignity with human responsibility.

In the same vein, Giovanni Pico della Mirandola, in the first part of his *Oration on the Dignity of Man* in which he deals extensively with the topic of human dignity, defines dignity as a value possessed by each human being *inherently*.¹⁵⁸ However, similar to Aquinas, his focus is on the ‘creative power’ of man, that is, the power of man to *choose* between different routes of development. Dignity is ultimately connected by Pico with human capacity for self-determination.

Furthermore, in the 18th century, Immanuel Kant, makes the dignity of humanity central in his philosophy. More specifically, Kant discusses thoroughly the dignity of humanity, or human dignity, in the *Groundwork of the Metaphysics of Morals*, which provides the foundation for all Kant’s subsequent writings in practical philosophy.¹⁵⁹ Here is Kant’s famous passage:

‘... the idea of the *dignity* of a rational being, who obeys no law other than that which he himself at the same time gives.

In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.

¹⁵⁶ In Pegis (1945), pp. 220-223

¹⁵⁷ Aquinas (1974), p. 91

¹⁵⁸ Available from: https://ebooks.adelaide.edu.au/p/pico_della_mirandola/giovanni/dignity/ [accessed 5 November 2017]

¹⁵⁹ Wood (1996), p. xxiii, Kant also talks about the dignity of humanity in *his Lectures on Ethics*. In particular, in Ak. 27:377 he writes: ‘... what matters is that, so long as he lives, he should live honorably, and not dishonor the dignity of humanity... But moral life is at an end if it no longer accords with the dignity of humanity’.

What is related to general human inclinations and needs has a *market price*; that which, even without presupposing a need, conforms with a certain taste, that is, with delight in the mere purposeless play of our mental powers, has a *fancy price*; but that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*.

Now, morality is the condition under which alone a rational being can be an end in itself, since only through this is it possible to be a lawgiving member in the kingdom of ends. Hence, morality, and humanity insofar as it is capable of morality, is that which alone has dignity' (Ak. 4:434-435).¹⁶⁰

Also, in the Ak. 4:436 of the *Groundwork*, Kant argues that every rational human being has inner value, that is, dignity, because he or she has autonomous will. Kant writes:

'But the lawgiving itself, which determines all worth, must for that very reason have dignity, that is, an unconditional, incomparable worth; and the word *respect* alone provides a becoming expression for the estimate of it that a rational being must give. *Autonomy* is therefore the ground of the dignity of human nature and of every rational nature'.¹⁶¹

Overall, and in line with the above passages, Kant defines dignity as an *inner* (not *intrinsic* or *inherent*) value potentially shared by all rational beings. This inner value is, in Kant's view, further grounded in the 'autonomy of the will', that is, the will of autonomous agents who are subjects to reason or practical reasoning (rational agents). Under this definition, apparently, Kant does not constrain dignity only to *human* beings, but he extends it to all *rational* beings.

After Kant –and also some other pre-war legal uses of the term 'dignity' in the 20th century, for instance in the Irish Constitution of 1937¹⁶²– dignity appeared as the

¹⁶⁰ Gregor (1996), p. 84

¹⁶¹ Gregor (1996), p. 85.

¹⁶² See Binchy, W. (2008), pp. 307-26

grounding *value* of human rights in the major human rights documents, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).¹⁶³ As has been stressed, dignity seems to be the ‘official’ justification of human rights in these documents; that is to say, what dominates in these documents is the idea that all rights to which they refer are grounded in dignity. However, dignity is not expressed precisely in the major human rights documents, so that it still remains an abstract concept. The vagueness of the notion of dignity is the main reason why, despite its popularity throughout centuries, and especially nowadays, dignity has also been much criticised. In what follows I focus on some important criticisms against the concept of human dignity.

One of the most vehement attacks in history against dignity –in particular against the Kantian concept of human dignity as a ‘value’– was advanced by Arthur Schopenhauer. In *the Basis of Morality*, Schopenhauer writes that the expression “‘human dignity”, once it was uttered by Kant, became the shibboleth of all perplexed and empty-headed moralists. For behind that imposing formula they concealed their lack, not to say, of a real ethical basis, but of any basis at all which was possessed of an intelligible meaning.’¹⁶⁴ Obviously, Schopenhauer sees no real or moral substance behind the word ‘dignity’. Ultimately, in the *Parerga and Paralipomena*, Schopenhauer calls the Kantian ‘dignity of man’ just a ‘hollow’ and ‘pretended’ concept.¹⁶⁵

Another ‘historical’ attack against dignity was advanced by Friedrich Nietzsche. In his essay ‘The Greek State’, Nietzsche writes that for the Greeks ‘the idea that labour is a disgrace is expressed with startling frankness’.¹⁶⁶ It is only the humanism of the 19th century that requires such ‘fictions as the dignity of man’, according to

¹⁶³ Łuków (2018): 313-329

¹⁶⁴ Schopenhauer (2017)

¹⁶⁵ Schopenhauer (1974), p. 202

¹⁶⁶ Available from: http://nietzsche.holtof.com/Nietzsche_various/the_greek_state.htm [accessed 6 November 2017].

Nietzsche.¹⁶⁷ Nietzsche invokes the idea of dignity in his own way. Dignity is, for him, an aesthetic quality. More specifically, he claims that what gives value to life is art, and for that purpose, leisure is necessary. Therefore, slavery is justified as absolutely necessary to those who must be left free to create. In Nietzsche's view, the subordination of the (dignified) lower classes to the higher classes, that is, the fact that they become a tool in the hands of the superior, in order to contribute to the realization of their (superiors') aspirations is due a degree of dignity. Nietzsche writes:

'... every human being...only has dignity in so far as he is a tool of the genius, consciously or unconsciously... man... only as a wholly determined being serving unconscious purposes can excuse his existence'.¹⁶⁸

The attacks against dignity continue in our time.¹⁶⁹ Mainly because of its vagueness, the concept of dignity has been much criticized since the end of the Second World War, and the subsequent drafting of the human rights documents. For instance, Oscar Schachter, the human rights jurist, has argued that there is no specific definition of dignity, and its meaning has been left to intuitive understanding.¹⁷⁰ Within this context, it is argued that the imprecision of dignity might create problems concerning its legal interpretation in courts. There are indeed many areas of legal controversy today, especially in the area of bioethics, in which dignity has a protagonist role. Here, a number of crucial questions arise. For example, does dignity justify assisting a suffering person to die, or does it require respect for human life? Also, is the embryo a full bearer of human dignity and therefore inviolable, or not?

In the same vein, Ruth Macklin has claimed that 'dignity is a useless concept' arguing that its vagueness makes it extremely difficult for it to be used in making

¹⁶⁷ See also Rosen (2012), p. 43.

¹⁶⁸ Available from: http://nietzsche.holtof.com/Nietzsche_various/the_greek_state.htm [accessed 6 November 2017]; see also Rosen (2012), p. 46.

¹⁶⁹ See for instance, Glendon (2011), pp. 41-5.

¹⁷⁰ Schachter (1983), pp. 848, 849

judgments about controversial medical issues.¹⁷¹ In addition, David Albert Jones has argued that dignity plays only a limited role in securing agreement in debates concerning abortion.¹⁷² What is effectively pointed out in these arguments is the fact that the imprecision of dignity makes it difficult for it to be used in making reliable legal judgments. Also, because dignity is seen as a concept stemming from different cultural contexts, hence it is understood as culturally relative notion, it is claimed that it can hardly play a role in securing *agreement* in controversial cases in the area of bioethics.

But the accusations against dignity do not stop here. There are also those who claim that human dignity is not just an abstract and imprecise notion that might still serve a positive role in the world today, but an 'empty' Western product, deriving from the Western Christian tradition, which aims to domination and universality.¹⁷³ Authors, such as Costas Douzinas, suggest that we should release ourselves from the oppressive power of empty concepts such as the concept of human dignity. In particular, Douzinas believes that we should favour a postmodern type of humanity, and human rights, constantly groundless and open to revolution and eternal redefinition.¹⁷⁴

Moreover, there are those who argue that dignity *has* to be an abstract concept, in order to function as a placeholder in the case of human rights, in particular. More specifically, many scholars today see the imprecision of the concept of dignity as an asset, or an advantage, within contemporary human rights discourse.¹⁷⁵ For instance, Christopher McCrudden has claimed that dignity was written into the Preambles of the human rights covenants 'not to convey any particular meaning, but to operate as a sort of place-holder in circumstances where the drafters wanted to sound philosophical but couldn't agree on what to say'.¹⁷⁶ Within this context, McCrudden

¹⁷¹ Macklin (2003), pp. 1419-20

¹⁷² Jones (2013), p. 525

¹⁷³ Douzinas (2007), p. 196

¹⁷⁴ Douzinas (2007), p. 290

¹⁷⁵ For example, Scott (2013), pp. 61-77

¹⁷⁶ McCrudden (2013), p. 11; see also Cruft, R., Liao, S.M., Renzo, M. (2015), p. 121

argues, that a type of dignity left to our intuitive understanding is better than a crystallised concept of dignity. Why? It would be better because it would be more easily accepted and adopted by *all* cultures. That is to say, because of the fact that there are different cultures in the world, with different cultural codes and values, a non-crystallised notion of dignity, would be better, because it wouldn't raise any concerns or doubts regarding its (specific) content, from one culture to another; so that eventually a universal agreement on human rights based on the fact that these rights are grounded in dignity would be more feasible.

Finally, I mention one of the most recent criticisms against human dignity, aimed against the *Kantian* moral concept of human dignity as a 'value' as discussed by Kant in the *Groundwork of the Metaphysics of Morals* (Ak. 4:434-435).¹⁷⁷ Michael Rosen disagrees with the alleged *metaphysical* character of this Kantian type of human dignity; he calls it a 'transcendental kernel'.¹⁷⁸ Apparently, Rosen thinks of this Kantian type of human dignity as not (easily) applicable to the modern or post-modern secular terrain of human rights. That is to say, Rosen questions the fact that a transcendental concept, as he understands the Kantian concept of human dignity, can be applied to the external, secular domain of human rights.

I think we should be careful when examining each one of these criticisms. It is true that, despite its rich historical background, dignity still remains a non-clarified, or a vague, concept. Therefore, as in the case of human rights, dignity seems to be too abstract to help us in several practical cases in the legal domain today, for example, cases regarding the dignity of embryos and mothers whose life is threatened. In these, and other similar cases, a number of controversies arise when dignity is invoked as the foundation of the relevant rights. For instance, some argue that the embryo is a full bearer of dignity, hence a right-holder; while some others do not, claiming that only mothers, as 'complete' human beings, are full bearers of dignity, hence they can be right-holders. Incidentally, a textual analysis of dignity in these cases complicates things even more, as its meaning is not clearly delineated

¹⁷⁷ Gregor (1997), p. 84

¹⁷⁸ Rosen (2012); also, McCrudden (2013), pp.143-154

within the major human rights documents. As has already been mentioned, dignity is not expressed in precise terms in the documents.¹⁷⁹ Consequently, I think *substantive* arguments, namely arguments independent of what is put forth in the ‘letter of the law’, or what is actually written in the law, are needed to explain whether or not dignity is the foundation of human rights.

My view is that the abstractness of dignity does not mean that it is an *empty* concept, as Douzinas claims, or a type of *placeholder*, that is, a notion getting different meanings in different contexts, as McCrudden argues. Rather, despite its indeterminacy, I see dignity as a *rich* concept with deep moral roots referring to all rational (human) beings (see further chapter 4). Additionally, I question the recent criticism against dignity, in particular the *Kantian* human dignity, as it is presented by Rosen. According to his understanding of Kantian human dignity, this cannot be applied to the secular terrain of human rights today as it is too metaphysical. To this, I invoke Thomas Hill’s claim that the Kantian human dignity is not and should not be seen as a mysterious metaphysical ‘kernel’. Hill argues:

‘... the normative principle prescribing respect for human dignity does not itself assert anything that belongs to metaphysics, as this is traditionally conceived. Metaphysics so conceived is about the world *as it is*, and it is the product of theoretical reason. Ethics is about our aims and choices *as they ought to be*, and it is the product of practical reason... In sum, Kant’s affirmation of human dignity is a normative claim about what is rationally imperative for those who have moral capacities... it is not an assertion of metaphysics based on theoretical reason’.¹⁸⁰

2. Contemporary dignitarian justifications of human rights

All the attacks against dignity have not stopped it from still being today the focus of the human rights discourse. Despite all the criticisms, dignity is presented by a

¹⁷⁹ See also: Sourlas (2016): 30-46

¹⁸⁰ McCrudden (2013), pp. 34, 322

number of contemporary scholars as the genuine basis of human rights holding a privileged position within the contemporary human rights discourse. Eventually, through the proposed accounts, is implicitly confirmed the decision of the drafters of the major human rights documents to set forth dignity as the grounding basis of human rights. There are a number of dignity-based accounts for the justification of human rights today. Most of them consider dignity either as a 'status', or as a 'value'; that is to say, the two basic conceptions of dignity, as they have been developed throughout history. The question here arises as to whether these dignity-based accounts are plausible or not; as well as whether dignity is correctly set forth by the drafters of the documents as the grounding basis of human rights. In what follows, I examine four of the most significant recent dignity-based accounts for the justification of human rights, centered around the two historical conceptions of dignity respectively, namely the dignity as 'status' and the dignity as 'value'.

2.1 The 'status' conception of dignity as the basis of human rights

The modern status conception of dignity is rooted in the old notion of the 'meritocratic' dignity.¹⁸¹ Recently, Oliver Sensen has called the modern status conception of dignity, which is related to the old *aristocratic* usage of it, as 'the *traditional* paradigm of human dignity'.¹⁸² As has already been discussed, the 'meritocratic' dignity is understood as a high status of people who are at the top of a hierarchical society. In what follows, I discuss one of the most prominent status-based dignitarian accounts for the justification of human rights today, namely Jeremy Waldron's account, according to which dignity as 'legal status' *may* be the basis of human rights.

¹⁸¹ Düwell, Braarvig, Brownsword, Mieth (2015), p. 53

¹⁸² See Sensen (2011), 71-91, especially p.75

2.1.1 Jeremy Waldron's dignity-based account for the justification of human rights

Jeremy Waldron is one of the main supporters of the 'status' conception of dignity. In most of his recent works, Waldron argues that dignity as a 'legal status' may be seen as the genuine basis for the derivation of human rights.¹⁸³ Specifically, Waldron claims that given the current failures and all disagreements arising from the practice of human rights today, we must examine these rights from scratch, or redefine them, in order to understand them in depth.¹⁸⁴ He then claims that to begin with morality is not the best way to understand human rights; rather he argues we should start from the *law* of human rights. That is to say, if we wanted to see what human rights *are*, Waldron suggests, we should focus on 'human rights law', namely the Declarations and Conventions, and not on the moral idea underlying them, or residing in the background of law.

According to Waldron, the best way to understand human rights law is to start by examining its 'official' justification, that is, the notion of human dignity. Even though, he admits that human rights documents 'are not noted for their philosophical rigor', he argues that we should still turn our attention to dignity given that this appears to be the basis of rights in most documents.¹⁸⁵ In particular, Waldron claims that we should treat dignity not as a moral, but as a legal concept in the first instance.¹⁸⁶ The legal conception of dignity seems for Waldron to have priority over the moral conception of it within the construction of a contemporary justificatory account of human rights.

More specifically, Waldron seems to favour the old 'status' conception of dignity. That is to say, he is following the old tradition, according to which dignity is

¹⁸³ See for instance, Waldron, J. (2012); McCrudden (2013), p. 327; Waldron, J. (2010a), pp. 216-235; Cruft, R., Liao, S.M., Renzo, M. (2015), p. 117; Waldron (2010b), pp. 1-28

¹⁸⁴ Waldron (2010b), pp. 1-28

¹⁸⁵ In: Cruft, R., Liao, S.M., Renzo, M. Eds. (2015), p. 118.

¹⁸⁶ Waldron (2012), pp. 13-16, 23-30; see also: Waldron (2010a), pp. 216-235

identified with ‘meritocratic’ dignity, namely a type of status connected with rank.¹⁸⁷ Waldron seems to have been influenced by Gregory Vlastos, who has argued that we should organize ourselves like an aristocratic or caste society.¹⁸⁸ Within this context, Waldron writes: ‘My own view of dignity is that we should contrive to keep faith somehow with its ancient connection to noble rank or high office’.¹⁸⁹ Waldron defines status as a ‘high-ranking status –high enough to be termed a “dignity”’.¹⁹⁰ He eventually claims that to treat someone as dignified is to treat her as royalty.¹⁹¹ Hence one whose dignity is not respected should effectively be seen as a prince or a duke, in the past, which have not been respected, on a certain occasion.¹⁹²

Further, Waldron argues that dignity is specifically a *legal* status, namely something accorded to people by law. A legal status in law is, in principle, as Waldron says, a package of rights and duties accorded to a person, or to a group of persons, exclusively by law. For example, ‘infancy’ is a type of legal status in the sense that the ‘status’ here operates like an abbreviation for the list of rights that a person has.¹⁹³ However, Waldron considers a legal status not just as a given package of rights and duties, but as a *special* package that also entails a deeper explanation of *why* these rights and duties are accorded to persons.¹⁹⁴ For example, in the case of infancy, the list of rights accorded to infants is a special package entailing a deeper explanation of *why* this package is accorded; apparently because infants are not capable of looking after themselves. Eventually, a legal status, as Waldron understands it, can explain *why* rights and duties are attributed to citizens by law.

¹⁸⁷ See Waldron (2012), pp. 14, 17, 21, 22, 24, 30; Cruft, R., Liao, S.M., Renzo, M. (2015), p. 133; McCrudden (2013), p. 336.

¹⁸⁸ Vlastos (1984)

¹⁸⁹ Waldron (2012), p. 30.

¹⁹⁰ Waldron (2012), p. 59.

¹⁹¹ Waldron, J. (2010b), pp. 1-28

¹⁹² Waldron, J. (2010b), pp. 1-28

¹⁹³ In: Cruft, R., Liao, S.M., Renzo, M. (2015), p. 134.

¹⁹⁴ Cruft, R., Liao, S.M., Renzo, M. (2015), pp. 135-136.

Ultimately, this kind of legal status conception of dignity might be seen, as Waldron claims, as the foundation of human rights.¹⁹⁵

Finally, contrary to one who would claim that this status conception of dignity seems to be favouring inequalities within societies, Waldron understands the above described legal status conception of dignity as perfectly combined with equality arguing that *all* people in modern democracies possess this type of status dignity.¹⁹⁶ In order to support his claim, Waldron points to a passage in the *Metaphysics of Morals* (Ak. 6:329), in which Kant writes: 'No human being in a state can be without any dignity, since he at least has the dignity of a citizen'.¹⁹⁷ Waldron then argues that dignity as a legal status can be combined with equality in the case of the 'dignity of citizenship'. That is to say, all human beings in a state have dignity, given that they all possess the Kantian dignity of citizenship. Waldron eventually claims that the legal status of the 'dignity of citizenship' can legitimately be proposed as the foundation of the rights of *all* citizens in modern democracies.¹⁹⁸

Recently, Waldron has examined the *extension* of the notion of legal status of the 'dignity of citizenship' from the domestic to the global level. In other words, instead of talking only about the dignity of citizens in a specific territory, he argues that we could legitimately argue in favour of a kind of dignity of citizens in international level. To support his claim, Waldron invokes the Kantian 'universal citizenship' through which it could be achieved, in his view, the extension of the legal status of the dignity of citizenship from the domestic to the international level.¹⁹⁹ Eventually, Waldron implies that the legal status concept of dignity he is favoring may legitimately be seen as the grounding basis of human rights both at domestic and international level.

¹⁹⁵ Cruft, R., Liao, S.M., Renzo, M. (2015), pp. 133-136; see also Waldron (2012), p. 14

¹⁹⁶ Waldron (2012), pp. 14, 31, 33; McCrudden (2013), p. 327

¹⁹⁷ Gregor (1996), p. 471

¹⁹⁸ Waldron (2012), p. 60; McCrudden (2013), pp. 327-343

¹⁹⁹ McCrudden (2013), p. 332; see also: Gregor (1996), p. 281

In summary, here are Waldron's main claims:

1. Because of the disagreements regarding human rights today, we must reconsider their grounds.
2. We should begin from law itself, not its moral background, in order to understand the law of human rights.
3. We should start by examining what appears to be the official justification of human rights law in the major documents, that is, the notion of human dignity treating it as a legal rather than a moral concept in the first instance.
4. Dignity is a type of status traditionally connected with rank.
5. In particular, dignity as a *legal* status may guarantee our human rights.
6. The legal status conception of dignity, which can be combined with equality, may guarantee the rights of citizens in the domestic level.
7. The extension of the notion of legal citizenship from the domestic to international level, may guarantee the rights of citizens in the international level as well.

In what follows, I respond to each one of these claims before I conclude that the legal status concept of dignity that Waldron favours is not the grounding basis of rights either at domestic or at international level.

1. and 2. Waldron is right that the controversies regarding human rights law today force us to understand it in depth. For instance, many argue that human rights law is just a Western concept imposed by Western cultural circles on non-Western states, with other values, customs and mores, only for serving West's special interests. Hence, we should understand the *nature* of human rights law in order to cope with such disagreements. Surely, the need for the determination of the nature of human rights leads us to the examination of their grounds (see chapter 1). Nevertheless, I

do not understand Waldron's reluctance to start from the *moral* background of human rights law.²⁰⁰ Here are two reasons.

First, as already mentioned in chapter 1, human rights are typically seen as *moral* rights. Hence, although it is law, 'human rights law' cannot be detached from the *moral* idea of human rights *preceding* it. In chapter 4, I explain the claim that human rights are *primarily* moral rights, with political connotations, which are *further* protected by law. Consequently, in order to understand the *law* of human rights, we should start from the examination of its *moral* nature and grounds, and give priority to them over the *law* itself, which *follows* them. Ultimately, starting from morality in order to understand human rights law, and not from the law –as, for example, Hohfeld did,²⁰¹ and now Waldron explicitly suggests– is a significant philosophical stance that brings philosophy at the heart of human rights' discourse connecting the two disciplines, namely the principles of philosophy and law.

Second, let's say that we follow Waldron and put the *law* (not morality) first in order to understand 'human rights law'. The issue here is whether this can answer the question of what effectively human rights *are*. Unfortunately, in most human rights cases today there is a large controversy regarding the interpretation of the relevant *rights*, that is, strictly speaking, the *law* of human rights. One example is the interpretation of the (legal) human right to freedom of religion²⁰² initiated by the landmark case of the ECJ, that is, *Kokkinakis v Greece* (1993).²⁰³ As Rivers says: 'There is no doubt in the minds of the Strasbourg judges that freedom of religion is important, but exactly what it is and why it matters remains elusive'.²⁰⁴ It seems then that the law itself does not provide the grounds for a deep understanding of the relevant right.

²⁰⁰ Waldron does not stress the distinction between human rights and human rights law. The first are the rights for example in the UDHR, while the second is the body of human rights which for example has been ratified by states and has afterwards become law.

²⁰¹ Hohfeld (1919)

²⁰² 'Legal' in the sense that it has been ratified and codified into law in many jurisdictions

²⁰³ Available from: <http://www.hrcr.org/safrica/religion/Kokkinakis.html> [accessed 19 November 2017]

²⁰⁴ McCrudden (2013), p. 405

But there must be an exact and correct interpretation of rights because without prior interpretation, there cannot be proper application of law.²⁰⁵ Therefore, we should not only connect the law of human rights with its morality, but also give priority to its moral nature over its legal character in order to adequately interpret some controversial rights in courts, such as the right to freedom of religion. Only a thorough investigation of the *morality* of human rights could enrich our understanding of the subsequent *law* of human rights as it has been formulated after the end of the Second World War.

3. Moreover, the fact that dignity seems to be the *official* justification of human rights in the major documents (e.g. in UDHR, ICCPR, ICESCR), is not sufficient reason for us to conclude that dignity is *indeed* the foundation of human rights. Waldron himself admits that human rights documents ‘are not noted for their philosophical rigor’.²⁰⁶ The meaning of dignity is not clearly delineated within the context of the major human rights documents. For instance, dignity does appear as the moral basis of human rights in the ICCPR, in which is written that the rights it contains ‘derive from the inherent dignity of the human person’.²⁰⁷ But, dignity does not appear as a straightforward foundational concept in the UDHR, in which it is written that ‘all human beings are born free and equal in dignity and rights’.²⁰⁸ Consequently, given the great confusion regarding the meaning of dignity in several documents, I think we should not focus on the law itself to shed light on the obscure concept of human dignity. Hence, I do not understand why Waldron still insists that the *legal*, rather than the *moral* meaning of dignity, should be our starting point.²⁰⁹

In addition, we must bear in mind that, even though the legal concept of dignity, e.g. within the context of a national Constitution, is ‘autonomous’, it is still a

²⁰⁵ McCrudden (2013), p. 381

²⁰⁶ Cruft, R., Liao, S.M., Renzo, M. (2015), p. 118.

²⁰⁷ Available from: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [accessed 19 November 2017]

²⁰⁸ Available from: <http://www.un.org/en/universal-declaration-human-rights/> [accessed 19 November 2017]

²⁰⁹ Waldron (2012), pp. 13, 15; also, Cruft, R., Liao, S.M., Renzo, M. (2015), pp. 118, 121, 123

rich concept with deep philosophical and theological roots which should not be overlooked. Thus, if we wanted to understand in depth the *legal* meaning of dignity, or its use within the legal context today, we should not ignore its moral character. This is attempted below. Consequently, I think one should return to dignity's *moral* roots treating it as a moral idea in the first instance, and not vice versa, as Waldron suggests.²¹⁰ However, this does not mean that one cannot return to the legal concept of dignity afterwards.

4. and 5. Furthermore, Waldron's idea of grounding human rights in dignity, understood as a status with references to aristocracy, seems to be an anachronistic idea that cannot be applied in the post-Enlightenment world, of which the central ideal and goal is the civil, political, social, and economic *equality* of all people. Besides, we must not ignore the fact that there are many examples in history which show that not all princes and dukes had high status.²¹¹ Additionally, I do not understand how dignity as a *legal* status may guarantee human rights for *all* people. For instance, this connection might lead one to the unreasonable claim that in political systems in which legal status, i.e. dignity, in Waldron's terms, is conferred only to men but not to women (e.g. in Saudi Arabia), only men's rights are justified. But this would be an unacceptable claim. Therefore, dignity as *legal* status and human rights should be kept distinct from one another, and should not be associated with each other.

6. In addition, I do not understand how Waldron's notion of the 'dignity of citizenship' can be the foundation of human rights of *all* people. There are four problems here: 1) The dignity of citizenship which Waldron suggests refers by definition only to the *citizens* of democratic countries excluding all other people

²¹⁰ McCrudden (2013), p. 383

²¹¹ See for instance the *Earl of Shrewsbury's Case*, 12 Co. Rep. 106, 77 Eng. Rep. 1383 (1612) cites the terms of an act of Parliament in the reign of Edward IV for the formal degradation of George Nevill, Duke of Bedford.

residing in it, for example immigrants, refugees, and 'apatrides'; 2) it does not include the citizens who live in countries which have not the characteristics of a democracy (e.g. North Korea is a democratic republic only on paper); 3) it does not include all those who live in non-democratic countries (e.g. Qatar, Saudi Arabia); 4) it does not include those who still live in isolated jungle tribes in the world. Consequently, this kind of dignity of citizenship cannot support, in my view, either an argument for the justification of human rights for all people in a certain territory or State, or an argument for the justification of human rights for all people around the world.²¹²

7. Finally, I do not understand the extension of the dignity of citizenship from domestic to global level through the Kantian notion of 'universal citizenship'. Contrary to what Waldron argues, Kant does not favour such a citizenship of the world. Even though Kant speaks about 'the relation of theory to practice... from a cosmopolitan perspective', clearly, he does not favour the notion of a universal citizenship.²¹³ The reason is that universal citizenship presupposes a world, or a global state, which Kant explicitly rejects. In 8:367 in *Perpetual Peace* Kant writes:

'... the *separation* of many neighboring states independent of one another... is nevertheless better, in accordance with the idea of reason than the fusion of them by one power overgrowing the rest and passing into a universal monarchy, since as the range of government expands laws progressively lose their vigor, and a soulless despotism, after it has destroyed the seed of good, finally deteriorates into anarchy'.²¹⁴

Consequently, the rejection by Kant of the possibility of a world government makes it impossible further to be argued that Kant favours a kind of world citizenship, as Waldron claims. Hence, Waldron's conception of the dignity of the

²¹² Waldron (2010b), pp. 1-28

²¹³ Gregor (1996), p. 281.

²¹⁴ Gregor (1996), p. 336; for the rejection of the possibility of a world government by Kant, see also the passages: 8:354 and 8:357.

citizens of the world, which is allegedly based on the Kantian 'universal citizenship', cannot legitimately be proposed as the basis of the rights of the citizens of the world, given that it is based on a misinterpretation of the Kantian text. Therefore, Waldron's argument according to which human rights might be seen as grounded in this kind of legal status of the dignity of (the Kantian) universal citizenship is flawed.²¹⁵

Following the discussion of Waldron's theory regarding the justification of human rights, I conclude that the type of dignity he favours, that is, the legal status conception of dignity is not the basis of human rights either at the domestic, regional, or international level. Perhaps Waldron could have followed his initial suspicion that dignity might not be the genuine basis of human rights. In his essay 'Is dignity the foundation of human rights', Waldron writes: '... even if it turns out that a strict understanding of the foundationalist claim cannot be defended, still there may be other ways in which dignity will turn out to be important in our understanding of human rights'.²¹⁶ I have no doubt that dignity is an important notion within the contemporary human rights *discourse*. Yet, as it is shown in the following two chapters of the thesis, dignity actually plays only a *secondary* role within the context of *justifying* human rights.

Consequently, even though Waldron is right that dignity is important in our understanding of human rights (and duties), a strict foundationalist claim regarding dignity and human rights cannot legitimately be defended. This is explained more thoroughly in chapters 3 and 4. At the moment, I turn to the discussion of one more significant contemporary dignity-based account for the justification of human rights,

²¹⁵ Following Kant, I argue that serious problems would arise from the creation of a global political entity. There would not only be practical problems regarding the cohesion between the different political entities, but also the crucial problem of despotism as derived from the 'Leviathan-type' global governance. These are the main reasons why I argue against globalization, in general, favouring, instead, a soft-cosmopolitan model for the world countries in the 21st century. According to this soft-cosmopolitan model, states would be able to communicate between them without losing their sovereignty. Eventually, within such a soft-cosmopolitan model, with no global government, one could at most see –and surely Kant would see– the idea of the World citizen just as a metaphor.

²¹⁶In: Cruft, R., Liao, S.M., Renzo, M. (2015), p. 117.

according to which rights are grounded *not* in a *legal*, but in a *moral* status conception of human dignity.

2.1.2 John Tasioulas's dignity-based account for the justification of human rights

Following Jeremy Waldron, John Tasioulas understands dignity as status, yet not as a *legal*, but as a *moral* status. Tasioulas elaborates on the *moral* status conception of dignity as –contrary to Waldron's *legal* status conception of dignity– this seems to him to denote an equality of the basic moral status among *all* human beings.²¹⁷ Eventually, Tasioulas formulates a two-level account for the grounding of human rights, which appeals to both *moral* (equal human dignity) and *prudential* (universal human interests) considerations.²¹⁸

Tasioulas locates human rights within the realm of moral philosophy. That is to say, he sees human rights as *moral* rights; hence he defends the so-called 'orthodoxy' regarding the nature of human rights, namely the idea that human rights are moral rights possessed by all human beings simply in virtue of their humanity.²¹⁹ More specifically, Tasioulas argues that these moral human rights are grounded in 'the universal interests of their holders, all of whom possess the equal moral status of human dignity'.²²⁰ The question here arises as to what Tasioulas means by 'interests' and 'dignity'. I start from the notion of dignity, as he does himself in his essay 'On the foundations of human rights'.²²¹

Dignity is seen by Tasioulas as a *moral* status inhering in *all* human beings by virtue of the fact that they are humans. He also points out that dignity's significance is something understood independently of the interests of the human beings who possess it.²²² He then offers a more detailed definition of this moral status

²¹⁷ Cruft, R., Liao, S.M., Renzo, M. (2015), p. 54.

²¹⁸ In: McCrudden (2013), pp. 291-312; Cruft, R., Liao, S.M., Renzo, M. (2015), pp. 45-70.

²¹⁹ Tasioulas, J. (2012a), pp. 17-59.

²²⁰ Cruft, R., Liao, S.M., Renzo, M. (2015), p. 70.

²²¹ Cruft, R., Liao, S.M., Renzo, M. (2015), especially pp. 49-56

²²² Cruft, R., Liao, S.M., Renzo, M. (2015), especially pp. 49-50

conception of human dignity. According to this, our dignity consists in the fact that we all belong to human species which is characterized by certain features such as: a characteristic form of embodiment; a finite life-span; capacities for physical growth and reproduction; psychological capacities; and rational capacities. Overall, this is what Tasioulas calls as 'the human nature conception of human dignity'.²²³

Further, Tasioulas claims that even though human dignity lies at the foundations of human rights, it does not by itself exhaust them. Rather, this moral status conception of dignity operates *in union* with universal human interests in generating human rights'.²²⁴ Following George Kateb, who has similarly argued in favour of a two-level pluralist account for justifying human rights, that is, an account based on both 'the equal individual status' and the 'minimizing of pain and suffering',²²⁵ Tasioulas claims that both our dignity and universal interests, that is, the universal standards enhancing our well-being, are *equally* fundamental in the task of justifying our human rights.²²⁶ Eventually, Tasioulas favours a kind of value pluralism, which embraces both moral and prudential elements, in grounding human rights. As regards the role of universal human interests, specifically, within the construction of a philosophical account for the justification of human rights, Tasioulas seems to have much been influenced by Joseph Raz's interest-based theory of individual moral rights.²²⁷

More specifically, according to Tasioulas, our human rights exist if our interests in the object of the putative rights are as *important* as to justify the imposition of duties on others to respect them (our interests).²²⁸ For example, Matina has the right not to be tortured by John because her *interest* not to be tortured is as important as to impose a duty to John to respect this interest, as well as her subsequent human right (ban on torture), as it is stipulated in the Universal

²²³ Cruft, R., Liao, S.M., Renzo, M. (2015), p. 54

²²⁴ Cruft, R., Liao, S.M., Renzo, M. (2015), especially p. 50

²²⁵ Kateb (2011), p. 39

²²⁶ Cruft, R., Liao, S.M., Renzo, M. (2015), especially pp. 51, 53-54

²²⁷ Raz (1988); Cruft, R., Liao, S.M., Renzo, M. (2015), p. 50.

²²⁸ Cruft, R., Liao, S.M., Renzo, M. (2015), p. 50.

Declaration of Human Rights. According to article 5 of the UDHR, 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.²²⁹ Eventually, through Tasioulas's account, human rights protect some of our most important interests, imposing duties to all others to respect and advance both these interests and the relevant human rights *deriving* from them. Finally, Tasioulas stresses the fact that the corresponding duties are not necessarily universal, that is to say, not *all* humans have to be the duty-bearers of the correlative human rights. Here is Tasioulas's derivation of human rights from our universal human interests:

'(i) For all human beings, within a given historical context, and simply in virtue of their humanity, having X (the object of the putative right) serves one or more of their basic interests, for example, interests in health, physical security, autonomy, understanding, friendship, achievement, play, etc. (ii) The interest in having X is, in the case of each human being and simply in virtue of their humanity, *pro tanto* of sufficient importance to justify the imposition of duties on others, for example, to variously protect, respect or advance their interest in X, (iii) The duties generated at (ii) are feasible claims on others given the constraints created by general and relatively entrenched facts of human nature and social life in the specified historical context. Therefore, (iv) All human beings within the specified historical context have a right to X'.²³⁰

Tasioulas concludes that human rights are grounded in the above universal human interests which belong to *all* human beings as a result of the fact that they all equally share the moral status of human dignity. Apparently, under this justificatory account of human rights, any violation of them constitutes the wrongdoing of both our individual interests and human dignity.²³¹

²²⁹ Available from: <http://www.un.org/en/universal-declaration-human-rights/> [accessed 26 November 2017].

²³⁰ Cruft, R., Liao, S.M., Renzo, M. (2015), pp. 50-51.

²³¹ Cruft, R., Liao, S.M., Renzo, M. (2015), p. 61.

I agree with Tasioulas's rejection of Waldron's *legal* status conception of dignity. As has already been argued, from this type of legal status a number of inequalities may arise within societies as well as in the global level. Also, I agree with Tasioulas's general approach to the justification of human rights, namely the location of them within the realm of *moral* philosophy. However, I find it quite difficult to grasp his *pluralist* account for the justification of human rights based on both the moral status concept of human dignity possessed by all human beings, and international human interests.²³² Tasioulas claims that human rights are grounded in both *moral* (human dignity) and *prudential* (universal human interests) considerations; and further that human dignity is a *status*, which by definition entails inequality; yet a *moral* status possessed by *all* human beings (equality). What I find difficult to understand is effectively the insertion into contemporary human rights discourse of such diverse constitutive marks as: 1) dignity *and* interests, and 2) *equal moral status*, in anyhow indeterminate concepts such as human rights and dignity.

Moreover, as I understand Tasioulas, one has a human right to something because it protects a human interest closely connected with the aforementioned right. Apparently, Tasioulas has been influenced here by two other significant accounts, namely Raz's *interest*-based account and Finnis's seven fundamental *goods* account. These two accounts have already been discussed. Here I briefly repeat that they both produce a broad list of human rights corresponding to each one of those interests or goods. Tasioulas's interest-based account does not seem to surpass the 'redundancy problem' of the two aforementioned accounts. Tasioulas overlooks the fact that there are countless aspects to human self-determination which cannot all be taken into consideration in the construction of a theory of human rights. Thus, I am afraid that, following his interest-based account, we would conclude to the unreasonable claim that I have the *right* to be loved by a friend; hence she has the *duty* to respect the alleged right. Although Tasioulas tries to set some limits to this undesirable redundancy of rights resulting from the excessiveness of human interests, by describing the character of these interests as 'objective, standardized,

²³² Katrin Flikschuh makes a similar claim by confessing her confusion in trying to understand the notion of human rights in general, in: Cruft, R., Liao, S.M., Renzo, M. (2015), p. 655.

pluralistic, open-ended, and holistic', that is, *significant* in some sense, still, he cannot actually treat the basic redundancy problem arising from his account.²³³

Following the previous argument, according to which Tasioulas' unrestricted interest-based account is excessively permissive,²³⁴ one could also add here that Tasioulas's interests-based account faces the problem of determining *which* interests are of sufficient importance, as well as *why* they are significant to justify the imposition of duties on others. Following Onora O' Neill, one might ask, 'How are we going to decide if an interest is important or not', in order to further connect it with the relevant right?²³⁵ Eventually, Tasioulas's approach compels us to *rank* the interests in order to avoid conflicts between them. Apparently, there is no such a metric. For instance, there is no metric through which we could plausibly rank our interests in 'close relationships with others' and our 'freedom'. That is to say, we do not have the means to argue with certainty that our interest in a close relationship with someone is more important than our freedom, and vice versa.²³⁶ But without such a metric, we cannot arguably decide which interests are of sufficient importance to justify the imposition of duties on others, as stipulated in Tasioulas's interest-based theory for the justification of human rights.

It seems that Tasioulas understands the inadequacy of a human rights justificatory account based on the concept of human interests, and the identification of the latter with the former. In other words, he understands that 'interests often go beyond rights;²³⁷ thus he eventually proposes a two-level pluralist account according to which our human rights are grounded not only in universal human interests, but also in our equal human dignity. There are four main problems in Tasioulas's conception of 'human dignity', and its role in the task of justifying human rights.

²³³ In: Cruft, R., Liao, S.M., Renzo, M. (2015), p. 51.

²³⁴ Griffin (2008), p.55

²³⁵ O'Neill, O. (2015a), p. 74.

²³⁶ In: Cruft, R., Liao, S.M., Renzo, M. (2015), p. 74; also Eddy (2007), 307-28, 314.

²³⁷ This is also stressed by Onora O'Neill in her response to Tasioulas's interest-based account in: Cruft, R., Liao, S.M., Renzo, M. (2015), pp. 72-73.

1. As has already been discussed, Tasioulas sees dignity as a moral **status** inhering in all human beings by virtue of the fact that they are all humans.²³⁸ But, as in Waldron's account, a status conception of dignity, in general, is problematic. The reason is that the status conception of dignity is an anachronistic idea entailing inequalities that cannot be applied in the post-Enlightenment world. This is something which has been explained above.

2. Dignity is, in Tasioulas's view, a moral status **equally** shared by all.²³⁹ Here, I do not understand how 'status' and 'equality' can be reconciled in a single account of dignity. Status by definition entails inequality which contradicts the *conditio sine qua non* of the idea of human rights, namely the notion of equality. Therefore, I do not see how human rights can be based on Tasioulas's moral status conception of dignity. It seems that Tasioulas tries to reconcile two different and opposing ideas that cannot actually be reconciled. Tasioulas does the same when he builds his human rights justificatory account on both moral (human dignity) and prudential (international human interests) considerations. But, again, how can these opposing ideas properly and legitimately be reconciled. Dignity and interests, in the case of human rights typically come from two different traditions, namely from the deontology and consequentialism terrains, respectively. Even though, this is an interesting and challenging 'reconciliatory' approach, which surely raises fewer objections from those other approaches which focus on a single element only, e.g. status (Waldron), interests (Raz), goods (Finnis), dignity (Griffin), this mixing of all these concepts weakens the strength and dynamic of the argument as a whole. Consequently, I think that philosophically we should keep core concepts distinct from one another.

3. Following the previous problem, Tasioulas's super-pluralist 'human nature conception of human dignity'²⁴⁰ could confuse even more the relevant parties in courts by expanding the range of the contingent interpretations of dignity. The difficulties arising from the vagueness of the concept of human dignity are apparent,

²³⁸ Cruft, R., Liao, S.M., Renzo, M. (2015), especially pp. 49-50

²³⁹ Cruft, R., Liao, S.M., Renzo, M. (2015), p. 54.

²⁴⁰ Cruft, R., Liao, S.M., Renzo, M. (2015), p. 54.

for example, in the well-known German Airliner Case.²⁴¹ In that case, the German Court decided that the shooting down of a hijacked aircraft in order to prevent other deaths on earth would be unconstitutional, hence illegal, because it would offend the dignity of the innocent passengers who would be treated as mere means, not ends, according to the Kantian Formula. Yet, in the same case the Court judged that this would not apply in the case in which the airplane was manned exclusively by terrorists. In this case, the shooting down of the aircraft would be permissible. This is, in my view, problematic. The Kantian moral concept of human dignity cannot be applied only in the case of the innocent passengers, but indifferently to all human beings, even if these are the terrorists themselves. By excluding the case in which the aircraft is manned only by the terrorists, the Court seems to apply a different notion of dignity; yet without specifying exactly which one, which confuses even more the relevant parties, and their confidence in courts' judgments and reasonings.

4. Eventually, as it is clearly shown in the following chapters of the thesis, the moral concept of human dignity cannot be the basis of human rights because dignity is not actually a value possessed by the *right-holders*, as Tasioulas and many others suggest. Rather, dignity is an *inner* (not *intrinsic* or *inherent*) value attributed to *duty-bearers* in certain circumstances (fulfilment of their duties). However, only a hasty researcher would offer her own analysis prior to the discussion of the most significant contemporary analyses on a concept. Hence, in what follows, I continue with the discussion of the second major conception of dignity throughout history, namely the 'value' conception of dignity and its relation to human rights.

2.2 The 'value' conception of dignity as the basis of human rights

In this section I turn to the examination of the second historical conception of dignity, namely the conception of dignity as a 'value' typically understood as possessed by *all* human beings on their own account. Kant and the Catholics are the main figures in the formulation of this type of dignity. In the following analysis, I first

²⁴¹The German Airliner Case BVerfGE 115, 118 ff, 15 February 2006.

focus on the Catholic conception of dignity, according to which dignity is primarily seen as the value of man being made in the image of God (*Imago Dei*);²⁴² and, second, on the Kantian ‘mainstream’ understanding of human dignity, according to which people have to be treated not as means to an end, but as ends in themselves.²⁴³ My aim is to show that neither the former, that is the Catholic, nor the latter, that is the ‘mainstream’ Kantian, concept of dignity may ground human rights –in spite of the fact that most of the major human rights documents, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and a number of Constitutions and legal decisions, either implicitly or explicitly, invoke these two conceptions of dignity as the foundation of human rights.

2.2.1 The Catholic value conception of dignity as the basis of human rights

Within the Catholic tradition, dignity is typically understood as an intrinsic *value* possessed by *all* human beings because of the fact that they incarnate God’s image (*Imago Dei*).²⁴⁴ Despite some slight differences among Catholics (see below, Thomas Aquinas), the dominant idea is basically that the dignified human being is one who has been created in God’s image. In this section, I discuss the main Catholic conception of dignity based on the doctrine of *Imago Dei*, as well as Thomas Aquinas’ view, according to which dignity signifies, in effect, *something’s* goodness on account of *itself*.²⁴⁵ Then, I focus on the relation between the Catholic notion of

²⁴² See for instance, Goos (2013), pp. 79-93

²⁴³ See for instance, Bennett (2010), pp. 75-77

²⁴⁴ See also: Waldron J. (2010b), pp. 1-28

²⁴⁵ Available from: <http://www.scottmsullivan.com/AquinasWorks/Sentences.htm> [accessed 5 November 2017]; see also: Pegis (1945), pp. 220, 223

dignity and human rights, arguing specifically that the Catholic notion of dignity is not the basis of human rights.

To begin with, traditional Catholics do not favour the 'status' conception of dignity, either in its legal, e.g. Waldron's, or in its moral, e.g. Tasioulas's, version. Rather, they generally favour the 'value' conception of dignity, which typically emphasizes the *equality* among all human beings. For instance, the German theologian Jurgen Moltmann has argued that 'the dignity of each and every human being is grounded in [its] objective likeness of God'.²⁴⁶ That is to say, each and every human being, no matter how poor, or burdened, or ill, is considered to be dignified, because she incarnates God's image. The idea that all human beings are created in the image of God comes from the book of Genesis (Gen. 1:26), in which God says: 'let us make mankind in our image, in our likeness...'²⁴⁷ This is the most common Catholic route to an understanding of the notion of human dignity.²⁴⁸ Ultimately, as Janet Soskice points out, given that it is not in virtue of our body that we are in the image of God, there are actually different interpretations of what the *nature* of the image of God consists in;²⁴⁹ for instance, goodness, rationality, and so forth.²⁵⁰ For example, Mother Teresa used to see Christ in every person, especially in persons *in need*.

Now, the Catholic notion of dignity of humanity is historically connected with human rights. This is apparent, for instance, in Pius' XII Christmas message on December 25, 1942:

'... the road from night to full day will be long; but of decisive importance are the first steps on the path, the first five mile-stones of which bear chiseled on them the following maxims:

²⁴⁶ Moltmann (1998), p. 34.

²⁴⁷ Available online from: <https://www.biblestudytools.com/genesis/1-26.html> [accessed 29 November 2017].

²⁴⁸ See also: Hanvey (2013), p. 216.

²⁴⁹ Soskice (2013), pp. 235-236.

²⁵⁰ See for instance Lee and George (2008), pp. 173-193.

1. Dignity of the Human Person. He who would have the Star of Peace shine out and stand over society should cooperate, for his part, in giving back to the human person the dignity given to it by God from the very beginning; should oppose the excessive herding of men, as if they were a mass without a soul; their economic, social, political, intellectual and moral inconsistency; their dearth of solid principles and strong convictions, their surfeit of instinctive sensible excitement and their fickleness.

He should favour, by every lawful means, in every sphere of life, social institutions in which a full personal responsibility is assured and guaranteed both in the early and the eternal order of things. He should uphold respect for and the practical realization of the following fundamental personal rights; the right to maintain and develop one's corporal, intellectual and moral life and especially the right to religious formation and education; the right to worship God in private and public and to carry on religious works of charity; the right to marry and to achieve the aim of married life; the right to conjugal and domestic society; the right to work, as the indispensable means towards the maintenance of family life; the right to free choice of state of life, and hence, too, of the priesthood or religious life; the right to the use of material goods; in keeping with his duties and social limitations'.²⁵¹

In particular, after the end of the Second World War, the Catholic value conception of dignity (*Imago Dei*) has influenced the drafters of the major human rights documents, bringing Christianity in close dialogue with human rights. Incidentally, we must not ignore the fact that it was the French Catholic philosopher Jacques Maritain who actively involved in the drafting of the Universal Declaration of Human Rights (UDHR) in 1948.²⁵² Further, in 1949, the *Imago Dei* doctrine, specifically in relation to human dignity, played significant role to the construction of the German Constitution (Grundgesetz), which is a model for many other

²⁵¹Pius XII, Christmas message, December 25, 1942, in: Moyn, S., Pink, T., Finnis, J., Zucca, L. (2017), pp.1-50; see also: Moyn (2015)

²⁵² In McCrudden (2013), p. 222

Constitutions around the world.²⁵³ Generally, Catholic thought has a prominent role within the German law and politics. Even though the Bundesrepublik is considered to be a modern democratic state, the influence of Catholicism is undeniable. For instance, the main German political parties of the centre-right, such as the Christlich Demokratische Union (CDU), have an explicitly Catholic orientation.²⁵⁴

More recently, within the context of the encyclical *Evangelium Vitae*, the Catholic conception of dignity, as the value arising from the fact that we incarnate God's image, was associated, by Pope John Paul II, with human rights. Pope John Paul II has addressed issues such as contraception, abortion, and new reproductive technologies.²⁵⁵ What he has argued is that dignity, in the Catholic sense, grounds the rights of every human being including embryos even from the moment of conception. Hence, dignity requires the inviolability of human life throughout our lifespan. Such understanding of dignity has further influenced judges in several legal cases in courts.²⁵⁶ Incidentally, this Catholic idea of dignity has raised a number of objections today, especially from organizations such as the Swiss 'Dignitas', whose aim is to assist those who wish to 'die with dignity' to end their lives.²⁵⁷ In the following analysis, I explain why the Catholic notion of dignity is not the basis of human rights.

First, the notion of *Imago Dei* is not properly explained and understood. The word 'image' itself is not adequately defined by the proponents of the Catholic conception of dignity. Hence, the question here arises as to what is meant by

²⁵³ Available from: <https://www.bundestag.de/grundgesetz> [accessed 29 November 2017]

²⁵⁴ See Rosen (2012), p. 91.

²⁵⁵ Coughlin (2003), pp. 65, 72–4; Pope John Paul II (1995); see also: Rosen, M. (2012), pp. 3, 6

²⁵⁶ See for instance: BVerfGE 39,1 / 25 February 1975; available from: https://en.wikipedia.org/wiki/German_Constitutional_Court_abortion_decision,_1975 [accessed 25 November 2017]

²⁵⁷ Rosen (2012), pp. 6-7; see also: <http://www.dignitas.ch/?lang=en> [accessed 29 November 2017]

'image'. One could argue that 'image' might mean the same representation of external forms between us and God. Another could argue that image is used symbolically to denote the same 'rationality' or 'goodness' between us and God. That is to say, it could be claimed that we all have dignity because we all share the same external form with God, or because we share the same rationality and goodness with God. Here another question arises as to how we can be sure that we do share these particular characteristics with God. To this, I am following Kant. At the beginning of the Critique of Pure Reason (1781), Kant famously writes:

'Human reason has the peculiar fate in one species of its cognitions that it is burdened with questions which it cannot dismiss, since they are given to it as problems by the nature of reason itself, but which it also cannot answer, since they transcend every capacity of human reason'.²⁵⁸

Consequently, even if we truly believe in God, we cannot be really sure whether or not we share the above characteristics (e.g. external form, rationality, goodness) with Him, as we are not capable of any God's *experience*. Hence, I cannot accept the claim that human beings' dignity arises from the fact that they share one or more common characteristics with God since these need to be defined and then defended. Consequently, the argument according to which dignity, understood as the value we possess because of the fact that we incarnate God's image, can hardly be invoked within the human rights foundations discourse.

Second, we must not ignore the fact that *Imago Dei* gets different meanings within the Jewish and Christian traditions themselves. In the Scriptures we find a variety of possible meanings of *Imago Dei*. It is not only said that humans have being created in the likeness of God, but it is also suggested that there might have been two phases of creation of human beings with the *Imago Dei* playing a different role in each one of them. Consequently, given its indeterminacy, a controversial doctrine, such as the *Imago Dei*, does not offer much to a human rights' justificatory theory. Eventually, as Fletcher correctly points out, I do not see any assets in connecting an

²⁵⁸ Kant (1998), p. 99; see also: Kant, I. (1999)

indeterminate notion, such as the *Imago Dei*, with another indeterminate concept, such as human rights.²⁵⁹

Third, on the one hand, the Catholic Church claims that all human beings have rights because they all are dignified as they incarnate God's image; while, on the other hand, it explicitly discriminates individuals. For instance, in the *Arcanum divinae sapientiae* on Christian marriage, Pope Leo XIII, writes that women must be subject to men, and obey them because they are flesh of their flesh and bones of their bones. Apparently, here women are considered to be dignified only as long as they blindly obey their husbands.²⁶⁰ More recently, the Catholic Church has criticized homosexuality as intrinsically disordered, and homosexuals as individuals with abnormal sexual behaviour; hence as individuals without dignity.²⁶¹ In his recent book, *Dignity: Its History and Meaning*, Michael Rosen reminds us the nineteenth century's anti-egalitarian character of Catholic thought about dignity. The Catholic polemic against egalitarianism in its various forms: liberalism, socialism, democracy, and the emancipation of women may lead us to the conclusion that the Catholic notion of dignity is not the basis of human rights.²⁶²

Fourth, we must not ignore the fact that many people are atheists, that is, persons who do not share a religious worldview. Also, there are many people who are followers of a religion other than the Jewish-Christian religious tradition, or who are committed to an approach to human rights that favours a multi-faith society. In Rawlsian terms it could be argued that if we wanted to attribute human rights to *all* people, we should not base them on grounds that cannot by definition be shared by all. Incidentally, this is one of the strongest secular political objections, among

²⁵⁹ See Fletcher (1999), 1608, 1615-17.

²⁶⁰ Available from: http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_10021880_arcanum.html [accessed 29 November 2017]

²⁶¹ See: Catechism of the Catholic Church, 2357 available from: http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm [accessed 3 May 2018]; also Rosen (2012), p. 7.

²⁶² Rosen (2012), p. 51.

liberals today, against a religious account of rights. Consequently, if we wanted to ground human rights for all people, we should not select dignity understood through the obscure doctrine of *Imago Dei*, as this would not help us to the determination of the vague concept of human rights themselves. Further, it would not contribute to the resolution of the second main problem of human rights today, namely the problem of their universal validity.

Fifth, the notion of dignity understood in Catholic terms as the intrinsic value attributed indiscriminately to all human beings, including embryos from the moment of conception, as Pope John Paul II suggests,²⁶³ might lead to unreasonable claims such as that abortion, or the premature infant delivery, are impermissible, even in serious pregnancy complications, in which a mother's life is threatened. In the same vein, the association of the Catholic value conception of dignity with human rights contradicts certain women's rights such as their right to reproductive freedom. Therefore, dignity, understood in religious terms, and human rights cannot be compatible – especially in the so-called 'hard cases' in law such as abortion.²⁶⁴

For all these reasons, we must be careful with the invocation of the religious *Imago Dei* doctrine as the basis of human rights. Perhaps Rawls is right here to claim that the legitimacy of human rights is much better secured if it rests on plain truths widely accepted, rather than a religious dogma such as the *Imago Dei*.²⁶⁵ Given all these flaws, it seems to me a paradox the implicit reference to the Catholic 'value' conception of dignity in the major human rights documents, in some States' Constitutions, and in legal cases in courts. I turn now to the examination of Aquinas's notion of dignity.

Both Aquinas' and Catholics' views on dignity, are not restricted and applied only to *human* beings, but it is also extended to all other beings (e.g. animals,

²⁶³ Coughlin (2003), pp. 65, 72–4; Pope John Paul II (1995); see also: Rosen (2012), pp. 3, 6.

²⁶⁴ For a similar claim, see: Waldron, J. (2010a), pp. 216-235

²⁶⁵ Rawls (1993), pp. 224-225.

plants); and, generally, to everything which has been created by God, or occupies a place within a divine order, independently of their/its rational capacities. However, Aquinas defines dignity in a slightly different sense than Catholics, namely as the value signifying *something's* goodness on account of *itself*.²⁶⁶ The main difference between Aquinas and other Catholics as regards the conception of dignity is that while the latter consider dignity to be an *intrinsic* value possessed by all human beings as a result of the fact that they incarnate God's image, the former thinks of dignity as a value accorded to someone or something not only because they/it are/is God's creation, and we have to *see* God in them/it, **but also** because they/it are/is good on account of themselves/itself. This approach gives, I think, Aquinas to some extent a place *between* the Catholics and the Enlightenment philosophers, in the sense that he does not invoke only religious elements, but also humanistic ones. That is to say, human beings are not simply beings created in the image of God, but also beings capable of using their own reason to think, judge, and act. That is an interesting approach in the sense that it does not only incorporate traditional Catholic elements, but also *humanistic* ones. These humanistic elements are a 'conditio sine qua non' within the discourse of *human* rights. That is to say, considering human beings as capable of using their *own* reason to think, judge, and act, is generally important in the case of human rights, as only through such a capacity we can further speak of human *responsibility* in certain cases.

However, I do not understand how Aquinas's notion of dignity can be reconciled with Catholics' dignity. In other words, I do not see how in Aquinas's account a *humanistic* version of dignity can coexist with a traditional Catholic understanding of dignity. Although ambitious, Aquinas's reconciliation of these two notions of dignity in a single account does not seem to be feasible. According to the traditional Catholic understanding of dignity, dignity is an *inherent* value, that is, a value that cannot be lost. But, according to Aquinas's humanistic dignity,

²⁶⁶ Available from: <http://www.scottmsullivan.com/AquinasWorks/Sentences.htm> [accessed 5 November 2017]; see also: Pegis (1945), pp. 220, 223

accompanied by human responsibility, dignity seems to be a value that can potentially be lost; hence it cannot be seen as an intrinsic or inherent value.

2.2.2 The 'mainstream' Kantian value conception of dignity as the basis of human rights

Immanuel Kant makes the dignity of humanity one of the central notions in his philosophy. Kant discusses thoroughly the dignity of humanity, or human dignity, in the first moral work of his critical period, namely in the *Groundwork of the Metaphysics of Morals*, which provides the foundation for all Kant's subsequent writings in practical philosophy.²⁶⁷ I re-write here Kant's famous passage:

'... the idea of the *dignity* of a rational being, who obeys no law other than that which he himself at the same time gives.

In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.

What is related to general human inclinations and needs has a *market price*; that which, even without presupposing a need, conforms with a certain taste, that is, with delight in the mere purposeless play of our mental powers, has a *fancy price*; but that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*.

Now, morality is the condition under which alone a rational being can be an end in itself, since only through this is it possible to be a lawgiving member in

²⁶⁷ Wood (1996), p. xxiii, Kant also talks about the dignity of humanity in *his Lectures on Ethics*. In particular, in Ak. 27:377 he writes: '... what matters is that, so long as he lives, he should live honorably, and not dishonor the dignity of humanity... But moral life is at an end if it no longer accords with the dignity of humanity'.

the kingdom of ends. Hence, morality, and humanity insofar as it is capable of morality, is that which alone has dignity' (Ak. 4:434-435).²⁶⁸

Also, in the Ak. 4:436 of the *Groundwork*, Kant argues that every rational human being has an inner value (dignity), because he or she has autonomous will. Kant writes:

'But the lawgiving itself, which determines all worth, must for that very reason have dignity, that is, an unconditional, incomparable worth; and the word *respect* alone provides a becoming expression for the estimate of it that a rational being must give. *Autonomy* is therefore the ground of the dignity of human nature and of every rational nature'.²⁶⁹

Apparently, the Kantian moral concept of human dignity, or 'würde' (in German), which etymologically comes from the word 'wert' which means value, is considered to be an inner, unconditional, and incomparable (i.e. not relational) value which exhibits rational moral will, and is shared by human and all other rational beings who respect the moral law by doing their moral duty. That is to say, the inner Kantian moral value (dignity) is grounded in the autonomy of the will, namely the will of autonomous agents who consciously subject themselves to reason, or practical reasoning (rational agents), and fulfill their moral duties (duty-bearers). This is the *genuine* Kantian human dignity.²⁷⁰ In what follows I focus on and discuss a *different*, popular yet mistaken, Kantian conception of dignity, and its relation to human rights. I call this **the 'mainstream' Kantian conception of dignity**, within the contemporary human rights discourse.

As has been mentioned above, Kant writes in the *Groundwork of the Metaphysics of Morals*: 'that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*' (4:434-5). He also argues that '*Autonomy* is therefore the ground of

²⁶⁸ Gregor (1996), p. 84.

²⁶⁹ Gregor (1996), p. 85.

²⁷⁰ More on what I see as the genuine Kantian human dignity in the following three chapters of the thesis.

the dignity of human nature and of every rational nature' (4:436).²⁷¹ What is popularly yet mistakenly argued is that we all have human rights, namely entitlements to be respected and treated as ends, not as means (4:429), as a result of the fact that we are all dignified as autonomous persons. That is to say, according to Kant's Formula of Humanity, we should act in ways that we use humanity, whether in our own person, or in the person of any other, always at the same time as an *end*, never merely as a *means*.²⁷² Eventually, we all possess human rights, or else entitlements to be respected and treated as ends as the result of the fact that we all possess an *intrinsic* or *inherent* value or worth that cannot be lost.²⁷³ This value or worth is, according to this view, the Kantian human dignity, which is further based on the fundamental Kantian moral principle of autonomy.

In other words, what most Kantian and non-Kantian scholars understand today is that from our *intrinsic* value, that is, our dignity (an inherent value that cannot be lost), which derives from Kantian autonomy, namely our capacity to make our own decisions independently without guidance or coercion from others, through the Formula of Humanity (4:429), we are led to human rights. For instance, according to Oliver Sensen's account, given that dignity derives from the moral law, and rights' ultimate source is taken to be the moral law too, it is legitimate for one to argue that human rights are in effect derived from human dignity.²⁷⁴ Further, Habermas argues that human rights have been developed in response to violations of human dignity; hence dignity can be conceived as their moral source.²⁷⁵ Ultimately, Kant is understood as claiming, for example, that slavery is wrong because it is incompatible with the idea that human beings, and all other rational beings, have to be treated as ends, namely as persons with intrinsic or inherent dignity, and further with

²⁷¹ Gregor (1996), pp. 84-85.

²⁷² See Kant's 'Formula of Humanity' in: Gregor (1996), p. 80.

²⁷³ We must not ignore the difference between the words 'inner' and 'intrinsic' or 'inherent'; while the former denotes a value that can be lost, the latter denote a value or worth that cannot be lost and is totally independent of the judgments and actions of the person who possess it.

²⁷⁴ See Sensen, O. (2011). *Kant on Human Dignity*. De Gruyter.

²⁷⁵ Habermas, J. (2010); Griffin (2008), p. 50; Hill (2013), pp. 313-325; Bennett (2015), pp. 76-77.

autonomy understood as freedom from coercion; or (another example) that torture is wrong because the tortured man is not being treated as an end, namely as a dignified person with autonomous will in the above sense.

Despite its resonance, the fundamental problem with this argument is the misinterpretation, by scholars and legal practitioners, of the grounding basis of human dignity, that is, the moral concept of autonomy. It is true that the Kantian autonomy of the will is an obscure concept that Kant does not clearly define in 4:440 in the *Groundwork of the Metaphysics of Morals*.²⁷⁶ Perhaps this is the reason why Kantian human dignity is considered to be an obscure concept as well. In the 4:440, in the *Metaphysics of Morals*, Kant writes: 'Autonomy of the will is the property of the will by which it is a law to itself (independently of any property of the objects of volition)'.²⁷⁷ What most scholars argue is that the autonomous humans, and all other rational beings, are those who are independent and free to make their own decisions without supervision or coercion from others. For instance, Simon Kirchin says that 'much of the appeal of autonomy lies in choosing what to do with your own life...'²⁷⁸ But just the freedom to choose the course of our own lives however we see fit is not the correct understanding of the *Kantian* autonomy.

Contrary to the 'mainstream' understanding of autonomy, I see the Kantian autonomous person as not just a person who does as she pleases, but as a freely self-legislating person who, applying reason or rationality to her inclinations, passions, social conventions, religious beliefs, ideologies etc., does her duty for duty's sake, or because it is the right thing to do, or out of respect for the moral law (in singular). This is my interpretation of the Kantian autonomy of the will, which contradicts many other prevalent explanations of it today. My understanding of Kantian autonomy is not only based on the interpretation of the relevant passage (4:440), but it is also part of a thorough conceptual analysis of autonomy developed in the following chapter.

²⁷⁶ Gregor (1996), p.89

²⁷⁷ Gregor (1996), p.89

²⁷⁸ Kirchin (2017), pp. 10-26; see also, Griffin (2008); and Rosen (2012), p. 25.

In addition, the ‘mainstream’ dignity-based Kantian argument for the justification of human rights is not only mistaken because of the misinterpretation of the grounding basis of dignity, that is, of the Kantian autonomy of the will, but also because of the subsequent misunderstanding of the Kantian moral concept of ‘human dignity’ itself, that is, the alleged ground of human rights. Specifically, what is mistakenly argued, or implied, is that the Kantian human dignity is an *intrinsic* or *inherent* value, namely a value *always* possessed by *all* human beings, which by definition cannot be lost. But, if dignity was indeed an intrinsic or inherent value, that is, a value that can never be lost by rational beings, then those of us who are not autonomous, that is, persons who *cannot* do our duties in accordance with the moral law’s commands, e.g. the criminals, could still be considered as dignified persons. However, this is not correct in Kantian terms. Kant writes in 4:434-435 in the *Groundwork*: ‘... the idea of the *dignity* of a rational being, who obeys no law other than that which he himself at the same time gives...’²⁷⁹ And in 4:436 he points out that ‘*autonomy* is therefore the ground of the dignity of human nature and of every rational nature’.²⁸⁰ Consequently, what actually attributes value, that is, dignity to agents is their autonomous moral agency, namely their capacity to fulfill their duties in accordance with reasons commands, or, in other words, their capacity to do their moral duty treating *others* as ends, that is, with respect.

Apparently, not all agents are autonomous in the Kantian sense, so not all of them possess dignity. Hence dignity is not an intrinsic or inherent value as the proponents of the mainstream Kantian thesis argue. Incidentally, nowhere in his opus, does Kant mention or imply the *intrinsicness* or *inherentness* of dignity. Hence, the correct understanding of the Kantian moral concept of human dignity is its understanding as an *inner* value, which simply denotes the fact that dignity belongs to the *internal domain* of morality. That is to say, dignity is the inner value or feeling, attributed to or possessed, respectively, only by those who *actually* exercise their moral capacity to fulfill their moral duties treating others as ends.

²⁷⁹Gregor (1996), p. 84.

²⁸⁰Gregor (1996), p. 85.

Moreover, another objection to the ‘mainstream’ argument, according to which the Kantian notion of human dignity is the foundation of human rights, is that such an argument disregards the fact that the Kantian moral concept of human dignity does not belong to the ‘external domain’ of law. Rather, it is a moral concept belonging exclusively to the ‘internal domain’ of morality. Kant writes in 4:434-435 in the *Groundwork*: ‘... but that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*.’²⁸¹ Consequently, if we restricted our ‘justificatory horizons’ to the notion of ‘human dignity’, which belongs to the internal domain of morality, without any recourse to the external domain of law, in which human rights typically reside, then their justification would obviously be implausible and illegitimate.

Furthermore, the popular dignity-based Kantian argument for the justification of human rights cannot actually be seen as a *truly* Kantian argument, given that it disregards the centrality and priority of the concept of ‘duty’ over the concept of ‘right’ within Kantian *duty-based* ethics, in general. The new (Kantian) duty-based argument for the justification of human and socioeconomic rights, or the new Duty-Based Approach (DBA), which is developed in chapter 4 of the thesis, has not only been formulated upon the general idea that within the context of a truly Kantian justification of rights duties must be put first, but it explains why duties have priority over rights.

Last but not least, the ‘mainstream’ Kantian dignity-based argument for the justification of human rights generates problems regarding the so-called ‘hard cases’ in law and medicine, e.g. abortion.²⁸² As has already been mentioned, the notion of dignity understood in Catholic terms, as the value attributed indifferently to all human beings including embryos from the moment of conception, as Pope John Paul II has claimed,²⁸³ might lead to unreasonable claims such as that abortion is

²⁸¹ Gregor (1996), p. 84.

²⁸² In McCrudden (2013), p. 319

²⁸³ Coughlin (2003), pp. 65, 72–4; Pope John Paul II (1995); see also: Rosen (2012), pp. 3, 6

impermissible. In the same vein, under the ‘mainstream’ Kantian dignity-based argument for the justification of human rights, in a high-risk pregnancy, in which a delivery of foetus would be urgent, the physician would seem to have two conflicting *dignities* to deal with, namely the dignity of mother and the dignity of the foetus. Apparently, as an *unconditional* value, neither mother’s dignity, nor foetus’ dignity can be violated. I recall here Kant’s Ak. 4:436: ‘But the lawgiving itself, which determines all worth, must for that very reason have dignity, that is, an **unconditional**, incomparable worth’.²⁸⁴ [emphasis added]. The physician then would come to a well-known dead-end in the literature of medical ethics. Consequently, the application of the ‘mainstream’ Kantian dignity-based argument for the justification of human rights, as well as the general focus on the concept of human dignity, do not seem easily applicable in the practical domain.²⁸⁵

One could counter here that even if we followed a Kantian duty-based approach, such as the one discussed in chapter 4 of the thesis, in the same high-risk pregnancy, in which a delivery of a foetus is urgent, the physician would still have to deal with a difficult task, namely the balancing –not of *dignities*, this time, but– of *duties*: the duty to save the life of mother, and the duty to save embryo’s life. The question here would arise as to why the **duty-based approach** proposed in the present thesis is more preferable than a **dignity-based approach**, given that both of them effectively require the same difficult task, namely the balancing of duties and dignities, respectively –from which rights are afterwards generated.

As it is clearly shown in chapters 3 and 4, the new Duty-Based Approach (DBA) does not suffer from the deficiencies of the dignity-based approach. Specifically, the DBA is based (1) on the exact interpretation of the Kantian supreme principle of morality, that is, of the autonomy of the will (chapter 3), (2) on the precise understanding of the Kantian human dignity, as a notion residing in the

²⁸⁴ Gregor (1996), p. 85.

²⁸⁵ See especially these two cases: BVerfGE 39, 1 / 25 February 1975, BVerfGE 88, 203 / 28 May 1993; available from: https://en.wikipedia.org/wiki/German_Constitutional_Court_abortion_decision,_1975 and <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=607>, respectively [accessed 25 November 2017]; see also: Sourlas (2016): pp.30-46

internal domain of morality (chapters 3 and 4), (3) on the precise interpretation of human rights, as a notion residing in the *external* domain of law (chapter 4), and, finally, (4) on the less ‘mysterious’ notion of ‘duty’, which is not only more important for Kant than the notion of dignity, but also easiest to use in practice (5).

More specifically, when a physician, in praxis, is dealing with a medical hard case, I think it is easier for him to choose between specific *duties* rather than between *dignities*. The reason is that while dignity is an **incomparable** value (see Ak. 4:436 above) that cannot be object of comparison, Kant does not set such a constraint for duties, which can legitimately be objects of comparison through the exercise of the deliberative capacity of the rational, moral, autonomous agent. Surely, this is not an easy task, but, at least, allows for some discretion which, contrary to the comparison of dignities, facilitates action. For example, in the case of the pregnant mother, after using his judgment, the physician might choose his duty to save a mother’s life on the basis of his moral duty to make the care of his patient/mother, not the embryo’s, his first concern. This would further be compatible with the General Medical Council’s (GMC) ethical guidance for doctors, and good medical practice, according to which a good doctor makes the care of his patient his first concern.²⁸⁶ Ultimately, this would be compatible with the (legal) contractual relationship forming the basis of patients’ and physicians’ duties and obligations.²⁸⁷

3. Conclusion

In this chapter, I have shown that dignity is a concept with deep historical roots. I have also shown that there are effectively two main conceptions of dignity throughout history, namely the conception of dignity as a ‘status’ and the conception of dignity as a ‘value’. Through the presentation of four of the most significant contemporary accounts on dignity, and their main weaknesses, it is claimed that dignity might not be the genuine basis of human rights, as it is very

²⁸⁶ For the ethical guidance provided by the GMC, see further: <https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/good-medical-practice> [accessed 7 November 2018]

²⁸⁷ Deutsch, Spickhoff (2008), p.55

often argued today. Neither the popular *legal status*, e.g. Waldron's, and *moral status*, e.g. Tasioulas's, nor the frequently invoked Catholic *value* conceptions of dignity, seem to be the genuine grounds of human rights. Finally, I do not regard either the mainstream or the correct Kantian conception of human dignity as the grounding basis of human rights either. The reason why not even the correct Kantian dignity as an *inner* value is the foundation of rights is that it is not effectively a value or a feeling of *right-holders* in the first place. Rather, it is a value and feeling possessed and attributed to *duty-bearers*. Hence, any violation against the rights of right-holders is not to be seen as an offense against *their* dignity, but as a result of the dysfunctional exercise of duty-bearers' (rational, moral, and) autonomous capacity, which is the true basis of their own (duty-bearers') dignity (more on this in the following chapters). Generally, I see the place of human dignity, both in the contemporary human rights discourse, and in the Kantian opus, as more modest than it is often taken to be.²⁸⁸ This is shown more clearly in the following chapter, within the context of the conceptual analysis of the moral concept of autonomy through the aesthetic category of the sublime.

²⁸⁸ For a similar claim see Sensen (2011a), p. 213.

Part Two

Chapter Three

Can there be a truly Kantian theory of human rights?

1. Introduction

In the General Introduction of the thesis I have stated the main question, namely: ‘what is the philosophical basis of human rights?’ In order to answer this question, I have examined some important rights-based justifications and, also, examined the ‘official’ justification of human rights, that is, the notion of human dignity. I have concluded that, because of their flaws, most of them already discussed in the relevant literature, neither the former, namely the naturalistic and political human rights justificatory accounts, nor the latter, namely the concept of human dignity – neither in its legal/moral status, nor in its value Catholic/Kantian versions– may adequately answer the main question of the thesis.

However, I do not think we should abandon a Kantian orientation or perspective regarding the philosophical foundations of rights. I am convinced that, even though the Kantian moral concept of human dignity is not the genuine basis of human rights, and Kant is generally seen as an opponent of rights, there is still room for the formulation of a (Kantian) duty-based justification of human and socioeconomic rights (chapter 4). Hence, in the present chapter, I examine two more Kantian accounts. I have decided to focus on and discuss the two most recent, noteworthy ones.²⁸⁹ These are: 1) Arthur Ripstein’s argument, according to which human rights are grounded in the Kantian notion of the ‘innate right to freedom’, in the Doctrine of Right, the Rechtslehre, in the *Metaphysics of Morals*;²⁹⁰ and 2) Katrin

²⁸⁹ There are of course the classical Kantian accounts for the justification of human rights, e.g. Rawls’s and Habermas’s accounts. However, I have decided to focus on two recent Kantian accounts. For the two aforementioned classical Kantian accounts for the justification of human rights, see: Rawls (2001); Habermas (2010), pp. 464-480

²⁹⁰ Ripstein (2009)

Flikschuh's *transcendental* approach to the justification of human rights.²⁹¹ Along with the Kantian dignity-based argument for the justification of human rights, these accounts are, I think, the three most important contemporary attempts to justify rights in a Kantian mode.

After the discussion of these accounts, I move on to what I see as the ideal starting point for the formulation of a new (Kantian) duty-based theory of human and socioeconomic rights (chapter 4), that is, to the Kantian notion of 'autonomy'. Within this context, I attempt a thorough conceptual analysis of the core moral concept of autonomy, as it is discussed by Kant in the *Groundwork of the Metaphysics of Morals*, through the Kantian aesthetic category of the sublime.²⁹² Following this analysis, I focus on two exemplary artworks, namely on Virginia Woolf's novel *Mrs. Dalloway* and on Bill Viola's 'five angels for the millennium', in order to show more clearly 1) the tension between the notions of autonomy and heteronomy, and 2) the relation between the aesthetic concept of the sublime and the moral notion of autonomy.

2. Arthur Ripstein's account for the justification of human rights

According to Arthur Ripstein's argument, human rights are grounded in the Kantian notion of the 'innate right to freedom' as it appears in the Doctrine of Right, the Rechtslehre, in the *Metaphysics of Morals*.²⁹³ Before the presentation and discussion of Ripstein's argument, as it is developed in his *Force and Freedom*,²⁹⁴ I focus on the 'innate right to freedom' itself as it is discussed by Kant in the Rechtslehre.

The *Metaphysics of Morals* is divided into a Doctrine of Right, and a Doctrine of Virtue. The Doctrine of Right, the Rechtslehre, which is considered to be the cornerstone of Kant's legal and political philosophy, has two parts, one on 'private

²⁹¹ In: Cruft, R., Liao, S.M., Renzo, M. (2015), pp.653-670.

²⁹² See Gregor (1996), p. 89.

²⁹³ Ripstein (2009)

²⁹⁴ Ripstein (2009)

right', and one on 'public right'.²⁹⁵ In the Introduction to the doctrine of right, Kant distinguishes between 'innate' and 'acquired' right. He argues that the former is a right belonging to everyone by nature, independently of any act that would establish it; while such an act is required for the latter. Kant then states in 6:237 that 'there is only one innate right'. Specifically, Kant writes: '*There is only one innate right*', and then: '*Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity*'.²⁹⁶

Ripstein focuses on this Kantian 'innate right to freedom', which he sees as the individualization of the Kantian Universal Principle of Right in 6:230, according to which 'any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law'.²⁹⁷ His goal is effectively to formulate upon this Kantian 'innate right to freedom' a contemporary justificatory account of human rights.²⁹⁸ He begins with describing the Kantian system of equal freedom as one in which each person is free to use her own powers, to set her own purposes, and no one else to compel her to use her powers in a way designed to advance any other person's purposes. That is to say, under the Kantian system of equal freedom, each person independently decides which ends she has, and through which means to pursue them, without having someone else to decide for her.²⁹⁹ Ripstein then focuses on the 'innate right to freedom' or, as he calls it, 'the right to independence'.

More specifically, Ripstein describes the Kantian innate right to freedom as a distinctive aspect of our status as persons in relation to other persons, which protects our purposiveness and sovereignty, that is, our capacity to choose independently the ends and the means to these ends, against the choices of any

²⁹⁵ Gregor (1996), pp. 353-603.

²⁹⁶ Gregor (1996), p.393

²⁹⁷ Gregor (1996), p. 387; Ripstein (2009), especially p. 35

²⁹⁸ Ripstein (2009), especially pp. 30-56

²⁹⁹ Ripstein (2009), especially p. 33

other person. This innate right allows for freedom and independence from the choice of others within the Kantian system of equal freedom as it has been described above. For instance, no one is allowed to decide for me even if she knows better than me. Eventually, the innate right to freedom is identified with one's right to be one's own master and have no other, within a system of equal freedom. Ripstein adds that this system of *equal* freedom must be understood as a system of *reciprocal limits* on freedom, that is to say, as a system in which an unconditional constraint, or a mutual restriction under law, is imposed on the conduct of all persons. These reciprocal limits are ultimately grounded in the importance of each person's independence. That is to say, because each person's independence matters, all other persons have to respect it, adjusting their conduct accordingly.³⁰⁰

Under this definition of the Kantian innate right to freedom, the idea of freedom is further identified by Ripstein with the idea of freedom as 'non-domination'. Considering the violation of our freedom as wrongdoing, Ripstein argues that any wrongdoing is effectively a form of domination. He then clarifies that the wrongdoing, or the violation of our freedom by the deeds of other persons, does not consist in the fact that someone does something that *causes* something bad to us, but that someone *does* something to us through dominating, or interfering with our freedom as independence.³⁰¹ For example, if I break your arm, Ripstein claims, the wrongdoing consists of the fact that I am interfering with your person. That is to say, by restricting your ability to set your own ends and pursue them as you see fit, I am not respecting our respective freedom under universal law.³⁰²

Ultimately, Ripstein argues that the 'innate right to freedom', or the right to independence, is the genuine foundation of the rights persons have against each other, as well as of the fundamental constitutional rights which protect political freedoms and freedom of religion. Ripstein claims that we *all* have human rights because we *all* have this innate right to freedom, namely the right to independence and the right to non-coercion, which sets limits to other persons regarding the ways

³⁰⁰ Ripstein (2009), pp. 31, 33-35, 37

³⁰¹ Ripstein (2009), p. 42.

³⁰² Ripstein (2009), p. 56; see also p. 44, 50

force may be used by them against us. Also, Ripstein argues that the innate right to freedom does not refer only to the relations between persons, but also it sets limits to states' actions, as well as the means states use in achieving them.³⁰³ Under this grounding of human rights, these are eventually considered to be the principles or rules which guarantee our equal freedom and independence from coercion.

Having presented his view, I now provide some criticisms of Ripstein's argument in the current literature. I begin with Katrin Flikschuh's claim that the innate right to freedom cannot actually be a foundational right because it is just a formalistic right from which no substantive legislation of (moral) human rights can be derived.³⁰⁴ That is to say, the innate right to freedom cannot be the source of any positive body of laws because it is just a purely formal right rather than a substantive concept with specific content. The main reason why we should see, in Flikschuh's view, the innate right to freedom as a formalistic right is that there cannot actually be a foundational right in the Doctrine of Right, as this would contradict Kant's general philosophical non-foundationalism.³⁰⁵ Consequently, although Flikschuh characterizes as 'tempting' the declaration of the innate right to freedom as a foundational human right, she explicitly says that we should resist this temptation.³⁰⁶

Although I agree with Flikschuh's initial claim that the innate right to freedom cannot actually be a foundational right because it is just a formalistic right, from which no substantive legislation of (moral) human rights can be derived, I cannot agree with her claim that Kant is *generally* an anti-foundationalist. To be more specific, it is true, in my view, that the innate right to freedom is a formalistic right which cannot further justify a particular, substantive body of laws. This is obvious after the analysis of the 6:237, in which Kant discusses the innate right to freedom. I quote the passage once more: '*There is only one innate right*', and then: '*Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only*

³⁰³ Ripstein (2009), pp. 31, 56

³⁰⁴ Flikschuh makes this claim in: Cruft, Liao, Renzo (2015), pp. 653-670.

³⁰⁵ Cruft, Liao, Renzo (2015), p. 661

³⁰⁶ Cruft, Liao, Renzo (2015), p. 661.

original right belonging to every man by virtue of his humanity'.³⁰⁷ In this passage, Kant argues that the innate right to freedom (independence of human beings from being constrained by others' choices) is an original right, that is, a right possessed by human beings in virtue of their humanity, which coexists with others' respective innate rights to freedom **in accordance with a universal law**.

What Kant means by 'universal law' is 'nature'. In 4:421 in the *Groundwork of the Metaphysics of Morals*, Kant writes: 'Since the universality of law in accordance with which effects take place constitutes what is properly called *nature* in the most general sense (as regards its form) – that is, the existence of things insofar as it is determined in accordance with universal laws...'.³⁰⁸ In particular, by 'universal law', Kant means 'nature' in *formalistic* terms. Incidentally, Henry Allison says that there are two (Kantian) ways of conceiving 'nature': formally and materially. Nature conceived formally is the existence of things in accordance with universal laws, while nature conceived materially is the sum-total of appearances.³⁰⁹ The former understanding of nature, that is, nature conceived in formalistic terms, as the existence of things in accordance with universal law, is what actually Kant means here. Consequently, the innate right to freedom is an *original*, or a *natural*, right that coexists with other peoples' respective innate rights to freedom in a *formalistic* way (*in accordance with a universal law of nature*). In 6:380 in the *Metaphysics of Morals*, Kant validates this claim: 'The doctrine of right dealt only with the *formal* condition of outer freedom (the consistency of outer freedom with itself if its maxim were made universal law), that is, with **right**' [bold in the original].³¹⁰

Therefore, I can hardly see a formalistic right, such as the formalistic 'innate right to freedom', as the basis of any substantive body of laws, as Ripstein argues. As has already been mentioned (chapter 1), human rights are typically seen as *moral* rights. A justificatory account restricted only to a formalistic notion taken from Kant's

³⁰⁷ Gregor (1996), p.393

³⁰⁸ Gregor (1996), p. 73.

³⁰⁹ Allison (2011), p. 177; see also KrV A418–19/B446 note; Pro: 4: 295–96; 90–91, 318; 110–11.

³¹⁰ Gregor (1996), p. 513.

legal/political philosophy lacks to show the *moral* character of these rights. Hence, the Doctrine of Right cannot support, in my view, any argument for the justification of substantive (moral) human rights.

Nevertheless, although I see the innate right to freedom, in particular, as a formalistic right, and the Doctrine of Right, in general, as formalistic, I can hardly claim, as Flikschuh does, that Kant is *generally* an anti-foundationalist. The fact that the Doctrine of Right, including the innate right to freedom, is a piece of formalistic philosophical work, does not mean that the Kantian philosophy in general, and Kant's *moral* philosophy in particular, is formalistic. In the following chapter, through the formulation of the main argument of the thesis, I show why Kant's ethics is not merely formal, and how it can actually provide specific and substantial guidance as an ethical system with the appropriate resources to do so. More specifically, I show how from the autonomy of the will we can move on gradually to the external moral duties, in which our human and socioeconomic rights are further grounded. Eventually, the kind of moral justification of human and socioeconomic rights provided in the present thesis might be seen as a way of combating Flikschuh's 'Hegelian-type' formalistic view of the Kantian opus in general.³¹¹

Another problem with the concept of 'innate right to freedom' as the basis of human rights, which has been stressed in the literature, is that we cannot ground these rights, which are supposed to belong equally to *all* human beings, in something such as freedom, which lacks any plausible metric. More specifically, O'Neill asks how could we know that we all have the same degree of freedom of expression if this right (freedom of expression) is grounded in the concept of (the innate right to) freedom which by definition cannot be measured. As O'Neill claims, 'without a

³¹¹ What is called the Empty Formalism Objection is found in Hegel's *Philosophy of Right*. Specifically, what Hegel argues is that the moral law, as Kant thinks of it, consists in a merely formal requirement of reason. The main argument of the thesis in the following chapter may be seen as one more attempt, within the relevant debate between Hegelians and Kantians, to combat Hegel's, and Hegelians' view, according to which the Kantian ethics is purely formalistic. See Hegel (2005); also: Freyenhagen (2011): 163-186; and Stern (2015)

metric for liberty, we cannot know which set of liberties is largest', so that freedom cannot be used as 'building block' for any account of justice.³¹²

Furthermore, in 6:237, Kant explicitly defines freedom as independence from being constrained by another's choice.³¹³ In my view, this type of freedom, that is, the freedom to do as one pleases cannot ground, and is no way compatible with, the idea of justice in general. Justice is the *conditio sine qua non* for the existence of a society living in harmony. But freedom is by definition a principle that does not entail limits, so that free people can hardly coexist in harmony. Apparently, in such a case, there would be harsh conflicting exercises of freedoms/liberties, and the balancing of them would be an extremely difficult task.

One could counter here that Kant also talks about the equality between moral agents in 6:237-8, and that it is the combination of *freedom* as independence and *equality* that eventually yields justice.³¹⁴ My reservations concerning this claim are the following: 1) Kant does not straightforwardly use the word 'equality' in these passages; he just implies it when, for instance, writes '*freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of **every other...**'³¹⁵ [emphasis added]; 2) but even if we take in good part the claim that Kant here does invoke the combination of *freedom* and *equality* as the cornerstone of justice, I cannot still understand how this combination might treat the aforementioned problem, namely the problem of the conflicting freedoms/liberties, and the balancing of them. Kant does not offer a resolution to this problem; rather he remains silent. But it would be extremely difficult for such a system of justice to weigh one liberty/freedom against the other and also liberty/freedom against other values.³¹⁶ Consequently, justice, in general, can hardly be seen as a system of *freedom* –even if freedom is combined with equality.³¹⁷ On the contrary, I believe a

³¹² O'Neill (1996), pp. 161-2

³¹³ Gregor (1996), p.393

³¹⁴ Gregor (1996), pp. 392-394

³¹⁵ Gregor (1996), p. 393

³¹⁶ For a similar claim, see: Cohen (1981), pp.126: 9; and Dworkin (1977), p. 271

³¹⁷ See Ripstein (2009), p. 32

system of *autonomy* can more effectively be connected with justice given that autonomy by definition entails limits, which are necessary for the existence of a harmonious society.

One more issue must be pointed out here: Although Ripstein does not explicitly say so, his argument, according to which we have rights *because* we all have an innate right to freedom, might further be understood as a 'relation of protection': human rights *protect* our innate right to freedom. However, this seems to be a consequentialist and instrumentalist view, far apart from a truly deontological and Kantian perspective. Eventually, such a view cannot actually be distinguished from an interest-based approach to law, with a consequentialist character, such as those which have been discussed in chapter 1.³¹⁸

Last but not least, I would like to mention one more objection against Ripstein's attempt to ground human rights in the innate right to freedom, as it is found in the Doctrine of Right. I start with Allen Wood's review of Ripstein's *Force and Freedom*.³¹⁹ Wood writes:

'One sunny spring day nearly forty years ago, I was sitting in an open-air café in Ithaca, New York, having coffee with Hans-Georg Gadamer. He was already over 70, and I was still in my twenties, having just published my first book on Kant. So, our conversation, which consisted mainly of youth listening to the superior wisdom of age, centered on the current state of Kant scholarship. Gadamer said that the biggest single lacuna in Kant studies was the absence of a really good book on Kant's *Rechtslehre*. It ought to be a book, he declared, that did not start out from Kantian ethics, but instead expounded Kant's theory of human rights, law and politics *authentically*, solely on the ground of Kant's concept of *Recht*: external freedom according to universal law. Gadamer told me *I should write such a book* -- a recommendation I found flattering, but I also immediately (and silently) dismissed, partly because my principal interest in Kant

³¹⁸ See for example Raz's interest theory of law, Raz (1984), pp.1–21.

³¹⁹ Wood, A. (2009)

was precisely in his ethics... Until now, however, I have never found the book Gadamer thought so badly needed to be written. But this book finally appears to be it... Ripstein...'³²⁰

Similar to Wood, I do *recognise* as one of the major contributions of Ripstein his attempt to ground human rights independently of Kant's ethics, in the innate right to freedom, in the Doctrine of Right, which is part of Kant's legal and political theory. However, either because of my personal interests in Kant's ethics, or my view that Kant is, above all, a moral philosopher, it is difficult for me to understand Ripstein's thesis that there can be a Kantian human rights' – that is moral rights' – justificatory argument *independently* of Kant's ethics and the moral law. Hence, in the main human and socioeconomic justificatory argument of the present thesis, I start from Kant's ethics, and, only after this, I move on to Kant's legal and political theory in the Doctrine of Right. I expand on this in chapter 4. In the same chapter, I argue in favour of the link between Kant's ethics and legal/political theory, overriding the 'rivalry' between the so-called 'independentists' and 'dependentists' scholars, and treating the Kantian opus as a work with continuity and coherence.

3. Katrin Flikschuh's transcendental argument for the justification of human rights

In this section I focus on Katrin Flikschuh's *transcendental* approach to the justification of human rights.³²¹ To begin with, distinguishing her approach from all the practice-based accounts (chapter 1), Flikschuh argues that the confusion regarding the *use* of human rights in several cases³²² might be indicative of confusion regarding their *meaning*, so that eventually our starting point in understanding them should not be their *practice*, but the *notion* of 'human right' itself.³²³ Within this context, Flikschuh claims that the fact that practical concepts, including moral concepts, are not restricted to the physical world, renders them more vulnerable to

³²⁰ Wood, A. (2009)

³²¹ Cruft, Liao, Renzo (2015), pp. 653-670.

³²² See for instance the German Airliner Case above

³²³ In: Cruft, Liao, Renzo (2015), p. 653.

doubt and dispute; hence implying in effect that the determination of the grounds and the content of human rights is a hard, yet unavoidable task.³²⁴

Flikschuh then moves on to arguing that she does not understand Kant as possessing the concept of 'human right' in general. In order to support her claim, she says that Kant does not systematically deploy the terms 'das Recht der Menschheit', or 'das recht der Menschen', into his opus; and, also, he never explicitly develops a theory of human rights, at least a theory of *individual* human rights. Rather the terms 'das Recht der Menschheit' and 'das recht der Menschen' have *collective* character in his philosophical theory. Flikschuh suggests then that we should translate the terms 'Menschheit' and 'Menschen' as 'humanity', not 'human'; so that eventually Kant should be seen as favouring the idea of 'the rights of humanity' rather than 'human rights' as we understand them today.³²⁵

Further, even though she seems not to be sure about the 'necessity' (*must have*) of a Kantian theory of human rights, or, in particular, of a Kantian account for the justification of human rights, Flikschuh says that if we *had* to construct one, we should be very careful, in the sense that we should seek to develop it in absolute consistence with *Kant's*, and not *ours*, philosophical thinking. Specifically, we should respect the fact that Kantian ethics are in effect duty-based ethics, in which duties have priority over rights.³²⁶ After these clarifications, Flikschuh develops her own argument for the justification of human rights indirectly by first rejecting as a basis of human rights the so-called 'innate right to freedom' in Kant's Doctrine of Right. As has been shown in the previous section, this right is popularly suggested today as a kind of 'pre-legal human right', or a 'foundational freedom right', from which all other rights are derived.³²⁷

Flikschuh rejects this innate right to freedom as a contingent basis of human rights. Her main objection regarding a foundationalist interpretation (or

³²⁴ Cruft, Liao, Renzo (2015), p. 655.

³²⁵ Cruft, Liao, Renzo (2015), p. 655, esp. note 10 in pp. 655-656.

³²⁶ Cruft, Liao, Renzo (2015), p. 656.

³²⁷ Cruft, Liao, Renzo (2015), pp. 660-661; see also Ripstein (2009)

interpretations) of the ‘innate right to freedom’ is that Kant is primarily considered by her as an anti-foundationalist and constructivist philosopher. She claims that Kant would never favour such a foundationalist approach to the issue of human rights. She also says that even the *Groundwork of the Metaphysics of Morals* has an anti-foundationalist character ‘starting from our “ordinary” concept of duty and regressing from there to its necessary presuppositions before attempting their critical vindication’.³²⁸ The Doctrine of Right, Flikschuh continues, is not excluded from Kant’s philosophical anti-foundationalism. Here again Kant starts, as Flikschuh argues, from the notion of right as it is found in legal practice, and, proceeds, via the torturous property argument, to the vindication of the necessary conditions of its practical possibility.³²⁹ She then argues against any non-formalistic understanding of the concept of right, in general.³³⁰ Flikschuh invokes 6:230 in the *Metaphysics of Morals* where Kant writes:

‘The concept of right, insofar as it is related to an obligation corresponding to it (i.e. the moral concept of right), has to do, *first*, only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other. But, *second*, it does not signify the relation of one’s choice to the mere wish (hence also to the mere need) of the other, as in actions beneficence of callousness, but only a relation to the other’s *choice*. *Third*, in this reciprocal relation of choice **no account at all is taken of the *matter* of choice**, that is, of the end each has in mind with the object he wants; is not asked for example whether someone who buys goods from me for his own commercial use will gain by the transaction or not. **All that is in question is the *form* in the relation of choice on the part of both...**’ [Bold added].³³¹

³²⁸In: Cruft, Liao, Renzo (2015), pp. 656, 659

³²⁹Cruft, Liao, Renzo (2015), pp. 659, 661

³³⁰Cruft, Liao, Renzo (2015), p. 669.

³³¹ In Gregor (1996), p. 387

Apparently, in the above passage, the concept of right, within the Doctrine of Right, seems to have a formalistic character that has nothing to do with the *matter* of choice. That is to say, it refers to a *formal* relation between (two or more) persons. Flikschuh claims then that, under this formalistic understanding of the Kantian concept of right in general, the ‘innate right to freedom’, in particular, cannot justify human rights as it similarly ‘functions as a formal *a priori* necessary presupposition of any substantive rights doctrine’.³³² Consequently, in her view, the formalistic innate right to freedom cannot be invoked as the foundation of any substantive positive body of laws.

Finally, Flikschuh presents her own thesis regarding the justification of human rights, which she calls: a ‘transcendental human rights conception’, the main characteristic of which is the recognition of ‘human cognitive and moral fallibility’.³³³ Within this context, Flikschuh claims that we cannot help but take ourselves and others as right-bearers, so that eventually human rights are to be understood as a ‘subjectively necessary reflective idea’ –something like the *necessary* idea of God, which makes it possible for human beings to do their duties in this life, believing in a kind of reward, or happiness, or the highest good in the afterlife. That is to say, Flikschuh sees human rights as an indeterminate idea incapable of any empirical knowledge. She attempts this parallelism claiming, in particular, that ‘despite our acknowledged lack of objectively sufficient theoretical warrant for affirming God’s *existence*, we have subjectively sufficient practical warrant for *faith* in God’s existence as supreme moral being: a warrant that is grounded in our hope concerning the non-futility of our moral endeavours, even in the face of a morally often recalcitrant empirical world’.³³⁴ Flikschuh concludes that God and human rights, in the domain of political morality, function similarly, that is in a transcendental way. Hence, in her view, **human rights** are a subjectively necessary

³³² Flikschuh (2017), pp. 69-100.

³³³ Cruft, Liao, Renzo (2015), esp. pp. 656-670.

³³⁴ Cruft, Liao, Renzo (2015), p. 666.

regulative idea of reason **arising from** the acknowledgment of the moral imperative to enter with all others into the civil condition.³³⁵

Having presented her view, I now evaluate Flikschuh's *transcendental* approach to the justification of human rights. To begin with, I must say that I agree with her choice to distinguish herself from the human rights practice-based accounts. It is true that the confusion regarding the *use* of human rights in practice is indicative of confusion regarding their *meaning*, so that eventually we should start from the *notion* of human rights, not their *practice*, in order to deeply understand them. Also, as has been discussed, apart from all their particular flaws, most of these –very popular during the last decades– political and practice-based accounts, overlook the fact that the international practice is ailing today (see chapter 1). The simple question then arises as to how a justification of human rights based on ailing grounds might be a successful one.

Further, I agree with Flikschuh that if one *had* to formulate a truly Kantian justification of human rights, one should deeply respect the Kantian opus, avoiding to project one's own philosophical 'obsessions' on it. Specifically, I agree with both of her claims that 1) in the Kantian duty-based ethics, duties come first, and 2) Kant himself never actually developed a *complete* theory of human rights. These are apparent not only in the *Groundwork of the Metaphysics of Morals*, but also in the *Metaphysics of Morals*, in which Kant officially develops his legal theory. Recognising these two constrains within the Kantian opus, my claim is that the formulation of a Kantian justification of rights is a challenging task in the sense that 1) duties should be put first –contrary to most contemporary rights-based justifications which give priority to rights over duties, and 2) one should actually work upon an incomplete legal theory. The (Kantian) duty-based justification of human and socioeconomic rights, in chapter 4, has been built upon these two constrains.

However, I disagree with Flikschuh's claim that Kant does not possess the concept of 'human right'. Even though his priority had been the notion of duty, Kant

³³⁵Cruft, Liao, Renzo (2015), pp. 18, 653-670, esp. 660, 666

was not 'indifferent' to human rights.³³⁶ For instance, in 6:239 in the *Metaphysics of Morals*, Kant explicitly says that: '... the *moral imperative*, which is a proposition commanding duty, from which the capacity for putting others under obligation, that is, **the concept of a right** [emphasis mine] can afterwards be explicated'.³³⁷ Consequently, my view is that, even though Kant does not *systematically* deploy the terms 'das Recht der Menschheit', or 'das recht der Menschen', into his opus, the concept of 'human right' is not totally absent from it. This is a crucial point, given that it allows for the legitimate formulation of the new theory of rights inspired by the original Kantian opus.

Moreover, I agree with Flikschuh's rejection of the 'innate right to freedom' as the foundation of human rights. As has been pointed out in the current literature, the innate right cannot ground any positive body of laws as it is just 'a formal presupposition of the possibility of substantive doctrine of acquired rights.'³³⁸ The idea of 'right' in the Doctrine of Right, in general, has an undoubtedly formalistic character; that is to say, it refers to a *formal* relation between (two or more) persons. The formalistic character of the Kantian 'innate right to freedom' has been explained in the previous section, when I discussed Ripstein's account. Here, I briefly mention that the innate right to freedom is an *original*, or a *natural*, right that coexists with other peoples' respective innate rights to freedom in a *formalistic* way (*in accordance with a universal law of nature*). Eventually, in 6:380 in the *Metaphysics of Morals*, Kant validates the aforementioned claim by arguing that: 'the doctrine of right dealt only with the *formal* condition of outer freedom (the consistency of outer freedom with itself if its maxim were made universal law), that is, with **right**' [bold in the original].³³⁹ Apparently, under this formalistic understanding of the Kantian 'innate right to freedom', one cannot legitimately suggest it as the foundation of any substantive positive body of law.

³³⁶Cruft, Liao, Renzo (2015), p. 671.

³³⁷ In Gregor (1996), p. 395

³³⁸ Cruft, Liao, Renzo (2015), p. 669.

³³⁹ Gregor (1996), p. 513.

Nevertheless, I disagree with Flikschuh's understanding of Kant as an anti-foundationalist, in general. It seems that Flikschuh has been influenced by Rawls and O'Neill, who have generally insisted, throughout their philosophical works, on a *constructivist* interpretation of Kant's account of moral obligation and practical reason.³⁴⁰ According to constructivism –which is used here as a synonym for 'anti-foundationalism'– there are answers to moral questions not because there are moral truths or facts, but because there are correct procedures for arriving at them.³⁴¹ On the contrary, I am closer to Wood's realist approach to Kant, according to which Kant's realism opposes the identification of the moral truth with any construction.³⁴² The reasons why I consider Kant as a foundationalist or moral realist, rather than a constructivist philosopher, are discussed in chapter 4.

Ultimately, according to Flikschuh's 'transcendental human rights conception', human rights are things in which *we cannot help believing*. My principal concern is whether such a *necessary* idea of human rights, resembling the idea of God, as Flikschuh claims, could easily be adopted and respected by *all* people around the world. I am afraid that such a task would be understood in most cases as one more imposition of Western values to the non-Western world.

4. Towards a new (Kantian) duty-based justification of human rights

After the examination and the evaluation of the three most popular contemporary Kantian accounts for the justification of human rights based on: 1) the notion of human dignity; 2) the 'innate right to freedom'; and 3) a *transcendental* understanding of human rights, I conclude that none of them can legitimately be proposed as the genuine basis of human rights. One could argue that there might not eventually be a truly Kantian theory of human rights. For instance, Andrea

³⁴⁰ Rawls (1980), pp.515-572; O'Neill (2016)

³⁴¹ See for instance, Korsgaard (1983), pp. 169-195

³⁴² Wood (1999)

Sangiovanni claims that there cannot be a genuine Kantian theory of human rights or a genuine Kantian justificatory theory for them, for three main reasons.³⁴³

First, Sangiovanni claims that the Kantian human dignity cannot be the basis of human rights because, within the Kantian system in general, the moral notion of human dignity ‘governs the character of our internal attitudes, reasons, and action. It does not govern the “external” domain of Right which sets limits to our actions but remains silent on the character of our reasons or attitudes towards those actions or towards the law governing those actions’.³⁴⁴ Second, Sangiovanni argues that the Kantian ‘innate right to freedom’ cannot be the basis of human rights not only because it is a formalistic right, as Flikschuh claims, but also because human rights must be directly and externally imposable in a way that the innate right, or the rights derived directly from the innate right, cannot be. In sum, Sangiovanni argues that the innate right cannot be the basis of human rights since its imposition against foreign states would count as a unilateral act.³⁴⁵ Third, Sangiovanni claims that Flikschuh’s transcendental understanding of human rights is not appropriate, basically because of the fact that her idea of human rights, as a transcendental concept, ‘takes us too far away from human rights practice’.³⁴⁶

I generally agree with Sangiovanni’s claims. More specifically, dignity belongs to the internal domain of morality which is indeed distinct from the external domain of law. In 4:434-435, Kant explicitly says that dignity is an ‘inner’ value, that is, a value belonging to the internal domain of morality. He writes: ‘... but that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*’.³⁴⁷ Further, it is true that the Kantian notion of the ‘innate right to freedom’ cannot be the basis of human rights not only because of what has already been mentioned

³⁴³Cruft, Liao, Renzo (2015), pp. 671-689.

³⁴⁴Cruft, Liao, Renzo (2015), pp. 684-685.

³⁴⁵ Cruft, Liao, Renzo (2015), pp. 675-676.

³⁴⁶ Cruft, Liao, Renzo (2015), p. 680.

³⁴⁷ Gregor (1996), p. 84.

above, namely that is a formalistic right, but also because, as Sangiovanni points out, the innate right to freedom typically belongs to the state of nature. Kant writes in 6:237 in the Introduction to the Doctrine of Right: 'An innate right is that which belongs to everyone by nature independently of any act that would establish a right'.³⁴⁸ But in the state of nature, wills are permitted to be imposed unilaterally, contrary to the rightful civil condition, in which human rights are located, that creates and requires an omnilateral will. Finally, I agree with Sangiovanni that Flikschuh's transcendental understanding of human rights is not appropriate because of the fact that such an idea of human rights is far away from the human rights practice.

Nevertheless, even though I generally agree with Sangiovanni's *particular* claims against the grounding of rights: 1) in the Kantian moral concept of human dignity, 2) in the Kantian innate right to freedom, and 3) in Kantian transcendental terms, I do not agree with his *general* claim that there cannot be a truly Kantian theory of human rights, or a genuine Kantian justification for them. I am convinced that there is still room in the Kantian opus for the formulation of a truly Kantian justification of human rights capable of overcoming the obstacles arising from all the aforementioned (Kantian and non-Kantian) justificatory accounts which have been examined in the first three chapters of the thesis. I epigrammatically mention some of the problems of these accounts:

1. Some accounts for the justification of human rights (e.g. Griffin's account) encounter problems with respect to human beings who lack the capacity to act as autonomous moral agents, e.g. children.
2. Also, Griffin's account is focused only on the concept of 'agency', ignoring that there are also other factors when judging that an act is a violation of a human right, e.g. pain.
3. The super-pluralist accounts favouring the plurality of elements (e.g. goods and interests-based accounts) produce such a broad list of human rights,

³⁴⁸ Gregor (1996), p. 393.

which might eventually turn into human rights everything I may require for my personal well-being, e.g. being friends with Alice Oswald.

4. On the contrary, the accounts favouring a minimum number of elements to be taken into consideration in the construction of a human rights' justificatory theory (e.g. the basic needs accounts) ignore the fact that a number of other significant rights, such as civil and political rights, remain unsupported within such a constrained justificatory context, e.g. the right to a fair trial.
5. Also, by using the language of 'functionings' rather than the language of 'capabilities', the main problem of Nussbaum's account—which also appears in the agency approach above—is the devaluation of children, the mentally disabled, comatose patients, and so on.
6. Further, some political accounts, for example Rawls's account, have been formulated exclusively upon the model of Western liberal democracies, ignoring the fact that not all countries in the world are liberal democracies.
7. Some other state-based accounts, for example Raz's account, ignore the fact that in many cases today states do not have the means or the volition to protect human rights.
8. Also, some practice-based accounts, for example Beitz's account, overlook the fact that the current deep confusion concerning the *use* of human rights in practice indicates a deeper confusion about their *meaning*; so that one should start from analyzing the *concept* of human rights, and then move on to the examination of their *practice*.
9. Additionally, some justifications, such as Beitz's justification, have been constructed upon the idea that human rights apply only to modern societies; but apparently not all people in the world live in societies with modern characteristics; for instance, there are still many un-contacted tribes in the world.
10. Also, some other accounts, for example the overlapping consensus justifications, ignore the fact that not all people in the world share the same idea of human rights, human dignity etc.

11. Overall, most of the practice-based accounts for the justification of human rights overlook the fact that international practice is ailing today; hence any justification based on ailing grounds cannot be a successful one.
12. Further, some dignity-based accounts have been formulated without a previously thorough conceptual analysis of the abstract and vague concept of human dignity (e.g. Waldron's and Tasioulas's accounts)
13. Also, the justificatory accounts based on the *status* concept of dignity with references to aristocracy, for example Waldron's account, cannot be applied in the post-Enlightenment world, of which the central ideal and goal is the civil, political, social, and economic equality of people.
14. In addition, Waldron's *legal* status concept of the dignity of citizens cannot by definition guarantee human rights for *all* people, e.g. immigrants, refugees, the 'apatrides', those who live in countries which have not the characteristics of a democracy, those who live in non-democratic countries, those who still live in isolated jungle tribes in the world, and so on.
15. Moreover, some religious accounts for the justification of human rights, for example the traditional Catholic one, ignore the fact that many people are atheists, that is, persons who do not share a religious worldview. Also, there are many people who are followers of other than the Jewish-Christian religious tradition, or who are committed to an approach to human rights that favors a multi-faith society.
16. Also, the religious accounts, according to which the value of dignity is indiscriminately accorded to all human beings, including embryos from the moment of conception, are also problematic, for example in cases of a high-risk pregnancy.
17. Furthermore, the 'mainstream' Kantian argument according to which human rights are grounded in the Kantian moral concept of human dignity is flawed because Kantian human dignity is mistakenly interpreted as an *intrinsic* value possessed by the *right-holders*. Rather dignity is an *inner* value and feeling possessed by and attributed to *duty-bearers* (see further chapter 4).
18. Also, the main problem of the Kantian notion of the 'innate right to freedom' (see for instance Ripstein's account) as the foundation of human rights is that

this right is too formalistic to guarantee a substantive legislation of (moral) human rights.

19. In addition, the concept of freedom cannot be the basis of human rights, as it cannot by definition guarantee a society without conflicts in which all live in harmony.
20. Also, Flikshcuh's transcendental approach based on a constructivist and anti-foundationalist reading of Kant is mistaken. Even if there are some constructivist elements in the Kantian opus, several other passages do not leave room for characterizing him as an anti-foundationalist.
21. Finally, a transcendental understanding of human rights, such as Flikschuh's, overlooks the fact that such an account could hardly be adopted and respected by *all* people around the world.

All these problems do open up an interesting question for me to investigate the philosophical foundations of human (and socioeconomic) rights further. In the following chapter, a new (Kantian) duty-based justification is presented, capable of overcoming the aforementioned obstacles. More specifically, this new foundation aims to provide the basis through which:

1. All, normal adult human beings, embryos, babies, children, the comatose, the mentally disabled, immigrants, refugees, the 'apatrides', the poor, homosexuals, bisexuals, transsexuals, those who live in countries which have not the characteristics of a democracy, those who live in non-democratic countries, those who still live in isolated jungle tribes in the world, possible future human beings, animals, plants, the environment, even beings from outer space to be protected.
2. Not only our civil and political, but also our socioeconomic rights can be and are protected.
3. The protection of human rights is not to be constrained to Western liberal democracies or to societies which have modern characteristics.
4. The idea of human rights can be acceptable by *all* people around the world.

5. All people, including those who live in states which do not have the means or the volition to protect human rights, can be effectively protected.
6. A solution for the so-called 'hard cases' in law, e.g. abortion, euthanasia etc., can be found.
7. A substantive positive body of laws can be developed afterwards.
8. The theory and the practice of human rights can come closer to each other.

In what follows I turn my attention to what I see as the ideal starting point of this new (Kantian) duty-based justification of human and socioeconomic rights, namely to the Kantian supreme principle of morality, that is, to the moral concept of 'autonomy of the will', as it is presented by Kant in 4:440 in the *Groundwork of the Metaphysics of Morals*.³⁴⁹

5. 'Autonomy of the will': a conceptual analysis

The Kantian autonomy of the will is officially introduced in **4:440** in the *Groundwork of the Metaphysics of Morals*. Kant writes: 'Autonomy of the will is the property of the will by which it is a law to itself (independently of any property of the objects of volition). The principle of autonomy is, therefore: to choose only in such a way that the maxims of your choice are also included as universal law in the same volition...'³⁵⁰ Kant does not only describe (yet not coherently and to its full extent) the moral principle of autonomy, as the 'supreme principle of morality', in 4:440, in the *Groundwork*, in which he provides the 'official' definition of it. He also mentions the supreme principle of morality in **5:33**, in the *Second Critique*. There Kant considers autonomy to be 'the *only possible* principle that is suitable for categorical imperatives, i.e., practical laws (which make action duties), and in general for the principle of morality both in judging and in applying it to the human will in

³⁴⁹ Gregor (1996), p. 89

³⁵⁰ Gregor (1996), p. 89

determining that will'.³⁵¹ Kant finally states it in **4:431-2**, in which the third version of the Categorical Imperative is formulated, namely the Formula of Autonomy (FOA).

More specifically, in order to specify the Categorical Imperative, that is, the absolute requirement of the moral law which is further grounded in reason, Kant introduces three Formulas. In 4:421, he first introduces the Formula of Universal Law (FUL) according to which we act only in accordance with that maxim through which we can at the same time will that it become a universal law.³⁵² He then moves on to 4:429 in which he states that according to the Formula of Humanity (FOH), we act that we use humanity, whether in our own person or in the person of any other always at the same time as an end, never merely as a means.³⁵³ Finally, in 4:431-2, Kant introduces the Formula of Autonomy (FOA).

Concerning the FOA, Kant writes: '... the ground of all practical lawgiving lies (in accordance with the first principle) *objectively in the rule* and the form of universality which makes it fit to be a law (possibly a law of nature); *subjectively*, however, it lies in the *end*; but the subject of all ends is every rational being as an end in itself (in accordance with the second principle); from this there follows now the third practical principle of the will, as supreme condition of its harmony with universal practical reason, the idea *of the will of every rational being as a will giving universal law*.'³⁵⁴ Also, in 4:432, Kant describes the FOA as 'the idea of the will of every rational being as a *will giving universal law*'.³⁵⁵ Apparently, the third version of the Categorical Imperative has been introduced by Kant in order to round up the two previously stated Formulas, namely the FUL and the FOH.

One may wonder which one of the three definitions of the Kantian supreme principle of morality is prevalent: the one in 4:440, the 5:33 in the Second *Critique*, or the FOA. My view is that through the references to the supreme principle of

³⁵¹Kant (2002), p.48

³⁵² Gregor (1996), p. 73

³⁵³ Gregor (1996), p. 80

³⁵⁴ Gregor (1996), p. 81

³⁵⁵ Gregor (1996), p. 82

morality (autonomy) within the context of the CI, and its reference in the Second *Critique*, Kant tries to give an integrated account of autonomy as it is *officially* yet unsuccessfully defined in 4:440. Hence, it is upon this definition (in 4:440) that Kant has formulated the Formula of Autonomy in 4:431-2. Also, it is the definition in the 4:440 that is further explicated by Kant in 5:33 in the *Critique of Practical Reason*. Consequently, we should not be confused between the two characterizations of autonomy as ‘principle’ in 4:431-2 and 5:33, and ‘property’ in 4:440. In any case, when one decides to investigate the Kantian moral concept of autonomy, her point of departure should be the passage in which Kant clearly gives the official, yet incomplete, hence unsuccessful, definition of it, that is, the 4:440 in the *Groundwork of the Metaphysics of Morals*.³⁵⁶

Further, the supreme principle of morality in 4:440 is developed from the Categorical Imperative, namely from the imperative that – contrary to an hypothetical imperative which tells you what to do in order to achieve a particular goal– it commands duty in a categorical way; that is to say, it tells you what to do irrespective of an end, or goal, or a desired *telos* (4:414). Kant explicitly says this in 6:383 in the *Metaphysics*, in which he states that autonomy is ‘... a capacity which, though not directly perceived, is yet rightly inferred from the moral categorical imperative’.³⁵⁷ Ultimately, the Categorical Imperative, which refers only to beings with rationality and inclinations (in tension), expresses the Moral Law (4:413, 4:454-5).³⁵⁸ Hence the CI may be considered as *derived* from the Moral Law, which, commanded by Pure Practical Reason, refers to *all* rational beings including God (5:31).³⁵⁹ Overall, **the justification ‘line’ here is the following:** from pure practical reason, through (in this order) the Moral Law and the CI, we are led to the autonomy of the will.

³⁵⁶ Allison has further discussed the distinction between autonomy as ‘property’ and autonomy as ‘principle’ in Allison (1990), pp. 94-106.

³⁵⁷ Gregor (1996), p. 515; see also 4:414, in Gregor (1996), p. 67

³⁵⁸ Gregor (1996), pp. 66, 67, 100, 101

³⁵⁹ Gregor (1996), pp. 164-5.

Incidentally, I write the 'Moral Law' with capital letters, in order to be distinguished from the substantive moral laws. That is to say, while Moral Law is developed by Pure Practical Reason, as the ultimate incentive of our moral judgments and actions, the moral laws in plural, such as the law according to which one ought not to lie ("thou shalt not lie") in 4:389, are straightforwardly derived from the supreme principle of morality, that is, from the autonomy of the will. Kant presents the Moral Law as the incentive of our moral judgments and actions in 6:480 in the *Metaphysics*, in which he writes: '... and so implies that the law itself, not the conduct of other human beings, must serve as our incentive'.³⁶⁰ However, this does not mean that we *must* always write the 'moral law' (in singular) with capital letters, especially if we really know about what we are talking.

Moreover, it is the Kantian autonomy of the will, as has been described above, which is set, in the following chapter, as the starting point of the new (Kantian) duty-based justification of human and socioeconomic rights. The reasons why the autonomy of the will, as it is stated in 4:440, in the *Groundwork*, is set as the starting point for the new justification of rights are, in effect, the following two. First, Kant is, above all, a moral philosopher, so that, even if there is not an explicit justificatory theory of rights in his opus, I am convinced that if he had to formulate one, he would consider rights as *moral* rights, and he would set as the starting point of his justification the *cornerstone of his ethics*, that is, the moral concept of autonomy of the will. Second, and most importantly, as it is clearly shown in the following chapter, the autonomy of the will allows for the derivation of *external* duties, which are the *conditio sine qua non* in the case of human (and socioeconomic) rights, in the sense that these rights typically belong to the 'external domain of law', rather to the 'internal domain of morality'. This is further explained in chapter 4.

Now, the fact that the Kantian supreme principle of morality, namely the autonomy of the will, is set as the starting point for the justification of rights, does not mean that the 'justificatory line' for rights stops, or is cut, at the autonomy of the

³⁶⁰ Gregor (1996), pp. 44-45, 593

will; in other words, the autonomy of the will is not the *ultimate* source of rights. While the supreme principle of morality may be seen as the **starting point** for the justification of moral rights in Kantian mode, their *ultimate* source is the pure practical reason, given that the autonomy of the will itself is further grounded in the CI which is based on the moral law commanded by the pure practical reason (see above).

Prior to setting the autonomy of the will as the starting point of the new duty-based account for the justification of human and socioeconomic rights, and showing how from the former we are led to the latter (chapter 4), we have to deal with two problems: first, there is not an *explicit* Kantian human rights justificatory account and, second, the moral concept of autonomy remains obscure within the Kantian opus. The first issue shall be discussed thoroughly in the following chapter, in which a Kantian (not Kant's) justification, or a justification of rights in Kantian mode, or a justification inspired by the Kantian opus, is developed. In the present chapter, I focus on the second issue, namely on the obscurity and vagueness of the Kantian supreme principle of morality. The Kantian autonomy is considered problematic by many authors and Kant scholars.³⁶¹ There are indeed many interpretations of it. In what follows, I present the two most dominant conceptions of autonomy in the modern literature.

First, a number of modern scholars conceive of autonomy as individuals' freedom to do what they want, or to act as they see fit. In this case, autonomy is identified with sheer independence or freedom from coercion. For example, Gerald Dworkin has noted that autonomy is equated with liberty, individuality, and independence; hence it is a desirable quality to have.³⁶² Griffin's notion of autonomy, as sketched in chapter 1, belongs to this category of interpretations. Specifically, Griffin's notion of 'normative agency' is described as peoples' capacity to choose and pursue their own conception of a worthwhile life.³⁶³ Griffin then argues

³⁶¹ See for instance Wood (2008)

³⁶² Dworkin, G. (1988). *The Theory and Practice of Autonomy*. Cambridge University Press, 6

³⁶³ Griffin (2008), ch. 2

that the realization of normative agency depends on ‘personhood’, one of the main characteristics of which is the notion of ‘autonomy’, that is, one’s capacity to choose one’s own path through life.³⁶⁴

However, and second, there is another conception of autonomy. Whereas the first interpretation of autonomy above emphasises the notions of *freedom* and *independence*, its second interpretation emphasises the moral *principles* upon which someone acts. O’Neill has recently argued in favor of the Kantian autonomy.³⁶⁵ According to her understanding of Kant’s autonomy, this differs significantly from sheer individual independence.³⁶⁶ O’Neill’s main objection is that individual independence does not necessarily lead to morally valuable actions; rather it *may* lead to good or bad actions, right or wrong actions, and so on.³⁶⁷ Therefore, she proposes Kant’s account, as she interprets it, as the true meaning of the moral concept of autonomy. Specifically, she argues that Kant ‘predicates autonomy not of *agents or acts*, but of the *will and determinations of the will, of principles, of reason*.³⁶⁸ In other words, O’Neill does not see the Kantian autonomy as referring to agents, but on principles; hence, she never speaks of autonomous agents, but of actions based on autonomous principles which take their justification from our own rational selves. Eventually, O’Neill concludes that the ‘Kantian autonomy must be a matter of adopting principles with a certain *structure and form*.’³⁶⁹

In spite of these two dominant conceptions of autonomy in the contemporary literature, autonomy is still unclear and indeterminate. Consequently, **if one wanted seriously to propose a new theory of human and socioeconomic rights starting from the moral concept of autonomy, one should first clarify its**

³⁶⁴ The other two characteristics are 1) liberty and 2) welfare; see chapter 1 of the thesis and Griffin (2008), p. 157

³⁶⁵ O’Neill, O. (2015), pp. 103-120. Further, on the differences between the Kantian and the ‘modern’ views of autonomy, see: Hill, T.E. Jr (1992), pp. 76-96.

³⁶⁶ O’Neill, O. (2015), pp., 104, 109.

³⁶⁷ O’Neill, O. (2015), p. 106.

³⁶⁸ O’Neill, O. (2015), p. 110.

³⁶⁹ O’Neill, O. (2015), p. 115.

meaning, and then move on to the formulation of the relevant argument. After the conceptual analysis of the Kantian autonomy via the aesthetic notion of the sublime below, I define autonomy in a way that differs both from its individualistic and its principle-based understandings above. This new understanding of autonomy will be the starting point for the formulation of the new (Kantian) duty-based account for the justification of human and socioeconomic rights in chapter 4. In what follows, I explain the rationale in the background of my conceptual analysis of autonomy via the sublime.

To begin with, it has been noted that Kant has presented the principle of autonomy as involving the use of an *analogy*.³⁷⁰ For instance, Pauline Kleingeld has recently argued that if we examine the Kantian notion of the political autonomy in *Naturrecht Feyerabend Lectures* (1784) we will see that the moral legislator is actually the analogue of the political legislator who primarily gives laws to the entire of people in the political community including herself.³⁷¹ In spite of the fact that I agree with the use of the *analogy* as a method to clarify the obscure Kantian concept of autonomy of the will, I disagree with Kleingeld's claim that the moral agent, or legislator, or politician, or judge **primarily gives law to others including herself**. Rather, I do see the moral agent's/legislator's/politician's/judge's *subjective* autonomy and her maxims, as well as the question '**what is the right thing to do?**', as the starting points of her legislation, which, through the notion of 'sensus communis', is **further universalized**. As Kant mentions in 6:480 in the *Metaphysics*, '*... in the subjective autonomy of each human's being practical reason and so implies that the law itself, not the conduct of other human beings, must serve as our incentive*' [italics added].³⁷²

However, even though I do not agree with Kleingeld's starting point of the relevant legislation, I do consider her effort to shed light on Kantian moral autonomy

³⁷⁰ See for instance, Timmermann, (2007), pp. 110-111.

³⁷¹ See Delfosse, H.P., Hinske, N., Bordoni, G.S. (2014); also, Kleingeld (2018)

³⁷² Gregor (1996), p. 593.

via an examination of Kantian political autonomy as significant. Her argument is not developed and discussed here to its full extent, however I do stress the attention she gives to the method of ‘analogy’. Analogy is an important tool within the Kantian opus in general. The reason why analogy is important for Kant is that for empirical concepts, and concepts of understanding, one can give examples and schemas, respectively, in order to be understood. For example, when the Aztecs first came across a horse, they thought it was a deer (empirical concept). Nevertheless, this does not apply to rational ideas of reason, which can be understood only indirectly via *analogy*. Kant writes in A145/B185 in the *Critique of Pure Reason* that ‘the schemata of the concepts of pure understanding are the true and sole condition for providing them with a relation to objects’.³⁷³ But rational ideas of reason can be grasped only through an analogy, which, Kant says in 4:357-8 in the Prolegomena, ‘does not signify, as the word is usually taken, an imperfect similarity of two things, but rather a perfect similarity between two relations in wholly dissimilar things’.³⁷⁴ As an example, Kant there mentions the analogy between the legal relation of human actions and the mechanical relation of moving forces, according to which nothing can I do to another without giving him the right to do the same to me under the same conditions.

I think such a perfect similarity between two relations in wholly dissimilar things is signified between Kant’s moral concept of *autonomy* and his aesthetic notion of the *sublime*. As Kleingeld, I do also favour an analogy, yet not an analogy between Kant’s ‘**morality and politics**’, but an analogy between his ‘**morality and aesthetics**’, which has further significant legal and political implications (see chapter 5). Within this context, in order to shed light on the Kantian obscure moral concept of the autonomy of the will, I focus on Kant’s aesthetic category of the sublime, and examine the analogy between them. That is to say, I use the sublime as a tool to reveal through its examination the true meaning of autonomy. Consequently, the discussion of the sublime in the thesis is not intended as a contribution to the debates in the Kantian literature on the sublime, but as more limited to the purposes

³⁷³ Guyer, Wood (1998), p. 276.

³⁷⁴ Hatfield (2004), pp. 108-9

of the thesis. What also must be stressed at this point is that the analogy between the autonomy and the sublime is something that has not yet been investigated by Kant scholars. The main reason why this research has not yet been done is that, with few exceptions, e.g. Paul Guyer and Henry Allison,³⁷⁵ most Kant scholars today focus on Kant's moral, legal, and political philosophy, sidestepping his aesthetic theory. But Kant's aesthetic philosophy is, in my view, valuable in order to understand the other disciplines in his opus. Thus, I strongly believe that more attention should be paid to Kant's *Critique of Judgment*. In her *Lectures on Kant's Political Philosophy*, Hannah Arendt has argued that:

'... the topics of the *Critique of Judgment* – ... the faculty of judgment as the faculty of man's mind to deal with it; sociability of men as the condition of the functioning of this faculty, that is, the insight that men are dependent on their fellow men not only because of their having a body and physical needs but precisely for their mental faculties – these topics, all of them of eminent political significance – that is, important for the political – were concerns of Kant long before he finally, after finishing the critical business (*das kritische Geschäft*), turned to them when he was old'.³⁷⁶

What Arendt has effectively argued is that Kant's aesthetic theory might be seen as his *real* political philosophy. This is a strong claim which is discussed in the last chapter of the thesis. Here I only point out that Arendt's view concerning the relation between the Kantian ethics and politics is exaggerated. That is to say, it cannot legitimately be claimed that the author of the *Metaphysics of Morals* and the *Perpetual Peace* has not actually written a genuine political work. However, it is true to some extent that Kant's aesthetic theory has significant political, moral, and legal connotations. My claim then is more modest than Arendt's. More specifically, I argue that through Kant's *aesthetic* theory, and the aesthetic category of the sublime, in particular, we can understand in more depth his *moral* philosophy –especially his

³⁷⁵ See for instance, Kant (2001); and Allison (2001)

³⁷⁶ Arendt (1982), p. 14.

obscure and abstract concept of the autonomy of the will. Before the conceptual analysis of the Kantian moral concept of autonomy through the Kantian aesthetic category of the sublime, I introduce Kant's 'sublime' as it is developed in the *Critique of Judgment*, in Book II, in the Analytic of the sublime, especially in paragraphs: 23-29.³⁷⁷

5.1 Kant's aesthetic category of the sublime

The modern interest in the sublime has been awakened in 1674 by Nicolas Boileau's translation of Longinus's treatise *Peri Hypsous* [*On the Sublime*].³⁷⁸ Apart from Longinus's treatise and Boileau's translation of it, one of the most influential texts regarding the aesthetic category of the sublime was Burke's, *A Philosophical Inquiry into the Origin of Our Ideas of the Sublime and the Beautiful*.³⁷⁹ Burke was the first who emphasized the main difference between the beautiful and the sublime; that is to say, the fact that, contrary to the former, which involves a calm feeling, the latter involves terror as its ruling principle, yet a kind of terror viewed as a delight felt at a distance and in safety.³⁸⁰ I will return to this in much greater detail below. Now, I focus on Kant who, following Burke, has thoroughly analyzed the sublime.

While in the *Observations on the Feeling of the Beautiful and Sublime*,³⁸¹ and in some other works,³⁸² Kant only sporadically refers to the sublime, it is, in effect, in the *Critique of Judgment* that he works systematically on it.³⁸³ More specifically, according to Kant, the aesthetic category of the sublime has the following nine characteristics: 1) It is a **reflective judgment**; 2) it is an **aesthetic judgment**; 3) it is a

³⁷⁷ Kant (1987), pp. 97-140

³⁷⁸ Longinus (2014)

³⁷⁹ Burke (1958)

³⁸⁰ Burke (1958) pp. 36, 39-40, 58

³⁸¹ Kant (2011)

³⁸² See for instance, Kant (2012), p. 175.

³⁸³ Ak 244-356, Kant (1987), pp. 97-232

disinterested judgment; 4) it concerns not only the form of the object, but it can also be found in a **formless object**; 5) it contains a '**high (counter)purposiveness without purpose**'; 6) it is a judgment which has **universal validity**; 7) its universality is based, in particular, on the notion of '**common sense**'; 8) it is a **feeling of pleasure and displeasure**; 9) in the judgment and feeling of the sublime, the **dignity** of humanity in our own person is reflected. In what follows, I discuss all these nine elements.

1. Initially, in several passages in the Critique of Judgment, Kant claims that the sublime is a **reflective judgment**.³⁸⁴ Kant describes, in particular, the judgment of reflection in the Introduction of the *Critique of Judgment*, where he writes:

'Judgment in general is the ability to think the particular as contained under the universal. If the universal (the rule, principle, law) is given, then judgment, which subsumes the particular under it, is *determinate* (even though [in its role] as transcendental judgment it states a priori the conditions that must be met for subsumption under that universal to be possible). But if only the particular is given and judgment has to find the universal for it, then this power is merely *reflective*.'³⁸⁵

Consequently, contrary to a judgment of sense, or a logically determinate judgment, the sublime is, in Kant's view, a reflective judgment, in which only the *particular* is given, and the relevant judgment has to 'find' the *universal* for it. That is to say, the reflective judgment of the sublime consists of a 'bottom-up' movement, that is, from a movement from the particular to the universal. As it shall be explained in more detail below, this reflective judgment of the sublime consists in the *autonomy* of the subject who, judging about a (simultaneous) feeling of pleasure and displeasure in a *given* (particular) representation, she makes a demand for everyone's (universal) agreement with her judgment. That is to say, it is the autonomous subject who, exercising her *lawgiving* function of morality, judges

³⁸⁴ See for instance: Ak 203, 204, 224 Kant (1987), pp. 43, 45, 70.

³⁸⁵ Ak 179, Kant (1987), pp. 18-19.

about a feeling of pleasure and displeasure in a given representation, and, at the same time, makes a demand for everyone's assent to her judgment.³⁸⁶

2. In addition, the sublime is according to Kant an **aesthetic judgment**. That is to say, it is not a cognitive, and so a logical judgment, namely a judgment in which the subject uses understanding to refer the presentation to the object so as to give rise to cognition. Rather, it is a judgment in which subject's liking or admiring of the object does not depend on a determinate concept, but on her free play of *imagination* and *reason*. Hence the sublime is an aesthetic judgment, or a judgment of taste, by which it is meant a judgment whose basis is *subjective*.³⁸⁷

3. However, even though the sublime is an aesthetic judgment, whose basis is subjective, it is not mingled with the least interest; hence it is a pure **disinterested judgment of taste**, or a merely *contemplative*, that is, a reflective judgment, indifferent to the existence of the object.³⁸⁸ Eventually, similarly to the beautiful, the sublime is liked or admired for its own sake.

4. Further, this liking or admiring by the subject, in the view of the sublime, refers, in principle, to a **formless object**. Kant claims that the sublime does not concern only the form of the object, as in the case of the beautiful,³⁸⁹ but it *can also* refer to a formless object, insofar as we present unboundedness; yet adding to this unboundedness the thought of its totality. Within this context, the sublime is regarded as 'the exhibition of an indeterminate concept of reason', that is to say, it is not contained in a specific form, but it concerns ideas of reason arising to our minds in an inadequate manner, namely in a way that transcends our mental powers.³⁹⁰

Kant here mentions as an example the vast ocean, which he does not actually call sublime, but he does think it is suitable for *exhibiting* sublimity in our minds.³⁹¹ Kant does not seem to pay *too much* attention to the sublimity in art. However, he

³⁸⁶ Allison (2001), p. 303.

³⁸⁷ Ak 203, Kant (1987), p. 44.

³⁸⁸ Ak 204, 221, Kant (1987), pp. 45, 66.

³⁸⁹ Ak 203 Kant. (1987), p. 43.

³⁹⁰ Ak 244, 245 Kant (1987), pp. 98-99.

³⁹¹ Ak 245, Kant (1987), p. 99.

does leave room for arguing that the sublime can refer not only to nature, but also to artworks. This is evident by his references to the Pyramids in Egypt and St. Peter's Basilica in Rome as characteristic examples of the aesthetic category of the sublime.³⁹² Consequently, it cannot be said that the sublime is excluded by Kant from the domain of art.³⁹³

Incidentally, based on *Kant's* notion of the sublime, Schiller emphasises the sublime in art. For Schiller, not only the natural phenomena, but also the artworks reveal the sublime to the subject.³⁹⁴ More recently, Adorno has argued that in order to analyse every modernist art movement, we must focus on the sublime. Within this context, Adorno uses the *Kantian* language of the sublime when he talks about an authentic work of art.³⁹⁵ Finally, inspired by Kant's *Critique of Judgment*, Lyotard has achieved the revival of the interest in the sublime in art in the 80's;³⁹⁶ so that, a number of post-modern artists, today, e.g. Mike Kelly and Cindy Sherman, have extensively used formlessness as a tool for creativity, not to straightforwardly elevate art, as in the case of the aesthetic category of the 'beautiful', but to elevate it in a different manner, that is, through its derogation or humiliation (sublime).³⁹⁷

5. Even though the aesthetic judgment of the sublime is a disinterested judgment of taste, it still gives rise to an interest. Hence, it is considered to be subjectively *purposive* without a presupposed presentation of a *purpose* (either objective or subjective).³⁹⁸ This is so, because, as Kant says, we can explain and grasp the object only if we assume that it is based on a causality operating in accordance with purpose. However, contrary to the beautiful, the aesthetic judgment of the sublime is said by Kant to contain not just a *plain* 'purposiveness without purpose', but, since the judgment refers to a terrifying formless object, the sublime is said to contain a

³⁹² Ak 252, Kant (1987), p. 108.

³⁹³ See also, Allison (2001), p.308.

³⁹⁴ See Barone, P. (2004), pp. 114-119; see also Paul de Man. (1996)

³⁹⁵ See Adorno, T.W. (2000), p. 295

³⁹⁶ Lyotard, J.F. (2007), pp. 33-48

³⁹⁷ See: <http://www.tate.org.uk/art/art-terms/f/formlessness>

³⁹⁸ Ak 205-206, 221, Kant (1987), pp. 47, 66.

kind of 'counter-purposiveness'. This is in effect the reason why Kant does not call the object itself as sublime, since the counter-purposiveness cannot be liked. But only our *idea* of it is called sublime, which is felt as purposive; hence the object is eventually *admired*.

This counter-purposiveness without purpose is what Kant calls **high (counter)purposiveness without purpose**, as it is a purposiveness which does not consist in the harmony between the *imagination* and *understanding*, as in the case of beautiful, but in a 'sui generis' harmony based on a contrast and conflict, that is, the harmony between *imagination* and *reason*.³⁹⁹ This *high* purposiveness without purpose is the result of the fact that in the sublime, whose sight is horrible, our 'mind is induced to abandon sensibility and occupy itself with ideas containing a higher purposiveness', that is, with ideas of reason, such as the idea of *freely* realizing our *humanité*.⁴⁰⁰ This is particularly the role attributed to the third *Critique* by Kant, namely its mediation to resolve the 'dispute' between the ideas of 'necessity' and 'freedom' in the first and the second *Critiques*, respectively. In that sense, the aesthetic judgment of the sublime resembles a pure moral judgment, that is, a judgment about the good –in spite of the fact that the concept of the 'good' presupposes an 'objective purposiveness', i.e. it presupposes, as Kant says, that we refer the object to a determinate purpose; while what determines the aesthetic judgment is not a *concept* but a *feeling* (of the inner sense).⁴⁰¹

6. Moreover, when someone consciously and without any interest judges something as sublime, then he cannot help judging, or *necessarily* judges, that the object is also judged as sublime by everyone else.⁴⁰² The sublime has a *necessary* reference to liking or admiring. This kind of necessity has neither a theoretical character allowing us to cognize a priori that everyone will feel this liking, nor a practical character where the liking is the necessary consequence of an objective law, according to which one ought to act in a certain way. Instead, it is an *exemplary* necessity, that is,

³⁹⁹ Ak 221 Kant (1987), pp. 65, 66, 84, 99; see also Allison (2001), p. 323.

⁴⁰⁰ Ak 245, 246 Kant (1987), p. 99

⁴⁰¹ Ak 203-205, 207-209, 211, 226, 228, Kant (1987), pp. 44, 46, 48-49, 51, 53, 73, 75.

⁴⁰² Ak 211, 214, Kant (1987), pp. 54, 57.

a necessity of the agreement of all with an aesthetic judgment which is regarded as an *example* of a universal rule that we are unable to state.⁴⁰³ Here, Kant points out that when the sublime arises in one's mind, one not only *presupposes* that everyone else judges in the same way, but she also *requires* the same judgment from all others. Her judgment is then required to be not only hers, but everyone else's judgment as well. Hence, she speaks of the sublime *as if* it was a property of things themselves, or as something having general validity, or being *public* –not just a private feeling or personal opinion. Thus, one eventually *demand*s that everyone else agrees with them.⁴⁰⁴

Within this context, Kant argues that a judgment of sublime may be converted into a logical judgment based on an aesthetic one. For example, if looking at the ocean we do not simply say that 'this ocean is sublime *to me*' but 'this ocean is sublime', then our judgment is no longer merely *aesthetic* but is a *logical* judgment based on an aesthetic judgment, given that, contrary to the first expression, the second one is stated in non-subjective terms carrying with it, as Kant says, an *aesthetic quantity* of universality, that is, of validity for everyone. Hence, it resembles a judgment about the good in the sense that when the ocean is called 'sublime' we effectively believe that we have a 'universal voice' claiming to the agreement of everyone.⁴⁰⁵

This is in effect the Kantian 'subjective universal communicability' of the aesthetic judgments in general, namely of the aesthetic judgments of the beautiful and the aesthetic judgments of the sublime.⁴⁰⁶ As has been mentioned, in the case of the sublime, in particular, Kant defines this 'subjective universal communicability' as the free play of *imagination* and *reason*. This special kind of **subjective** –not objective, because it does not rest on a concept as in the case of a moral

⁴⁰³ Ak 237, Kant (1987), p. 85.

⁴⁰⁴ Ak 213-216, Kant (1987), pp. 56-60.

⁴⁰⁵ Ak. 215-216, Kant (1987), p. 58-60.

⁴⁰⁶ Ak 217-218, Kant (1987), p. 62.

judgment⁴⁰⁷– **universality** is the result of the fact that one’s judgment is not based on *private* conditions, or interests, or inclinations, or ideologies, and so on; so that it can be assumed that everyone else judges in the same way, or that the relevant judgment is **universally valid** for all subjects.⁴⁰⁸ Here the question arises as to how we become conscious of the reciprocal subjective harmony between our cognitive powers?

The reciprocal subjective harmony, as Kant claims, reveals itself through *sensation* only. This sensation, in particular, consists of the free play of *imagination* and *reason*.⁴⁰⁹ Hence, when one talks about the relevant object, belonging in the aesthetic area of the sublime, one speaks *as if* the sublime was something accorded to the object itself, and one’s judgment is a logical judgment valid for everyone, not an aesthetic judgment; for example, one says that the view from the top of the mountain *is* sublime, not that one *considers* the view from the top of the mountain *as* sublime. Kant claims that it would be ridiculous if someone who prided himself on his taste tried to justify it by saying that the object is sublime *for him or her*.⁴¹⁰

7. In particular, Kant argues that ‘the condition for the necessity alleged by a judgment of taste is the idea of a common sense’.⁴¹¹ ‘**Common sense**’, which differs from ‘common understanding’, in which the judgment is based on concepts, is a subjective principle which determines by feeling only and universal validity the liking or admiring. That is to say, it is a ‘shared sense’ by all, i.e. a judging power that in reflecting takes account of everyone else’s way of presenting something, in order as it were to compare our own judgment with human reason, so that to escape the illusion arising from the ease of mistaking subjective conditions for objective ones.⁴¹²

Kant describes in detail how this is done: We compare our judgments not so much with the *actual*, but rather with the *possible* judgments of others putting

⁴⁰⁷ Ak 214, Kant (1987), p. 58.

⁴⁰⁸ Ak 244, Kant (1987), p. 97.

⁴⁰⁹ Ak 292 Kant (1987), p. 158.

⁴¹⁰ Ak 212-213, 214-215, see: Kant (1987), pp. 55-56, 58-59.

⁴¹¹ Ak 238, Kant (1987), p. 87.

⁴¹² Ak 293, Kant (1987), p. 160.

ourselves in the position of others by abstracting from the limitations that attach to our own judging, that is, by leaving out as much as possible whatever belongs to sensation, and focusing more on the formal features of our presentation. Kant mentions three crucial elements in achieving this common sense: 1) to think without prejudices and superstitions, 2) to think in broad terms overriding the private conditions of judgment, and 3) to think repeatedly using 1) and 2).⁴¹³ Eventually, through common or shared sense, the aesthetic judgment becomes universally communicable, hence a judgment with *exemplary validity*, that is, a rule for everyone.⁴¹⁴ Consequently, whenever we make an aesthetic judgment declaring that something is sublime (or beautiful), we presuppose that everyone else holds the same opinion, or that everyone else ought to agree with our judgment, even though our judgment is based only on our own feeling.

8. Further, according to Kant, the sublime is not just an aesthetic *judgment*, but also a *feeling*; yet not a private feeling of a sensation confined to one's own person, but a feeling *arising from* the public validity of a judgment. Hence Kant priorities the feeling and the judgment accordingly, that is, he puts the judgment first, and the feeling derived from it second. Kant, in particular, claims that the universal communicability in the given representation underlying the aesthetic judgment of the sublime as its subjective condition *precedes* the feeling derived from the sublime. Kant explains why the aesthetic judgment comes first:

'If the pleasure in the given object came first, and our judgment of taste were to attribute only the pleasure's universal communicability to the presentation of the object, then this procedure would be self-contradictory. For that kind of pleasure would be none other than mere agreeableness in the sensation, so that by its very nature it could have only private validity, because it would depend directly on the presentation by which the object *is given*'.⁴¹⁵

⁴¹³ Ak 294, 295 Kant (1987), pp. 160-162.

⁴¹⁴ Ak 238, Kant (1987), p. 87.

⁴¹⁵ Ak 217, Kant (1987), p. 61.

Eventually, the universal communicability underlying the aesthetic judgment of the sublime not only comes first, but also it is the *basis* of the feeling, in the sense that one's ability to communicate one's mental state carries the feeling of the sublime with it.

Further, the sublime is not, as the beautiful is, a feeling of furtherance of life. Rather, it is an intellectual, or spiritual, mixed **feeling of pleasure and displeasure**, in the sense that the mind is repelled by a disliked object and attracted to it simultaneously.⁴¹⁶ In particular, Kant says that the sublime is a 'feeling of a momentary inhibition of the vital forces followed immediately by an outpouring of them that is all the stronger'.⁴¹⁷ On the one hand, the displeasure arises from the necessary abandonment of human sensibility, as a result of the inadequacy of imagination in the view of a terrifying object to think the totality of sensible representation as given. This displeasure arises in us from a safe distance; otherwise the judgment can substantially lose its power. On the other hand, the pleasure arises from the fact that the aforementioned displeasure is balanced by the simultaneous disclosure of 1) our supersensible capacity manifested in the thought of a noumenon as supersensible substrate of appearance, and 2) our vocation of the mind to the 'moral', that is, to ideas of reason such as the idea of *freely* realizing our *humanité*.⁴¹⁸

Eventually, becoming absolutely aware of our freedom from the constraints of nature, we cross the barriers of sensibility with a practical aim. Ultimately, this complex mental state, or feeling, consisting of a negative pleasure arising indirectly, resembles admiration and respect. Kant writes at the beginning of paragraph 27 in the *Critique of Judgment*: 'The feeling of our incapacity to attain to an idea that is a law for us is respect'.⁴¹⁹ Thus, in the case of the sublime, we say that the object is admired, or respected, rather than liked.

⁴¹⁶ Allison (2001), p. 309.

⁴¹⁷ Ak 244, Kant (1987), p. 98.

⁴¹⁸ Ak 245, 246 Kant (1987), p. 99

⁴¹⁹ Kant (1911), p. 257; see also Allison (2001), pp. 321-327.

Furthermore, this mixed feeling is divided by Kant into the *mathematically* and the *dynamically* sublime.⁴²⁰ In both types of sublime, we find in our mind superiority over nature.⁴²¹ More specifically, on the one hand, the *mathematically* sublime is the feeling arising when we are confronted with something not only large, but large *absolutely* [*schlechthin, absolute*], in every respect (beyond all comparison).⁴²² In this case, our imagination strives to progress towards infinity, while our reason demands absolute totality, and so our imagination is inadequate to that idea. It is exactly this inadequacy that arises in us a feeling that we have within us a supersensible power.⁴²³ As examples of the mathematically sublime Kant lists the Pyramids in Egypt and St. Peter's Basilica in Rome; implying that the sublime does not refer only to nature, but also to art.⁴²⁴

On the other hand, the *dynamically*⁴²⁵ sublime is the feeling arising in us when in an aesthetic judgment we consider the *might* nature (or art) as a power that cannot dominate us.⁴²⁶ The dynamically sublime arises in us a gladness involving our liberation from the danger. Kant's examples in the case of the dynamically sublime include overhanging and threatening rocks, volcanoes, hurricanes, the boundless ocean, the high waterfall of a river, and so on. Kant points out that in the view of all these fearful phenomena of nature, or artworks, we feel attraction provided we are in a safe place, otherwise the aesthetic judgment of the sublime would cease to exist.

Also, one of the most important Kant's claims here is that, contrary to the beautiful, the sublime stands in more intimate relation to morality.⁴²⁷ All the fearful

⁴²⁰ Ak 247, Kant (1987), p. 101.

⁴²¹ Ak 261, Kant (1987), p. 120.

⁴²² Ak 250, Kant (1987), p. 105.

⁴²³ Ak 250, Kant (1987), p. 106.

⁴²⁴ Ak 252, Kant (1987), p. 108.

⁴²⁵ From the Greek word 'δύναμις' (*dynamis*), i.e. might, power, etc.

⁴²⁶ Ak 260, Kant (1987), p. 119.

⁴²⁷ See also Allison (2001), p. 303.

objects, both in the case of the mathematically and in the case of the dynamically sublime, raise the fortitude of soul above its middle range allowing us to discover in us a *moral* capacity to resist the seeming omnipotence of nature or art. We eventually become courageous enough to believe that we are equal to nature's or art's seeming omnipotence.⁴²⁸ For although we realize our own limitation and physical/mental impotence in the view of such immensity, at the same time we find in our own *reason* a *moral* power through which our initial humiliation, in front of the objects exceeding our middle human powers, becomes exaltation. That is to say, in the view of such power and enormity, we feel humiliated, yet at the same time, through the necessary expansion of our imagination, an *ethical* disposition is revealed in us showing our moral capacities and vocation as human beings (our *humanité*). This revealed moral capacity is, as Kant says, what keeps the humanity in our own person from being degraded;⁴²⁹ and it is, as he points out, our *obligation* to develop and exercise it further.

Thus, the aesthetic judgment of the sublime requires cultivation.⁴³⁰ For, as Kant claims all possess this capacity. Even a savage, he says, admires a person who, against his own interests (of sense), judges without feeling fear and tremble, but with vigour and full deliberation. According to Kant, the admiration for the warrior has not eclipsed in the civilized society, except that now we demand the demonstration of some other virtues by him, such as: gentleness, sympathy, and care.⁴³¹ Ultimately, Kant claims that it is a mistake one to worry that this *determination*, in accordance with the moral law, may result in a cold and lifeless approval of the moral law without any moving force or emotion. On the contrary, he argues, a feeling of exaltation resembling the feeling of enthusiasm arises in man's soul inducing eventually an ideal balance between the feeling of pleasure and displeasure.⁴³²

⁴²⁸ Ak 261, Kant (1987), p. 120.

⁴²⁹ Ak 268, 269, Kant (1987), pp. 128-129.

⁴³⁰ Ak 264,265, Kant (1987), p. 124.

⁴³¹ Ak 261, 262, 267, Kant (1987), pp. 120-121, 127.

⁴³² Ak 274, Kant (1987), p. 135.

At the end of my discussion, I add one more significant aspect of the *dynamically* sublime, which is not equally stressed by Kant in his theory of the *mathematically* sublime. While the mathematically sublime mostly refers to *sense*, the Kantian dynamically sublime refers also to *action*. It is not by accident the fact that Kant himself calls it 'dynamically' sublime, and he further associates it (yet he does not identify it) with the moral feeling of 'respect', which by definition forces us to action and the realization of the 'good' towards ourselves and others.⁴³³ In the similar vein, Schiller calls the Kantian dynamically sublime 'practically' sublime, arguing that this type of sublimity has more active character than the mathematically sublime. Through the dynamically sublime, Schiller claims, we do not get simply a feeling or sense of our moral autonomy, but we are also forced to the realization of it, that is, to the realization of our autonomy of the will, namely to the abandonment of our sensibility, and the (autonomously) fulfillment of our moral duties to oneself and others.⁴³⁴ Consequently, the sublime does not only provide us with the aesthetic awareness of what morality requires of us with respect to duties, but also it is an aesthetic feeling with *motivating* force enabling us to fulfill our moral duties. Hence, it could be argued that artworks in the area of the sublime have an edificatory role. This point could further be taken into consideration by governments within the context of the creation of national curriculum programmes of compulsory education.

9. Finally, as Kant points out in the 'General comment on the exposition of aesthetic reflective judgments', in the *Critique of Judgment*, while the beautiful, e.g. in romances and maudlin plays, make the heart lethargic and non-sensitive to the severe precept of duty, only the sublime makes the heart capable of respect for the *dignity* of humanity in our own person, and for the *human rights* of others. Kant writes:

'Every affect of the VIGOROUS KIND (i.e., which makes us conscious that we have forces to overcome any resistance, i.e. makes us conscious of our

⁴³³ Ak 261, 262, 267, Kant (1987), pp. 120-121, 127.

⁴³⁴ Schiller (1962), p. 527.

animus strenuous) is *aesthetically sublime*... But an affect of the LANGUID kind... has nothing *noble* about it, though it may classed with the beautiful of the sensible kind... let alone sublimity... romances and maudlin plays; insipid moral precepts that dally with (falsely) so-called noble attitudes but that in fact make the heart languid and insensitive to the stern precept of duty, and that hence make the heart incapable of any respect for the dignity of the humanity in our own person and for human rights (which are something quite different from human happiness) and thus make it incapable of any firm principles in general...⁴³⁵

That is to say, according to Kant, the person who experiences the sublime not only feels she is dignified, but she is also considered to be dignified by others, as a result of the fact that she respects the rights of other people. Within the context of the present thesis, this is an extremely important passage as Kant here explicitly associates the judgment and feeling of the **sublime** with **dignity (internally)** and **human rights (externally)**. In the last two chapters of the thesis, through the new (Kantian) duty-based justification of human and socioeconomic rights, more light is shed on this association.

5.2 Conceptual analysis of the Kantian 'autonomy of the will' through the Kantian aesthetic category of the 'sublime'

In this section, I analyze the obscure Kantian principle of 'autonomy of the will' in the *Groundwork of the Metaphysics of Morals* through the Kantian aesthetic category of the sublime in the *Critique of Judgment*.⁴³⁶ That is to say, I show how the position of the spectator/actor in the view of the sublime *mirrors* the position of a rational moral being that judges and acts autonomously. **This is an important task, within the context of the present thesis, given that the Kantian moral concept of autonomy of the will is the starting point of the new (Kantian) duty-based**

⁴³⁵ Ak 272-273, Kant (1987), pp. 133-4.

⁴³⁶ Ak 244-356, Kant (1987), pp. 97-232

justification of human and socioeconomic rights in chapter 4. But Kant leaves this difficult, yet philosophically important moral concept unaddressed, in spite of the fact that in several passages, in the Kantian opus, the autonomy of the will is, either implicitly or explicitly, associated with sublimity. For instance, in 4:426 in the *Groundwork of the Metaphysics of Morals*, Kant describes the ‘absolutely good will’, namely the autonomy of the will, as ‘uber allen Preis *erhabene*’, that is, as ‘*sublime* above all price’ [italics mine].⁴³⁷ Also, in 5:88, in the Critique of Practical Reason, Kant claims that the *sublimity* consists in our recognition of our sensible existence, yet, at the same time, in the realization of our supersensible existence; in other words, in the actualization of our autonomy of the will.⁴³⁸

Consequently, in what follows, I attempt the conceptual analysis of Kant’s ‘autonomy of the will’ via his aesthetic notion of the ‘sublime’. I start by stating once more Kant’s official definition of the supreme principle of morality, that is, of the autonomy of the will in 4:440 in the *Groundwork of the Metaphysics of Morals*. Kant writes: ‘Autonomy of the will is the property of the will by which it is a law to itself (independently of any property of the objects of volition). The principle of autonomy is, therefore: to choose only in such a way that the maxims of your choice are also included as universal law in the same volition...’⁴³⁹ In this obscure definition of the principle of autonomy, Kant gives us effectively three main characteristics of it: The autonomy of the will, that is the property of the will by which it is a law to itself (1), is the principle through which we choose only in such a way that the maxims of our choice are also included as universal law in the same volition (2), and which are independent of any property of the objects of volition (3).

Unluckily, the presentation of these three characteristics by Kant is not adequate enough to understand in depth this significant principle in Kantian ethics. Not only do these three elements need further development, but also, they are not enough to define the Kantian autonomy of the will. Consequently, what is needed, in

⁴³⁷ For the identification of ‘autonomy of the will’ with ‘good will’, see Kant, I. (1870); see also 4:414, in Gregor (1996), p. 67.

⁴³⁸ Gregor (1996), p. 211.

⁴³⁹ Ditto, p. 89.

order to have a full account of the supreme principle of morality, is not only the clarification of the three characteristics of the autonomy of the will mentioned by Kant, but also their supplementation with some other crucial elements. This can be achieved, in my judgment, through the analysis of the Kantian autonomy of the will via the Kantian aesthetic category of the sublime.

I briefly recall here the nine characteristics of aesthetic judgment and the feeling of the sublime, as presented previously. The sublime: 1) is a **reflective judgment**; 2) is an **aesthetic judgment**; 3) is a **disinterested judgment**; 4) it concerns not only the form of the object, but it can also be found in a **formless object**; 5) it contains a **'high (counter)purposiveness without purpose'**; 6) it is a judgment which has **universal validity**; 7) it has universality which is based, in particular, on the notion of **'common sense'**; 8) it is a **feeling of pleasure and displeasure**; and 9) in this judgment and feeling of the sublime, the **dignity** of humanity in our own person is reflected. In what follows, I show how these nine characteristics *apply* to the Kantian autonomy of the will.

1. To begin with, similarly to the reflective judgment of the sublime, we may see the Kantian autonomy of the will not analogous to a *determinate* judgment, but to an *aesthetic* judgment of **reflection (reflective judgment)**. According to this judgment, autonomous persons, who are exercising their lawgiving function of morality, as Kant points out in the definition of autonomy of the will, in 4:440, start from a *particular* case, in order to find the *universal* i.e. the principle, the law. What is crucial to be clarified at this point is that the exercise of the autonomy of the will here refers to particular *agents*, e.g. ordinary people, politicians and judges, who decide at some point and act upon specific moral laws. As Kant mentions in 6:480 in the *Metaphysics*, *'... in the subjective autonomy of each human's being practical reason and so implies that the law itself, not the conduct of other human beings, must serve as our incentive'* [italics added].⁴⁴⁰

Yet, this is not the sole understanding of the autonomy of the will. Other authors and Kant scholars insist on the impersonality of the self *qua* rational

⁴⁴⁰ Gregor (1996), p. 593.

being.⁴⁴¹ It is true that in 4:440 Kant does not straightforwardly refer to autonomy as a property of persons. Rather he describes it as ‘the property of the will by which it is a law to itself’.⁴⁴² However, in spite of Kant’s unsuccessful wording here, I see Kantian autonomy as referring to *particular* selves. It is not accident that, when he specifies the moral concept of the autonomy of the will, through the Formula of Autonomy in 4:431, Kant himself writes that ‘the third practical principle of the will, as supreme condition of its harmony with universal practical reason, the idea of *the will of every rational being as a will giving universal law*’.⁴⁴³ [Emphasis added].

Also, the word ‘autonomy’ comes from the Greek word ‘αυτονομία’, that is, ‘αυτός’ (self) and ‘νόμος’ (law). ‘Αυτονομία’ in Greek means ‘legislation by oneself’, or ‘self-legislation’ and ‘responsibility’ simultaneously; hence, ‘autonomy’ differs from the notion of ‘freedom’ which consists in sheer independence and ‘self-legislation’ without the burden of responsibility. Apparently, under this understanding of autonomy, heteronomy, which comes from the Greek word ‘ετερονομία’, that is, ‘έτερος’ (other) and ‘νόμος’ (law), denotes the legislation by other(s), as well as a lack of responsibility, and non-independence or coercion. Kant writes in 4:441 in the *Groundwork* that ‘if the will seeks the law that is to determine it *anywhere else* than in the fitness of its maxims for its own giving of universal law – consequently if, in going beyond itself, it seeks this law in a property of any of its objects – heteronomy always results’.⁴⁴⁴

Ultimately, the meaning of autonomy as ‘legislation by oneself’ and ‘responsibility’ is also denoted in 5:185-6 in the *Critique of Judgment*.⁴⁴⁵ Yet, there, Kant does not use the word ‘autonomy’, but the awkward, nonexistent neologism: ‘heautonomy’. But even if Kant does not use the word ‘autonomy’, this does not mean that by ‘heautonomy’ he means something else. The neologism ‘heautonomy’,

⁴⁴¹ See for instance, O’Neill (2013); also, O’Neill (2016), p. 104

⁴⁴² Gregor (1996), p. 89.

⁴⁴³ Gregor (1996), p. 81.

⁴⁴⁴ Gregor (1996), p. 89.

⁴⁴⁵ Kant (1987), pp. 24-25.

which is made of the two Greek words 'εαυτός' (self) and 'νόμος' (law), is identified with the word 'autonomy' given that the Greek prefix 'auto' is in effect the synonym and short for the Greek prefix 'heauto'; they both mean 'self'. Therefore, as the word 'autonomy', the peculiar Kantian 'heautonomy' means a responsible legislation by *oneself*.

Nevertheless, even though I see the Kantian autonomy of the will as a judgment of reflection, according to which autonomous *persons* are exercising their lawgiving function of morality in a 'bottom-up' manner, I do not agree with Gerald Dworkin's thesis according to which '... autonomy is a feature of persons and that it is a desirable quality to have'.⁴⁴⁶ Contrary to Dworkin's 'personal autonomy', as well as to the '... free, independent, lonely, powerful, and rational...' twentieth-century autonomous person condemned by Iris Murdoch, the Kantian autonomy of the will is neither a property of *all* persons and a *desirable* (only) quality to have, nor it has an individualistic and atomistic character. Rather, the Kantian autonomous person 1) is a *moral* person, who 2) experiences a *mixed* feeling of pleasure and displeasure, and 3) through her imagined deliberation she aims at and achieves intersubjectivity.⁴⁴⁷ All these characteristics of the Kantian autonomous person are explained below.

2. In the same context, similarly to the **aesthetic** judgment of the sublime, in which subject's admiring of the object does not depend on a *determinate* concept, but on his or her free play of *imagination* and *reason*, we may see the subjective moral judgment of the autonomous self-legislating person as not based on a determinate concept, but, as a judgment in which a particular is given, and the unknown determinate concept has further to be found. This can also be applied to the case of law and the legal judgment. For example, the legislator has available only a particular case for which she has to find a determinate rule, applying to all similar cases. I will return to these two crucial issues, that is, to 1) the bottom-up movement of the judgment of reflection, as well as to 2) the 'aesthetically' mode of judging, in which

⁴⁴⁶ Dworkin (2012)

⁴⁴⁷ Murdoch (1970), p. 80.

only a particular case is given, and the judging person has to find the appropriate *determinate* concept applying to it, in the final chapter of the thesis, in order to stress the political and legal implications of both.

3. Also, similarly to the sublime which is a subjective judgment, yet a judgment not mingled with the least interest, hence a pure **disinterested judgment**, we may understand Kantian autonomy of the will as referring to a moral judgment indifferently to the existence of the object. Incidentally, this is explicitly mentioned by Kant in the parenthesis in the definition of the autonomy of the will in 4:440. Kant claims that the autonomy of the will is the property of the will by which it is a law to itself (*independently of any property of the objects of volition*). Consequently, the objects are not taken into consideration by the autonomously judging subject. That is to say, in the case of the autonomy of the will, the autonomous person judges and further does the 'good', that is, her moral duty for duty's sake, or for the sake of the moral law alone.

4. Further, similarly to the sublime, which refers, in principle, to a **formless object** – hence it is regarded as the exhibition of an indeterminate concept of reason, namely to an idea of reason arising to our minds in a manner transcending our human mental powers– the Kantian concept of autonomy may be seen as referring to the idea of moral duty, of which fulfillment transcends our limited human powers.

5. Moreover, as has been mentioned above, the aesthetic judgment of the sublime contains a **high (counter)purposiveness without purpose**, as a result of the fact that in the view of the horrible sublime our mind is induced to abandon sensibility and occupy itself with ideas containing a higher purposiveness, that is, with ideas of reason, such as the ideas of being capable of humbly and nobly (that is morally) *resisting* fear and trembling arising from the omnipotence of the object of sublime, and further *acting* accordingly.⁴⁴⁸ In a similar vein, we may regard the moral judgment of the autonomous person as containing a kind of high (counter) purposiveness without purpose, in the sense that in the view of the moral duty commanded by reason, the mind is called to abandon sensibility (Kant calls it

⁴⁴⁸ Ak 245, 246 Kant (1987), p. 99

‘volition’ in 4:440), and occupy itself with ideas containing a higher purposiveness, that is, with ideas of reason such as the ideas of *freely* resisting fear arising from the morally demanding duty that has to be fulfilled, and acting accordingly.

6. Furthermore, similarly to the aesthetic judgment of the sublime which has **universal validity**, as a result of the fact that one’s judgment is not based on *private* conditions, or interests, or inclinations, or ideologies, and so forth, the moral judgment of the autonomous person may be considered as universally valid for all other subjects as well. Kant explicitly says this in the 4:440: ‘...The principle of autonomy is, therefore: to choose only in such a way that the maxims of your choice are also included as *universal law* in the same volition...’ [Italics mine].⁴⁴⁹ Within this context, I see the moral judgment of the autonomous person as a judgment through which the judging subject does not only *presuppose* that everyone else judges in the same way, but –similarly to the sublime– she also *requires* the same judgment from all others. Hence, she speaks of the moral duty *as if* it was something having general validity, or as being *public* –not just a personal opinion. Eventually, it seems that the Kantian ‘subjective universal communicability’ of the aesthetic judgments applies to moral judgments as well.

7. We may apply the condition for the necessity alleged by a judgment of taste, that is, the idea of ‘**common sense**’ to the moral judgment as well. When we judge rationally and morally, and we further consider a subsequent course of action, we formulate the appropriate maxim, and decide whether it can be universalized; that is to say, whether it can be willed by all others. This is how one of the most prominent formulations of the Categorical Imperative, that is, the Formula of Universal Law (FUL) [see above] actually works. However, this is not apparent in the *Groundwork of the Metaphysics of Morals*, so that it could be argued that the notion of ‘*sensus communis*’, as it is specified by Kant in the third *Critique*, is important to the clarification of the FUL in his moral theory.

To be more specific, Kant writes in 4:421 in the *Groundwork*: ‘*act only in accordance with that maxim through which you can at the same time will that it*

⁴⁴⁹ Gregor (1996), p. 89.

become a universal law'.⁴⁵⁰ This could be interpreted (via the 'sublime') as follows: The autonomously judging person while reflecting takes account of *everyone else's* way of presenting something, that is to say, she compares her own judgment not so much with the *actual* but with the *possible or contingent* judgments of all others putting herself in their position. In other words, the deliberation here is not necessarily an *actual* deliberation, but an *imagined* deliberation. The word 'imagined' signifies the enlarged mentality of the deliberator who manages to escape the constraints of her limited, private thought, and immerse her thinking in the grounds of morally *judging* –which is actually a locus medium between *thinking* and *acting*.

In particular, the rational agent asks whether the maxim she wills can also, at the same time (*zugleich*), be willed by all other persons. The term 'zugleich', that is, 'simultaneously' must not be omitted here.⁴⁵¹ It is of great importance, the maxim of the moral deliberator to be in coordination with the maxims of all others. If her maxim cannot be willed at the same time by all others, then it must be rejected. We can easily determine whether a certain maxim can be willed by all others: a maxim, of which realization contradicts the notion of the universalization itself, cannot ipso facto be universalized. For example, even if this maxim is willed by a neo-liberal, the extinction of all socialists cannot be universalized because there are *at least* the socialists who do not will the relevant maxim. Of course, instead of the group of socialists, the same could be said for any other group, for example, the group of Armenians (in relation to genocide perpetrators or murderers).

Eventually, the autonomous person, similarly to the person who judges aesthetically, thinks 1) without prejudices and superstitions, 2) in broad terms overriding the private conditions of thinking, and 3) using repeatedly the 1) and 2). Through the idea of 'common sense', the moral judgment of the autonomous subject becomes universally communicable, hence a judgment with *exemplary validity*, that is, a rule for everyone. Within this context, intersubjectivity means that

⁴⁵⁰ Gregor (1996), p. 73.

⁴⁵¹ See further Kleingeld (2017), pp. 89-115.

we are not self-sufficient, or atomistic selves, or individual, or isolated, or separate atoms indifferent to the thoughts and feelings of others, but *autonomously* interconnected agents/persons. Ultimately, the idea of universalisability is not a chimera, but something absolutely feasible. What must be stressed here is that other beings who possibly inhabit a distant planet but they are not *communicable* cannot be taken into (moral) consideration by the judging person.

Nevertheless, contrary to the above understanding of the Kantian autonomously reflective-judging person, as one who does not necessarily interact with others in order to formulate her judgment, other prominent Kant scholars do insist on an *actual* interaction with others.⁴⁵² However, this is not accurate in Kantian terms. In 4:438 in the *Groundwork of the Metaphysics of Morals*, Kant explicitly argues that ‘every rational being must act as if he were by his maxims at all time a lawgiving member of the universal kingdom of ends’.⁴⁵³ In addition, in 5:36 in the *Critique of Practical Reason*, the scope of the imagined legislation is the entire moral community. For instance, Kant writes that the moral law is thought as objectively necessary only because it holds for everyone who has reason and autonomous will.⁴⁵⁴

Therefore, according to the procedure followed by the autonomously reflective-judging person, all others are seriously taken into consideration, yet their consent is not *actually* required, but it is primarily *imagined*. Ultimately, through such an imaginative procedure, or an ‘imaginative syllogism’, the Kantian moral person is not identified with the individual atom; hence the Kantian autonomy is eventually rescued from being characterized as an individualistic and atomistic neoliberal concept.

8. Further, similarly to the sublime, we may see the autonomy of the will not only as a moral *judgment*, but also as a moral *feeling* arising from the public validity of the

⁴⁵²In ‘Jean-Jacques Rousseau Annual Lecture & Conference’ at Keele University, Saturday, 10 March 2018, Pauline Kleingeld argued that there might be an actual interaction with others, for example through voting.

⁴⁵³ Gregor (1996), p. 87.

⁴⁵⁴ Gregor (1996), p. 169.

relevant judgment. Here again, as in the case of the sublime, the feeling is following the judgment (see above). The universal communicability underlying the moral judgment of the autonomous person not only comes first but also it is the *basis* of the moral feeling, in the sense that one's ability to communicate her mental state carries the relevant moral feeling with it.

Specifically, the moral feeling arising in the case of the autonomy of the will is –similarly to the feeling of the sublime– an intellectual, or spiritual, mixed **feeling of pleasure and displeasure**, in the sense that the mind is, at the same time, *repelled* by reason's command to do what is the right thing to do, or to fulfill a moral duty, and *attracted* by it. On the one hand, the displeasure arises from the necessary abandonment of human *volition* as a result of the inadequacy of our 'imagination', in the 'view' of a moral duty commanded by reason, e.g. not to coerce other people when it suits us. This feeling of displeasure is identified by Kant in 6:436, in the *Metaphysics of Morals*, with the feeling of *humility* following 'unavoidably from our sincere and exact comparison of ourselves with the moral law (its holiness and strictness)'.⁴⁵⁵ At the same time, on the other hand, an elevating feeling of pleasure arises from the fact that the aforementioned displeasure is balanced by the simultaneous disclosure of our supersensible capacity manifested in the thought of a noumenon as supersensible substrate of appearance, and our vocation of the mind to the *moral*, that is, to ideas of reason, such as the idea of *freely* fulfilling our relevant moral duty. As Kant writes in 6:436, in the *Metaphysics of Morals*, '... but from our capacity for internal lawgiving and from the (natural) human being's feeling himself compelled to revere the (moral) human being within his own person, at the same time there comes *exaltation...*'; an exaltation resembling the exaltation in the view of the 'sublime'.⁴⁵⁶

Eventually, the similarity between the two feelings, that is, the mixed feeling arising in the view of the 'sublime' and the feeling in the view of what is the right thing to do, or our moral duty, is apparent. As in the former, in the 'view' of the

⁴⁵⁵ Gregor (1996), p. 558

⁴⁵⁶ Gregor (1996), p. 558

moral law's command, the feeling of the autonomous subject is a mixed feeling of *humiliation* and *elevation*. In 5:79-80, in the *Critique of Practical Reason*, Kant writes: '... humiliation on the sensible side – is an elevation of the moral – that is, practical – esteem for the law itself on the intellectual side...'⁴⁵⁷ More generally, in 5:74 Kant claims that the 'supreme lawgiving', namely the lawgiving in the case of the supreme principle of morality, that is, the autonomy of the will, consists in both a positive and negative effect.⁴⁵⁸ Conversely, in 5:86 Kant's reference to the sublime clearly shows its connection with the supreme principle of morality, that is, with the autonomy of the will. Kant writes: 'Sublime... that requires submission... and yet gains reluctant reverence... a law before which all inclinations are dumb, even though they secretly work against it'.⁴⁵⁹ Consequently, as in the case of the sublime, the Kantian autonomous person, becoming absolutely aware of her freedom from the constraints of nature, e.g. fear, crosses the barriers of sensibility with a practical aim: to resist fear, and do what is the right thing to do, that is to say, to fulfill her duty.⁴⁶⁰

This complex mental state, or feeling, consisting of a 'negative pleasure' arising indirectly, is further associated by Kant with the feeling of *admiration* and *respect*. In 5:76 in the *Critique of Practical Reason* Kant writes that the *respect* to the moral law –which is further directed to persons– is something that comes near to the feeling of *admiration*.⁴⁶¹ Kant writes, in 5:74, that when something humiliates us, it awakens *respect* for itself insofar as it is *positive* as the moral law.⁴⁶² The same applies to the aesthetic experience of the sublime. Overall, the notion of 'respect' to the moral law in Kant's moral theory seems to derive from a specific intellectual ground, that is, from the complexity characterizing the autonomy of the will.

Ultimately, I stress the fact that, as exactly in the case of the sublime, the autonomy of the will does refer to the *action* of the autonomous agent. The

⁴⁵⁷ Gregor (1996), pp. 203-5.

⁴⁵⁸ Gregor (1996), p. 200.

⁴⁵⁹ Gregor (1996), p. 209.

⁴⁶⁰ For a similar claim, see Allison (2001), pp. 321-322.

⁴⁶¹ Gregor (1996), p. 202.

⁴⁶² Gregor (1996), p. 200.

aforementioned notion of 'respect' enables us to understand better this aspect of the Kantian autonomy of the will. Given that the feeling of respect is grounded in the autonomy of the will, and also considering the fact that the notion of respect by definition forces us to *action* and the realization of the 'good' towards ourselves and others, one easily concludes that the Kantian autonomy of the will is the supreme principle of morality in the sense that it leads us to the realization of our moral duties, and the 'good' in general towards ourselves and others.⁴⁶³ Kant writes in 5:80 and 5:81, in the *Critique of Practical Reason*, that the autonomous person is impelled to an activity or action, which is called 'duty';⁴⁶⁴ a duty (action) which, according to Kant, is fulfilled or performed by someone who, being bound to it, acts not *in conformity with duty* (mere legality), but *from duty*, that is, for the sake of the moral law alone.⁴⁶⁵

In other words, the incentive, or the subjective determining ground, of the subsequent moral action (fulfillment of duty) is the moral law as it comes from the practical pure reason. In particular, Kant writes in 5:78 in the *Critique of Practical Reason*: 'Respect for the moral law is therefore the sole and also the undoubted moral incentive'.⁴⁶⁶ The similarity between the feeling in the view of the sublime, and the feeling arising when one exercises her autonomy of the will, is the reason why Kant calls, in 5:85 and 5:86, all actions done with sacrifice and for the sake of duty *sublime*.⁴⁶⁷

Finally, it is not by accident the fact that throughout the previous conceptual analysis, I repeatedly call the autonomous lawgiving agent 'person'. Kant writes in 5:86-7, in the *Critique of Practical Reason*:

'It is nothing other than *personality*, that is, freedom and independence from the mechanisms of the whole nature, regarded nevertheless as also a

⁴⁶³ Ak 261, 262, 267, Kant (1987), pp. 120-121, 127.

⁴⁶⁴ See 5:80, Gregor (1996), p. 205.

⁴⁶⁵ See 5:81, Gregor (1996), p. 205; also 6:222, in Gregor (1996), p. 377.

⁴⁶⁶ Gregor, (1996), p. 203; see also: 5:75, Gregor (1996), p. 201.

⁴⁶⁷ Gregor (1996), p. 208-9.

capacity of a being subject to special laws – namely pure practical laws given by his own reason, so that the person as belonging to the sensible world is subject to his own personality insofar as he also belongs to the intelligible world'.⁴⁶⁸

Consequently, it seems that the notion of 'personality' (also very often used in law) is grounded in the supreme principle of morality, that is, in the autonomy of the will. Hence, this idea of personality indicates, as Kant claims, the *sublimity* of the higher self of the autonomous *agent*.⁴⁶⁹

9. Similarly to the aesthetic notion of the sublime, which instills dignity in our own person, and respect for the human rights of others, the moral concept of autonomy of the will may be seen as not only leading to the respect of the rights of others through the fulfillment of our duties, but also to a feeling of dignity towards ourselves, as well as to being regarded as dignified by others. Kant writes in 4:394 in the *Groundwork* that the 'autonomy of the will', is the will of the person who feels an 'inner value' or 'dignity' in his own person.⁴⁷⁰ Ultimately, Kant claims that '... the mere dignity of humanity as rational nature, without any other end or advantage to be attained by it – hence respect for a mere idea – is yet to serve as an inflexible precept of the will, and that it is just in this independence of maxims from all such incentives that their sublimity consists, and the worthiness of every rational subject to be a lawgiving member in the kingdom of ends'.⁴⁷¹

After the conceptual analysis of the Kantian moral concept of autonomy of the will through the Kantian aesthetic category of the sublime, we can move on to the reconstruction of the unsuccessful Kantian definition of the supreme principle of morality in the *Groundwork of the Metaphysics of Morals*. My own understanding of the Kantian incomplete definition of the 'autonomy of the will' in 4:440 is the following: **Autonomy of the will is both the judgment and feeling of autonomous**

⁴⁶⁸ Gregor (1996), p. 210.

⁴⁶⁹ See 5:87, in Gregor (1996), p. 210.

⁴⁷⁰ Gregor (1996), p. 50.

⁴⁷¹ Gregor (1996), p. 88.

moral agents who, although they feel humiliated by the omnipotence of the moral law, they abandon ‘volition’, that is, their inclinations, ideologies, wishes and so forth, and, freely self-legislating –yet requiring the same legislation from all others– respect the moral ideas of reason, such as the fulfillment of their moral duties, realizing their higher self as autonomous moral agents (*self-approbation*),⁴⁷² while feeling (and being regarded by others), at the same time, that they are persons with dignity. In what follows, I explain why the Kantian ‘autonomy of the will’, as has just been defined, is effectively identified with the Kantian ‘good will’.

To begin with, Kant starts the first section of the *Groundwork* with the claim that: ‘It is impossible to think of anything at all in the world, or indeed even beyond it, that could be considered good without limitation except a good will’.⁴⁷³ But what does Kant actually mean by ‘good will’? As the ‘autonomy of the will’, the notion of ‘good will’ is not explicitly defined by Kant. However, **through a text-based analysis, it is clearly shown that by ‘good will’ Kant actually means the ‘autonomy of the will’.**

- a. Initially, according to 4:402 of the *Groundwork*, a morally good will is the will of a person who behaves morally, that is to say, a person who does not deviate from her **duty**, or the person who does her duty; that is to say, a person who is motivated by duty/moral law alone rather than the good.⁴⁷⁴
- b. Such a will, according to Kant, differs both from a will which responds directly to desires, e.g. most animals’ will, as well as from a divine will, that is, a will which responds only to rational choices lacking desires, wishes, and so forth. A ‘good will’, in the Kantian sense, belongs only to beings that are capable of choosing rationally, in spite of being affected by their opposite **inclinations**.⁴⁷⁵
- c. Further, Kant claims in 4:413 that this good will is determined ‘by means of representations of reason, hence not by subjective causes but objectively,

⁴⁷² See 5:81, in Gregor (1996), p. 205

⁴⁷³ Gregor (1996), p. 49.

⁴⁷⁴ See especially 4:397, Gregor (1996), p. 52; also pp. 56-57.

⁴⁷⁵ See *Metaphysics of Morals*, 6:231-4, in: Gregor (1996), pp. 374-375.

that is, from grounds that are valid for **every rational being** as such'.⁴⁷⁶ Kant asks in 4:403: 'Can you also will that your maxim become a universal law? If not, then it is to be repudiated... because it cannot fit as a principle into a possible giving of universal law, for which lawgiving reason, however, forces from me immediate respect'.⁴⁷⁷

- d. Furthermore, in Kant's view, only such a 'good will' is a will possessing 'inner value' or '**dignity**'. Incidentally, in 4:435 in the *Groundwork*, Kant writes 'What is related to general human inclinations and needs has a *market price*... but that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*'.⁴⁷⁸ Hence, in 4:394, Kant claims that: 'A good will is not good because of what it effects or accomplishes, because of its fitness to attain some proposed end; but only because of its volition, that is, it is good in itself, and regarded for itself, is to be valued incomparably higher...'⁴⁷⁹ In 4:439, Kant claims that '... the mere dignity of humanity as rational nature, without any other end or advantage to be attained by it – hence respect for a mere idea – is yet to serve as an inflexible precept of the will, and that it is just in this independence of maxims from all such incentives that their sublimity consists, and the worthiness of every rational subject to be a lawgiving member in the kingdom of ends'.⁴⁸⁰
- e. Finally, in 4:436, Kant points out that the lawgiving has an unconditional, incomparable value, and that **respect** alone is the expression of what must be given by a rational autonomous being.⁴⁸¹

According to this text-based analysis of the Kantian 'good will', the good person seems to be the person who, in spite of her opposite **inclinations**, and freely self-legislating, yet legislating for **all others**, **respects** the moral ideas of reason, such

⁴⁷⁶ Gregor (1996), p. 67.

⁴⁷⁷ Gregor (1996), p. 58.

⁴⁷⁸ Gregor (1996), p. 84.

⁴⁷⁹ Gregor (1996), p. 50.

⁴⁸⁰ Gregor (1996), p. 88.

⁴⁸¹ Gregor (1996), p. 85.

as the fulfillment of her **duties**, while feeling (and being considered by others), at the same time, as a person with **dignity**. But these five elements (in bold letters) are found in the definition of the autonomy of the will as well. I recall here the full definition of the autonomy of the will:

*Autonomy of the will is both the judgment and feeling of autonomous moral agents who, although they feel humiliated by the omnipotence of the moral law, they abandon 'volition', that is, their **inclinations**, ideologies, wishes and so forth, and, freely self-legislating –yet requiring the same legislation from **all others**– **respect** the moral ideas of reason, such as the fulfillment of their moral **duties**, realizing their higher self as autonomous moral agents (self-approbation⁴⁸²), while feeling (and being regarded by others), at the same time, that they are persons with **dignity**.*

Consequently, following the above text-based analysis, it could be claimed that not only the Kantian 'good will' is identified with the Kantian 'autonomy of the will', but also that 'good will' has the characteristics of the aesthetic category of the sublime given that, after the conceptual analysis of the autonomy via the sublime, we concluded that the autonomy of the will resembles the aesthetic judgment and feeling of the sublime. Eventually, the Kantian '**autonomous person**' is the Kantian '**good person**' who judges and feels as a '**person who experiences the sublime**'; that is to say, a dignified person who, despite her opposite inclinations, freely self-legislates, yet requiring the same legislation from all others, and respects the moral ideas of reason, such as the fulfillment of her moral duties.

Ultimately, under this analysis of the 'autonomy of the will', or the 'good will', the initial definition of the Kantian 'heteronomy of the will', in 4:441, as the will which, for its own universal lawgiving, seeks the law that is to determine it anywhere else than in the fitness of its maxims,⁴⁸³ may be formed accordingly as: **Heteronomy of the will is both the judgment and feeling of agents who, not being capable of abandoning 'volition', that is, their inclinations, ideologies, wishes and so forth,**

⁴⁸² See 5:81, Gregor (1996), p. 205

⁴⁸³ Gregor (1996), p. 89.

freely self-legislate –yet require the same legislation from all others– in accordance with a ‘law’ found anywhere else than in the moral law.

Here it must be pointed out that, similarly to the autonomous or good person’s, the heteronomous person’s lawgiving is a *universal* lawgiving which is taking place *freely*. Hence, what in effect distinguishes the heteronomous from the autonomous person is not the lack of her universal lawgiving, or the lack of freedom while lawgiving, but her incapacity of abandoning ‘*volition*’, as well as the pursuit of law that is to determine her will *anywhere else* than in the fitness of its maxims. Incidentally, the two definitions of autonomy and heteronomy here not only feature the difference between the concept of autonomy, as the supreme principle of morality, and the concept of freedom or *sheer* independence, as simply one’s ability to initiate an action spontaneously, but also designate the Kantian ethics not as an ‘ethics of freedom’ but as an ‘ethics of autonomy’.

5.3 The moral concept of autonomy in Virginia Woolf’s *Mrs. Dalloway*

The analysis of the two main characters in Woolf’s novel *Mrs. Dalloway*, namely of Clarissa Dalloway and Septimus Warren Smith, aids our understanding of the Kantian autonomy of the will, or good will, as interpreted via the aesthetic concept of the sublime. In *Mrs. Dalloway*, Woolf details a day in the life of a high-society woman, in post First World War England (1925).⁴⁸⁴ In this work, Woolf offers us an alternative (Kantian) understanding of the obscure concept of autonomy. That is to say, in this novel, autonomy is not presented as sheer independence or freedom from coercion (see for instance Griffin’s interpretation in chapter 1), but as a mixed feeling of pleasure and displeasure resembling the aesthetic feeling of the sublime.

To begin with, both his decision to commit suicide (judgment) and his deliberate killing of himself by jumping out of the window (action) show that Septimus Warren Smith is a free man in the sense that he is independent to judge

⁴⁸⁴ All the quotations below come from Woolf (2008)

and act however he likes without guidance or coercion from others, e.g. his wife, or his doctors. Even if Septimus suffers from a mental disorder, he is still free to judge and act as he likes. Here the question arises as to whether Septimus is an autonomous person as well. I recall the Kantian definition of the autonomy of the will as it has been formulated after its conceptual analysis through the Kantian aesthetic category of the sublime above:

Autonomy of the will is both the judgment and feeling of autonomous moral agents who, although they feel humiliated by the omnipotence of the moral law, they abandon 'volition', that is, their inclinations, ideologies, wishes and so forth, and, freely self-legislating –yet requiring the same legislation from all others– respect the moral ideas of reason, such as the fulfillment of their moral duties, realizing their higher self as autonomous moral agents (self-approbation⁴⁸⁵), while feeling (and being considered by others), at the same time, that they are persons with dignity.

Apparently, Septimus is not an autonomous person –at least, an autonomous person in the Kantian sense. He does not seem to be capable of abandoning his volition, that is, his inclinations, e.g. death drive. Also, he does not abandon his ideologies. He cannot come to some kind of compromise with the external world, e.g. the hypocrisy of the English society. Additionally, he is obsessed with the idea of showing courage and bravery without limit, as he once did at war. He also overlooks moral law's commands to respect himself and others, e.g. his wife and his doctor. Eventually, he seems incapable of feeling dignity. Overall, while he is absolutely free, Septimus is not an autonomous moral agent in the Kantian sense. Rather he may be characterized philosophically as a heteronomous person. According to the Kantian definition of heteronomy, Septimus is a person who, not being capable of abandoning his 'volition', that is, his inclinations, ideologies, wishes and so forth, freely self-legislates in accordance with a 'law' found somewhere else than in the moral law: in his own internal, sui generis, disordered 'moral kingdom'.

⁴⁸⁵ See 5:81, in Gregor (1996), p. 205

Here, it might be argued that Septimus is Clarissa's 'double' or 'alter ego'. Both Septimus and Clarissa act freely. But this is not the whole story. Free action does not lead Septimus to a right or moral action in the Kantian sense.⁴⁸⁶ Incidentally, we must not ignore the fact that Kant denounces suicide in several passages in the *Metaphysics of Morals*. In particular, Kant regards suicide an irrational act that debases humanity in our own person.⁴⁸⁷ Consequently, if we wanted something more than 'acting freely', that is to say, if we wanted to act morally and rightly, I think we should focus on the delicate 51-year-old protagonist of the novel, who is not simply free, but may also be characterized as an autonomous person. As has been explained above, what distinguishes the heteronomous from the autonomous person is not the lack of universal lawgiving, or the lack of freedom, independence, and the capacity to initiate an action spontaneously. What distinguishes them is the *incapacity* of the heteronomous person to abandon 'volition', and to freely self-legislate in accordance with the moral law (in singular). Conversely, what distinguishes them is the *capacity* of the autonomous person to abandon 'volition', and to freely self-legislate in accordance with the moral law. The following analysis of the persona of Clarissa Dalloway clearly shows the necessary conditions of one to be regarded as a truly autonomous person in the Kantian sense.

Initially, similarly to Septimus, Clarissa is disappointed in life. As Septimus, she conceives of the post-war English society as a hypocritical society, and, also, she does not seem to be fully satisfied with her personal life. However, contrary to Septimus, Mrs. Dalloway is dealing successfully with her existential crisis without unexpected outbursts, but with a lot of patience; in spite of her annoyance arising either from her personal, or from her social background. I think her stance is the result of the exercise of Kantian-type autonomy of the will.

More specifically, despite her opposite wishes, desires, and so forth, throughout her life Clarissa seems to constraining herself and doing her duties in

⁴⁸⁶ O'Neill (2015), p. 106.

⁴⁸⁷ See 6:240 and 6:422-423, in Gregor (1996), pp. 395, 546-547.

accordance with moral law's commands. This struggle is reflected, for example, upon her rejection of a marriage proposal by her unreliable and erratic friend Peter Walsh, despite her strong feelings for him. Also, despite her emotional disconnection with her 'practical' husband, Richard Dalloway, Clarissa does not separate from him but she still does her duties as a wife and mother of their daughter. Finally, her struggle to be faithful to (Kantian) morality despite her opposite inclinations (death drive) is reflected upon the moment when, similarly to Septimus, she seems ready to take 'a flight to freedom' through her open window, but she doesn't.

At that particular moment, while she is standing at the window, Clarissa seems to get a feeling which is actually higher than Septimus's plain feeling of 'pleasure' derived from the satisfaction of his desires and wishes. Clarissa's feeling is a different type of feeling which resembles the feeling of the *sublime*: a mixed feeling of pleasure and displeasure. Kant writes in paragraph 27 in the *Critique of Judgment*: 'The feeling of the sublime is, therefore, at once a feeling of displeasure, arising from the inadequacy of imagination in the aesthetic estimation of magnitude to attain to its estimation by reason, and a simultaneously awakened pleasure, arising from this very judgment of the inadequacy of the greatest faculty of sense being in accord with the ideas of reason, so far as the effort to attain to these is for us a law'.⁴⁸⁸ By her *free* submission of her will to the moral law, despite her opposite inclinations, Clarissa experiences this mixed feeling of the sublime. Eventually, her feeling of the sublime resembles to her moral feeling of autonomy. In spite of her fear deriving from a demanding and challenging moral endeavour, by admitting that a life is to be lived to the end (judgment/decision), as she says, Clarissa shows deep respect for the moral ideas of reason, such as the fulfillment of her moral duty to return to the party (action), realising her higher self as a (Kantian) autonomous moral agent with dignity.

Here, one could argue that simply doing our duties, putting aside our opposite inclinations, vulnerabilities, wishes, desires, fears, and so on, is not something that can be accomplished by human beings who are empirical beings.

⁴⁸⁸ Kant (1911), p. 257.

Under this view, the Kantian autonomy of the will, or the good will, may be regarded as a kind of ‘philosophical mistake’ condemned only to beings with superhuman qualities, e.g. God, angels, or characters in novels such as Mrs. Dalloway.

Contrary to such claims, my view is that although we are *empirical* beings, we are at the same time *moral* beings with boundless powers. This is apparent, for example, in heroes and saints. If only our inclinations, drives, and urges (empirical nature) were the decisive factors shaping our judgments and actions, then we would still be in a pro-political stage in which there would be no relations between us other than the barbarous relations dictated by the primitive phase of humanity. Rather, our capacity to fulfilling our moral duties despite our opposite inclinations is, I think, the main reason why human beings have made significant political communities and civilizations.

Moreover, by showing the tension between the moral concept of autonomy and the notion of heteronomy, *Mrs. Dalloway* offers us a remarkable paradigm of how we should regard and treat the ‘insane’. As I see them, the personas of Clarissa and Septimus do not actually correspond to the ‘sane’ and the ‘insane’ in society, but to the ‘autonomous’ and the ‘heteronomous’ in the Kantian sense. If we all regarded and called the ‘insane’ not a ‘crazy’ but a ‘heteronomous’ person –not only in verbal terms but also in practice– the stigma of mental illness would attenuate. Kant writes in 6:315 in the *Metaphysics of Morals*: ‘these are mere underlings... they have to be under the direction or protection of other individuals’.⁴⁸⁹ Although Kant here, in principle, refers to *passive citizens* in a polis, we could legitimately generalize his claim in order to include the mentally disabled persons in a political community, about which Kant has particularly written: ‘I cannot do good to anyone in accordance with *my* concepts of happiness (except to young children and the **insane**), thinking to benefit him by forcing a gift upon him; rather, I can benefit him only in accordance

⁴⁸⁹ Gregor (1996), p. 458.

with *his* concepts of happiness' [emphasis given].⁴⁹⁰ Incidentally, Kant's 'soft paternalism' is apparent in this passage.

Finally, and this brings me to the end of the analysis of Woolf's *Mrs. Dalloway*, this novel offers us a remarkable paradigm of what might actually be the obscure and vague Kantian concept of the autonomy of the will or the good will.⁴⁹¹ Whether I am right or wrong, the preceding interpretation of the Kantian autonomy of the will, or the good will, through Woolf's protagonist in this exemplary work of literature, may still be regarded noteworthy given that it offers a new understanding of the concept of autonomy as a mixed feeling of pleasure and displeasure which resembles the aesthetic feeling of the sublime. I hope this interpretation enriches the contemporary literature, in which autonomy is mostly seen as sheer independence or freedom from coercion (see for instance Griffin's argument in chapter 1). But, as has been shown, this is not actually the kind of autonomy which is ethically important for Kant. Eventually, as Murdoch argues, if autonomy was just one's independence, then we should forcefully question its ethical importance.⁴⁹²

5.4 The moral concept of autonomy in contemporary art of the sublime: the case of the video artist Bill Viola

The interest in the aesthetic category of the sublime has not ceased to attract 21st century's artists. Among other subjects, e.g. nature, sexuality, identity, religion, and so forth, through the contemporary sublime, is also expressed the moral (as well as legal and political) concept of human autonomy. The link between the contemporary sublime and the moral concept of autonomy has not yet been on the focus of art critics, aestheticians, and philosophers of art. In order to *show* the association or the analogy between the moral concept of autonomy and the contemporary aesthetic notion of the sublime, in this section, I focus on the visual artist, Bill Viola. In

⁴⁹⁰ Gregor (1996), p. 573.

⁴⁹¹ For further explorations in the 'paradigm' of judgment see Ferrara, A. (2008), pp. 16, 42.

⁴⁹² Murdoch (1970)

particular, Viola's 'five angels for the millennium' shows the supreme principle of Kantian ethics, that is, the moral concept of the autonomy of the will, or good will.

More specifically, Viola's work depends upon electronic, sound, and image technology in new media. Through his high-tech microcosms, Viola opens up possibilities around the meaning of human nature, and consciousness.⁴⁹³ In 2001, in California, Viola made an installation titled 'five angels for the millennium' which consists of five videos projected at a large scale onto the walls of a dark gallery space. These videos are individually titled: 1) the 'departing Angel', 2) the 'birth Angel', 3) the 'fire Angel', 4) the 'ascending Angel', and 5) the 'creation Angel'. Each one of them shows a male figure submerging in water or hovering over it. These actions occur in a continuous loop, which are enhanced by a soundtrack of water noises and colour changes.⁴⁹⁴ In what follows, I show how through this installation of Viola, which aesthetically belongs to the area of the sublime, or it 'activates' the sublime, the moral concept of autonomy is visualized or disclosed in an exceptional manner.⁴⁹⁵

The dispersed settlement of Viola's 'five angels' makes the whole installation formless; hence, the viewer is unable to capture it all. However, on the unboundedness of the settlement is reflected the thought of a totality. The five videos are effectively one and the same artwork. This is enhanced by the fact that the actions in the installation occur in a continuous, slow motion loop which freezes the sequences. Hence a feeling of a momentary inhibition of the vital forces is followed immediately by an outpouring of them that is all the stronger.⁴⁹⁶

More specifically, in the view of the formless video installation of Viola, the viewer experiences a mixed feeling of pleasure and displeasure. On the one hand,

⁴⁹³ See further <http://www.tate.org.uk/art/artists/bill-viola-2333> [accessed 14 February 2018]

⁴⁹⁴ For further technical details regarding the relevant installation see <http://www.tate.org.uk/art/artworks/viola-five-angels-for-the-millennium-t11805> [accessed 14 February 2018]

⁴⁹⁵ For a thorough analysis of why this particular work of Viola belongs to the aesthetic area of the sublime, see further Arya (2013)

⁴⁹⁶ Ak 244, Kant (1987), p. 98.

the mind is repelled by the disliked fall of the male figures below the water, while on the other hand, it is attracted by their rise above it. This 'negative pleasure', namely the sublime, consists effectively in the *necessary* abandonment of viewer's human sensibility (her inclinations, fears, desires, and so on), as a result of the inadequacy of her imagination in the view of the terrifying drawing figure, and the simultaneous discovery of a higher moral capacity manifested in the view of the male figure's ascension. It is not accident that Viola's installation is titled: 'five angels.' Angels are beings which can be both good and evil, and can live both in the human realm (fallen angels) as well as in the divine realm (good angels). Incidentally, there is an analogy here between Viola's angels and Blake's –the eighteenth century's 'sublime artist' as he used to call himself– ambiguous good and evil angels.⁴⁹⁷ There is also a further analogy between Viola's five angels and Wender's *der Himmel über Berlin* or *Wings of Desire*, the romantic fantasy film about the decision of an angel to become mortal.⁴⁹⁸

Eventually, in spite of the fear arising in the viewer as a result of the horrible look of the submerging and hovering figures, at the same time, these figures arise in the viewer a gladness/exaltation involving his/her own liberation from the constraints of the lower nature, and the barriers of sensibility. Here the experience of the aesthetic feeling of the sublime not only stands in intimate relation to the experience of the autonomy, but it also *visualizes* it in an exceptional manner.⁴⁹⁹ That is to say, the moral experience of the autonomy of the will is reflected in the experience of the aesthetic feeling of the sublime. As in the case of the viewer/spectator who feels both helpless in front of the horrible look of the figures, and capable of being free from his/her lower nature, similarly, the autonomous person experiences both helplessness in front of the demanding and challenging moral duty that he/she has to fulfill, and capable of being free from his/her inclinations, wishes, desires, fears, and so on. Ultimately, both the viewer and the

⁴⁹⁷ See <http://www.tate.org.uk/art/artworks/blake-the-good-and-evil-angels-n05057> [accessed 16 February 2018].

⁴⁹⁸ The trailer of this great movie is available here: <https://www.youtube.com/watch?v=hAzzR2Uklok> [Accessed 16 February 2018].

⁴⁹⁹ See also Allison (2001), p. 303.

autonomous person discover a higher, non-sensible, moral/practical self. This is, I think, the great contribution of the Kantian aesthetic category of the sublime to morality. I will return to this in chapter 5.

6. Conclusion

This chapter's main question of whether there can be a truly Kantian justificatory theory of rights has not yet been answered to its full extent. I provide a full answer in the following chapter. In the present chapter I have discussed two noteworthy contemporary Kantian human rights justificatory accounts: 1) Arthur Ripstein's argument according to which human rights are grounded in the Kantian notion of the 'innate right to freedom' in the Doctrine of Right, the *Rechtslehre*, in the *Metaphysics of Morals*;⁵⁰⁰ and 2) Katrin Flikschuh's *transcendental* approach to the justification of human rights.⁵⁰¹ After the examination and evaluation of these two Kantian accounts for the justification of human rights, I have argued that, despite their flaws, we should not abandon a Kantian, or a duty-based, or deontological, perspective as regards the rights justification issue.

Following this claim, I have discussed what is set as the ideal starting point for a justification for human and socioeconomic rights, namely the Kantian supreme principle of morality, that is, the autonomy of the will, in 4:440, in the *Groundwork of the Metaphysics of Morals*. However, given that the Kantian autonomy of the will is not fully explained by Kant, I have offered a conceptual analysis of it based on the Kantian aesthetic category of the sublime in order to shed more light on the obscure Kantian supreme principle of morality. Within this context, in order to show more clearly the tension between the concept of autonomy and the notion of heteronomy, I have examined Virginia Woolf's novel *Mrs. Dalloway*. Further, in order to show the relation between the sublime and autonomy, I have focused on Bill Viola's 'five angels for the millennium'. Now, space has opened up for me to show

⁵⁰⁰ Ripstein (2009)

⁵⁰¹ In: Cruft, R., Liao, S.M., Renzo, M. (2015), pp.653-670.

how exactly from the Kantian supreme principle of morality we are led to human and socioeconomic rights.

Part Three

Chapter four

A new (Kantian) duty-based account for the justification of human and socioeconomic rights

‘I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done.’

Mohandas Gandhi⁵⁰²

1. Introduction

As has been mentioned in the General Introduction, the present thesis addresses a question of contemporary philosophical debate: ‘What is the philosophical basis of human and socioeconomic rights?’ Before I present a new (Kantian) duty-based justification of human and socioeconomic rights, and explain how these rights are derived from 1) our universal perfect duties of right to others, and 2) our specific perfect duties of right to others, respectively, I briefly recall the main issues discussed in the previous three chapters of the thesis. This summary is important given that all these issues have in effect led me to the formulation of the new DBA.

In the first chapter I discussed some of the most important modern ‘rights-based’ justifications of human rights. More specifically, I focused on: 1) the naturalistic, or traditional, or orthodox accounts; and 2) on the political and practice-based accounts. Following this, in the second chapter of the thesis, I examined four popular contemporary ‘dignity-based’ accounts for the justification of human rights. Further, in the first part of chapter 3, I focused on two more significant ‘Kantian-

⁵⁰² Gandhi’s response to the English evolutionary theorist and director-general of UNESCO, Huxley, who, in 1947, wrote to Gandhi to ask him to contribute an essay to a collection of philosophical reflections on human rights. See Moyn, S. (2016)

based' justifications of human rights. Ultimately, after the examination of all these accounts, I concluded that, because of their flaws none of them give us an adequate answer to the core question of thesis: 'What is the philosophical foundation of human and socioeconomic rights?'

In the second part of chapter 3, I claimed that we should not abandon a Kantian or deontological orientation and perspective regarding the philosophical foundations of rights. It is not only commonly argued that the most promising grounds on which to build a contemporary theory of human rights are to be found in Kant,⁵⁰³ but also I am convinced that, even though the popular Kantian moral concept of human dignity is not the basis of human rights, there is still room for the formulation of 1) a truly Kantian (yet not Kant's) justificatory account for *human* rights, as well as 2) a duty-based justification for socioeconomic rights inspired by the Kantian opus. Within this context, I set as the ideal starting point for the formulation of these two justifications the Kantian supreme principle of morality, that is, the autonomy of the will, or the good will, as discussed by Kant in the *Groundwork of the Metaphysics of Morals*.⁵⁰⁴ Ultimately, I attempted a conceptual analysis of the obscure Kantian moral concept of autonomy via the Kantian aesthetic category of the sublime.

Having clarified Kant's supreme principle of morality, in the previous chapter, we can now move on to the presentation of the new justification of rights, which I strongly believe it is capable of overcoming most of the obstacles of the popular rights-based, dignity-based, and Kantian-based justificatory accounts. This justification of rights comprises, or is composed of, **two sub-justifications: 1) a truly Kantian duty-based justification of *human* rights, and 2) a duty-based, or deontological, justification of *socioeconomic* rights inspired by the Kantian opus**. Incidentally, this is the reason why, throughout the thesis, sometimes I put the word 'Kantian' in a parenthesis. While the word 'Kantian' can legitimately be used in the case of *human* rights, this is not the case for socioeconomic rights. That is to say,

⁵⁰³In: Cruft, R., Liao, S.M., Renzo, M. (2015), p. 671.

⁵⁰⁴ See Gregor (1996), p. 89.

although the Kantian opus allows for arguing a Kantian justification of *human* rights, it does not similarly allow for a truly Kantian justification of *socioeconomic* rights, but simply a justification inspired by Kant. I think this is something we must always bear in mind and respect, as no one has the right to appropriate the work of a philosopher for his/her own purposes. I will show this more clearly below. In what follows, I recall the main axes upon which the new justificatory account, in its two versions, has been built:

1. All, normal adult human beings, embryos, babies, children, the comatose, the mentally disabled, immigrants, refugees, the 'apatrides', the poor, homosexuals, bisexuals, transsexuals, those who live in countries which have not the characteristics of a democracy, those who live in non-democratic countries, those who still live in isolated jungle tribes in the world, possible future human beings, animals, plants, environment, even beings from outer space must be protected.
2. Our civil and political rights are distinct from our socioeconomic rights.
3. Human and socioeconomic rights can and must be protected not only in Western liberal democracies, or in societies which have modern characteristics, but all over the world.
4. Given that human and socioeconomic rights are grounded in their true basis, not only the Western people, but *all* people around the world can and should accept them.
5. All people, including those who live in states which do not have the means or the volition to protect human rights, can and must be protected.
6. The so-called 'hard cases' in law, e.g. abortion, euthanasia etc., need to be urgently confronted.
7. The theory and the practice of human rights should eventually be reconciled, so that a substantive positive body of (duty-based) laws can be developed afterwards.

2. A new (Kantian) duty-based justification of human and socioeconomic rights

As has been mentioned several times throughout the thesis, the new justification of rights is a duty-based justification. Within this context, duties do not only have priority over rights, but they straightforwardly *derive* from them. In this section, I clearly show this derivation or justification. Throughout I use the terms: ‘derive’, ‘grounded in’, ‘come from’, ‘based on’, ‘justification’, ‘foundation’, and ‘grounding’ interchangeably, to show that duties are the *source* of rights. Hence in the absence of the (owed) duties, from which they derive, the relevant (claim) rights alone *do not/cannot exist*. One might ask here whether the duties, from which rights derive, are their *ultimate* source; that is to say, whether there is a deeper justification, or not, of duties (and hence rights). My answer to this question is the following.

The duties, from which (human and socioeconomic) rights derive, are not their *ultimate* basis. Rather, it is their first justificatory ‘step’, or their first-level source. Yet, although not their ultimate step, this first step is important considering that, in the human rights discourse, the relation between rights and duties is not clear. As it is shown below, some argue that rights and duties are *correlative* or *corresponding* ideas, while some others, such as O’Neill, that the fulfillment of duties or obligations is more *basic* than the fulfillment of rights.⁵⁰⁵ But, these claims simply indicate a *correlation* or *correspondence* without any deeper, morally established, connection of rights with duties. Consequently, even though the *ultimate* philosophical foundation of human and socioeconomic rights is in effect the pure practical reason, as it is clearly shown below, their first-level source are moral duties. In this section, I develop the justificatory line starting from the autonomy of the will and, through the moral duties, leads us to rights.

To begin with, in the previous chapter, I explained how the supreme principle of morality, that is, the ‘autonomy of the will’ is grounded, through the mediation of the Categorical Imperative (CI) and the moral law (in singular), in the pure practical reason. This is one justificatory line. Now, I show that there is another line of justification in the Kantian opus, which has not been discussed by Kant scholars up

⁵⁰⁵ For a similar claim see also: O’Neill (2016), p. 35.

until today. **This second justificatory line (main argument - original thesis) starts from the autonomy of the will (common 'ground' to both justificatory lines) and, through the *external* moral duties, which are based on it (autonomy), leads us to human and socioeconomic rights.** Along with the first justificatory line, this second line of justification makes up the *whole/full* justification line for human and socioeconomic rights. Specifically, from the pure practical reason (or rationality), that is, the common to all rational beings' genetic basis for moral agency, we are led, through the moral law, the CI, the autonomy of the will (1st line),⁵⁰⁶ to our moral duties, in which rights are grounded (2nd line). Eventually, it could be argued that the (Kantian) duty-based justification of human and socioeconomic rights is an account typically referring to all rational beings. Hence, **moral agency** is understood as derived from **autonomous agency**, which is ultimately generated from **rational agency**. But let's take things slowly, in order to see how exactly this second justificatory line (main argument – original thesis) is developed.

The starting point for the new (Kantian) duty-based justification of human and socioeconomic rights (from now on: Duty Based Approach or DBA), is the Kantian supreme principle of morality, that is, the autonomy of the will. The reason why I set the autonomy of the will (and not, for example, the pure practical reason) as the starting point for the new DBA is the following: I see Kant, above all, as a moral philosopher, so that, even if there is not a complete justificatory theory of rights in his opus, if he had to formulate one, I am convinced he would consider human rights as moral rights, and he would start his justification from the cornerstone of his ethics, that is, the moral concept of autonomy of the will. Also, and most importantly, the autonomy of the will itself *allows for* the derivation of *external* duties, which are a *conditio sine qua non* in the case of human (and socioeconomic) rights, which typically belong to the *external* domain of law, rather

⁵⁰⁶ Rationality, which is developed in all normal human and other (rational) beings according to a fairly predictable schedule, has uncontroversial genetic basis. By 'genetic basis', I mean an 'intrinsic capacity', that is, a capacity that cannot be lost. Rapid advances in genomic technologies may lead to the discovery of the particular set of genes which are necessary and sufficient for the genetic basis of autonomous and moral agency; see also Liao (2015), pp. 18, 19

than to the internal domain of morality, in which the pure practical reason resides; hence any attempt to ground rights *straightforwardly* in the pure practical reason or rationality, that is, the genetic basis for moral agency, which is common to all rational beings,⁵⁰⁷ would not only be unsuccessful, but also philosophically illegitimate. What remains to be shown is how from the autonomy, through the mediation of the external moral duties, which are based on it, we are led to rights grounded in external moral duties.

In his incomplete definition of the supreme principle of morality in 4:440, Kant claims that 'Autonomy of the will is the property of the will by which it is a law to itself'.⁵⁰⁸ Here another question arises as to what exactly is meant by 'self-legislation', 'law to itself', or 'lawgiving function of morality'. Kant does not answer this question in full in the *Groundwork of the Metaphysics of Morals*. However, he explains it in the Introduction of the *Metaphysics of Morals*.⁵⁰⁹ Consequently, what must be pointed out here is that the Kantian supreme principle of morality, that is, the autonomy of the will, or the good will, does also appear in the *Metaphysics of Morals*. Kant still persists in considering it, either explicitly or implicitly, as the supreme principle of morality.

More specifically, in 6:383 Kant explicitly mentions the moral concept of autonomy. In particular, he argues that for finite *holy* beings, that is to say, for *sage* or wise beings, such as those human beings who manage to realize their higher self as moral beings, there is a doctrine of morals, that is, the **autonomy** of practical reason. This doctrine involves consciousness of their moral capacity to master their inclinations whenever they rebel against the moral law –a capacity which is derived from the third formulation of the categorical imperative, that is, from the Formula of Autonomy in 4:431 in the *Groundwork of the Metaphysics of Morals*.⁵¹⁰ Eventually, this is the Kantian pure human morality in its highest stage, that is, in the area between the divinity of God(s) and human immorality. Incidentally, the passage

⁵⁰⁷ see Liao (2015), pp. 18, 19

⁵⁰⁸ Gregor (1996), p. 89.

⁵⁰⁹ Gregor (1996), pp. 383-385.

⁵¹⁰ Gregor (1996), pp. 515, 81

6:383 is crucial given that, by explicitly referring to human morality as the continuous effort of finite human beings to approximate a moral ideal by freeing themselves from any incentives other than the moral duty, Kant actually evidences the results of the attempted, in chapter 3, conceptual analysis of the obscure autonomy of the will.

Additionally, in 6:480, in the *Metaphysics*, Kant does once more explicitly mention the supreme principle of morality, that is, the autonomy of the will as practical reason's property of being the source of moral laws independently of any other inclination. Kant writes: '... **autonomy** of each human being's practical reason... implies that the law itself, not the conduct of other human beings, must serve as our incentive... A good example... should not serve as a model...'⁵¹¹ That is, even exemplary conduct should not be admired or wished, hence serve as our incentive.

Finally –and this is of great importance within the context of the present thesis– in the *Metaphysics of Morals*, Kant also implicitly, or silently, 'mentions' autonomy by further specifying –admittedly in a quite abstract manner– its main function which is omitted in the official definition of it in 4:440 in the *Groundwork*.⁵¹² To be more specific, the main function of autonomy, which literally means '**self-moral-law-giving**', is the 'ethical lawgiving' that is discussed by Kant in 6:219-221 in the Introduction to the *Metaphysics of Morals*.⁵¹³

Specifically, Kant starts in 6:218 by generally claiming that there are two elements in lawgiving: first, a law representing objectively an action that has to be done, that is, a law which makes the action a duty; and second, an incentive, of which role is to connect subjectively a ground for determining choice to the action with law's representation.⁵¹⁴ Kant further distinguishes between two types of

⁵¹¹ Gregor (1996), p. 593.

⁵¹² Gregor (1996), p. 89.

⁵¹³ Gregor (1996), pp. 383-385; also, recently Oliver Sensen has argued that in the *Metaphysics of Morals* Kant simply fails to mention the supreme principle of morality; although he silently implies it, see: Sensen (2013)

⁵¹⁴ Gregor, (1996), p. 383.

lawgiving with respect to the incentive. He writes: 'All lawgiving can therefore be distinguished with respect to the incentive... That lawgiving which makes an action a duty, and also makes this duty the incentive is ethical. But that lawgiving which does not include the incentive of duty in the law, and so admits an incentive other than the idea of duty itself is juridical'.⁵¹⁵

Apparently, the exercise of the lawgiving function of morality by the *morally* autonomous person is identified not with the 'juridical' but with the 'ethical' lawgiving, according to which an action is made a duty, and this duty is also made the incentive of the action. Eventually, the Kantian autonomous or good person is the person who is ethically lawgiving, yet she does not just *presuppose* that everyone else gives the same law, but she *requires* the giving of the same law from all others, according to the Formula of Universal Law.⁵¹⁶ As has already been explained in detail in the previous chapter, the idea of 'universalisability' here is not a chimera, but something absolutely feasible.

Further, the autonomy of the person, who exercises her ethical lawgiving directly refers to the idea of moral duty, of which fulfillment transcends her limited human powers. As Kant writes in 5:80 and 5:81, in the *Critique of Practical Reason*, the autonomous person is impelled to an activity or action, which is called 'duty';⁵¹⁷ a duty (action) which, according to Kant, is fulfilled, or performed, by someone who, being bound to it, acts not *in conformity with duty* (mere legality), but *from duty*, that is, for the sake of the moral law alone, or because it (the duty/action) is the right thing to do.⁵¹⁸ **Eventually, the Kantian autonomy of the will leads one to the realization of one's moral duties, and the 'good' in general, towards oneself and others.**⁵¹⁹ The question here arises as to *what kind* of duties the autonomous person, who is exercising her ethical lawgiving, is impelled to act upon.

⁵¹⁵ Gregor (1996), p. 383.

⁵¹⁶ See 4:421, in Gregor (1996), p. 73.

⁵¹⁷ See 5:80, in Gregor (1996), p. 205.

⁵¹⁸ See 5:81, Gregor (1996), p. 205; also 6:222, Gregor (1996), p. 377.

⁵¹⁹ Ak 261, 262, 267, Kant (1987), pp. 120-121, 127.

According to Kant, on the one hand, duties in accordance with the juridical lawgiving are *external* duties; as this type of lawgiving does not require the idea of duty to be the determining ground of the agent's choice, but it needs an incentive suited to the law (external incentive).⁵²⁰ On the other hand, from 6:219 to 6:221, Kant explicitly argues that the ethical lawgiving refers both to *internal* and *external* duties. In particular, Kant writes: 'ethical lawgiving, while it also makes internal actions duties, does not exclude external actions but applies to everything that is a duty in general... ethical lawgiving... does take up duties which rest on... an external lawgiving by making them, *as duties*, incentives in its lawgiving... there are external duties in ethics... Ethics has... duties in common with right'.⁵²¹ ⁵²² This is a crucial distinction by Kant, given that only in *external* moral duties, rights can be grounded, given rights' position to the external domain of law, rather than to the internal domain of morality.

Consequently, the autonomous person, who is exercising her *ethical* lawgiving, is impelled not only to *internal*, but also to *external* actions and duties, or to *enforceable* duties. Hence, Kant claims in 6:219 that 'all duties, just because they are duties, belong to ethics.'⁵²³ Apparently, even if they derive from the ethical lawgiving, there can be *external* moral duties. Here the question arises as to *which are*, exactly, these *external* moral duties deriving from the aforementioned ethical

⁵²⁰ See 6:219, in Gregor (1996), pp. 383-384.

⁵²¹ Gregor (1996), pp. 384-385.

⁵²² In spite of the fact that the Latin word 'morality' is frequently distinguished today from the Greek word 'ethics', in the present thesis I use these two terms as equivalent. Hence, contrary to Enlightenment thinkers' aversion to the word 'moral', as a word used for centuries by Christian theologians, and the preference instead to the word 'ethical', as a word denoting the disengagement from the Christian tradition, I still use the two words as they are used at the start, that is, as if there is no difference between them. I effectively use the two terms interchangeably because I do not think there is a substantial difference between them; rather, their tension is grounded in superficial grounds, that is, the controversy between the Christian and the Enlightenment tradition. Apparently, Kant follows the Enlightenment tradition using the word 'ethical' to denote this type of lawgiving. However, his stance, for the reason which has just been mentioned, does not distinguish, in my view, the term 'ethical lawgiving' from the term 'moral lawgiving'. See further Sproul (2013).

⁵²³ Gregor (1996), p. 384.

lawgiving. In order to answer this question, one needs first to recall Kant's own division of moral duties in the *Metaphysics of Morals*.⁵²⁴

More specifically, in 6:239-240 in the *Metaphysics of Morals*, Kant claims that 'all duties are either *duties of right (official iuris)*, that is, duties for which external lawgiving is possible, or *duties of virtue (official virtutis s. ethica)*, for which external lawgiving is not possible'.⁵²⁵ On the one hand, duties of right are claimable by those who possess the right not to wrongdoing, or to positive action; hence they are externally enforceable, e.g. by public authorities. On the other hand, duties of virtue are non-claimable; thus, in this case, there are no right-holders. Yet, even though duties of virtue are non-claimable, hence non-externally enforceable (by public authorities), this does not mean that they are less *demanding* than the claimable duties of right. This is more clearly shown below when I am referring to specific examples. Eventually, given that in the Introduction of *the Metaphysics of Morals* Kant has explicitly argued that all duties, including the external duties of right, or juridical duties, just because they are duties, belong to ethics, one can conclude that both duties of right and duties of virtue are in effect *moral* duties. Incidentally, in the Doctrine of Virtue, in the *Metaphysics of Morals*, Kant similarly argues that even in the case in which law lays down a duty of right, the action or duty springing from it can be moral.⁵²⁶

Overall, we may divide the Kantian duties to 'moral duties of right' and 'moral duties of virtue'. This is the first Kantian general division of duties. In addition, at the end of 6:239 and the beginning of 6:240, Kant distinguishes between 1) 'moral duties to oneself', e.g. not to commit suicide,⁵²⁷ and 'moral duties to others', e.g. promise keeping, as well as 2) between moral 'perfect' and moral 'imperfect' duties. On the one hand, perfect duties, e.g. duties of promise keeping, are owed without exception, they cannot be overridden, and require certain actions or omissions. On

⁵²⁴ Gregor (1996), pp. 394-395.

⁵²⁵ Gregor (1996), p. 394.

⁵²⁶ Gregor (1996), p. 525.

⁵²⁷ I see these duties (to oneself) as not duties about self-interest, but as duties leading one to the realization of one's *humanité*

the other hand, imperfect duties, e.g. duties of beneficence, loyalty, decency, civility, and so on, typically require only the setting of ends, and leave agents discretion on when and how to act.⁵²⁸ Here is the schema depicting all the aforementioned Kantian divisions of moral duties [bold letters mine]:⁵²⁹

Division

In Accordance with the Objective Relation of Law to Duty

		Perfect Duty		
	The right of humanity in our own person		The right of human beings	
Duty to Oneself		(of right) Duty (of virtue)		Duty to Others
	The end of humanity in our own person		The end of human beings	
		Imperfect Duty		

⁵²⁸ See Gregor (1996), p. 395; also, Wood (2002); also, it must be noted that there is a debate among Kantians on whether or not imperfect rights do leave latitude for the agents as to how and when to act on them. However, although significant, I do not think it is necessary for the purpose of the present thesis to engage with this discussion. See, for instance: Workshop (2014). 'Rights and imperfect duties in political philosophy'. ECPR Research Sessions. University of Essex, at: <https://ecpr.eu/Events/PanelDetails.aspx?PanelID=3492&EventID=91> [Accessed 8 December 2018]

⁵²⁹ See Kant's schema in 6:240, in Gregor (1996), p. 395.

Here is another schema of the Kantian division of duties:

Perfect duties of right:

- **Duty to oneself → The right of humanity in our own person**
- **Duty to others → The right of human beings**

Imperfect duties of virtue:

- **Duty to oneself → The end of humanity in our own person**
- **Duty to others → The end of human beings**

Overall, the Kantian external moral duties deriving from the ethical lawgiving, as has been described above, are divided into three main categories: First, into duties of right and duties of virtue; second into duties to oneself and duties to others; and third, into perfect and imperfect duties. The main goal of the present section (and of the thesis as a whole) is to show how, in particular, human and socioeconomic rights are generated from these duties. The Kantian duties of right, the Kantian duties towards others, and the Kantian perfect duties are of great importance, given that human and socioeconomic rights are: 1) rights 2) towards others, which 3) refer to duties that cannot be overridden.

To this triple Kantian division of duties, I add a fourth division, namely the division between universal and specific duties; that is to say, between duties which require actions or omissions by all, and duties requiring actions or omissions by specific duty bearers, respectively. This division has not been on Kant's focus, but is added by the author of the thesis. It is an important division in view of the distinction between human and socioeconomic rights which is suggested by the present thesis. That is to say, contrary to human rights, which are considered to be universal rights, socioeconomic rights are specific rights in the sense that they are not owed to

someone by *all* others. Rather, they are owed to someone by *specific* others, either individuals or states, or institutions. I will return to this issue below.⁵³⁰

At this point, the fundamental question of the thesis arises as to *how* exactly from the aforementioned duties, namely the Kantian duties of right, the duties to others, and the perfect duties, as well as the universal and specific duties, our human and socioeconomic rights are further developed. Before I show the precise contours of this derivation, I organize here the aforementioned types of duties into two categories, so that they can be seen to correspond to the two main distinctions of rights, that is, to human and socioeconomic rights, which are on the focus of the present thesis. These two categories of duties are: 1) the moral universal perfect duties of right to others; and 2) the moral specific perfect duties of right to others. After the categorization of duties into these two main categories, in what follows, I show how our human and socioeconomic rights are generated from them.

It is generally true that a Kantian derivation of rights from duties is a difficult task. As Katrin Flikschuh has stressed, the derivation of rights from duties remains obscure within the Kantian opus.⁵³¹ However, in spite of its difficulty, Flikschuh does not exclude such possibility. My own view is that it is not only worth considering, but also a challenge the derivation of rights from duties within the context of a philosophical work of a philosopher of duty dedicated to the idea of 'duty' rather than to the idea of 'right'; hence the initial goal of the present thesis is to shed light

⁵³⁰ What should be added here is that the new justification does not refer only to our moral duties towards other *human* beings, but also, *by extension*, towards all other beings, e.g. animals and the natural world. Of course, Kant argues in 6:442, in the *Metaphysics of Morals*, that we can have no duties to beings other than human beings. In particular, Kant claims that we have duties only to human beings because our duties to any subject are generally moral constraints by *that subject's* will [see Gregor (1996), p. 563; see also Wood (2009), p. 244] However, I think Kant is wrong here. According to the conceptual analysis of the Kantian supreme principle of morality, that is, the autonomy of the will, or the good will, in the previous chapter, we concluded that our duties to any subject are moral constraints by our *own* (autonomous, good) will. Therefore, the new (Kantian) duty-based account for the justification of human and socioeconomic rights cannot refer only to the fulfillment of moral duties towards human beings, but towards all other beings.

⁵³¹ In Cruft R., Liao S.M., Renzo M. (2015), p. 657, note 14.

on this obscure ‘derivation’, or ‘development’, or ‘generation’ of our human and socioeconomic rights from the Kantian external moral duties. As shown below, this derivation is feasible. I start with the crucial Kantian passage that enables us to argue accordingly. More specifically, in 6:239 in the *Metaphysics of Morals*, Kant argues:⁵³²

‘Warum wird aber die Sittenlehre (Moral) gewöhnlich (namentlich vom Cicero) die Lehre von den Pflichten und nicht auch von den Rechten betitelt? da doch die einen sich auf die andern beziehen. – Der Grund ist dieser: Wir kennen unsere eigene Freiheit (von der alle moralische Gesetze, mithin auch alle Rechte sowohl als Pflichten ausgehen) nur durch den moralischen Imperativ, welcher ein pflichtgebieten der Satz ist, aus welchem nachher das Vermögen, andere zu verpflichten, d.i. der Begriff des Rechts, entwickelt werden kann’. [Bold mine]

And here is the above Kantian passage in English:⁵³³

But why is the doctrine of morals usually called (especially by Cicero) a doctrine of *duties* and not also a doctrine of *rights*, even though rights have reference to duties? – The reason is that we know our own freedom (from which all moral laws, and so all rights as well as duties proceed) only through the moral imperative, that is, the proposition which commands duty, from which the capacity for putting others under obligation, that is, the concept of right can afterwards be generated.

In the above passage, Kant initially argues that we experience our freedom only through a moral imperative which commands the fulfillment of our **duties**. Allen Wood writes: ‘... the *moral* imperative whose command gives us the concept of **duty**’ [emphasis added]⁵³⁴ Incidentally, nowhere here does Kant mention the concept of ‘right’ or ‘rights’. What he effectively offers to the reader is the thesis that it is in a moral imperative, namely the CI, via the free exercise of our autonomous will, that

⁵³²See Kant (2013), p. 346

⁵³³ The passage is translated by the author of the thesis.

⁵³⁴ Wood (2002), p. 6

our moral **duties** are grounded. Incidentally, light has been shed on the derivation of duties from the CI in the previous analysis.⁵³⁵ What remains is to shed light on the (crucial) derivation of rights from these duties.

Specifically, in the proposition that ‘we know our own freedom (...) only through the moral imperative, that is, the proposition which commands duty’ Kant inserts a remarkable parenthesis which cannot be overlooked. The content of the parenthesis is the following: ‘(from which all moral laws, and so all rights as well as duties proceed)’. De-contextualizing the aforementioned parenthesis, one can –not at all unreasonably– argue that from the free exercise of our autonomous will *both* rights and duties proceed, in no particular order. It is true indeed that from the free exercise of our autonomous will both our duties and our rights proceed. However, my claim is that this does take place in *specific* order. The question here arises as to the order in which duties and rights come. Even though Kant mentions both rights and duties in the above parenthesis, without explicitly prioritizing one over another, there are in effect two reasons why normative priority must be given to duties over rights here and elsewhere in the Kantian opus.⁵³⁶

First, in 6:239, Kant himself mentions that duty is grounded in the CI. He writes: ‘... the moral imperative, that is, the proposition which commands duty’.⁵³⁷ Guyer translates it as: ‘... the *moral imperative*, which is a proposition commanding duty.’⁵³⁸ I am sure that if Kant believed that *both* duties and rights are of equal normative weight, he would have certainly added the notion of right here too; but he hasn’t. Instead he has argued that duty (*only*) comes directly from the CI.

⁵³⁵ Apart from the derivation of duties by the CI in the present thesis, I must say that there is considerable literature on the derivation of specific duties from the Categorical Imperative, and the question is at issue in literature; see for instance, Herman, B. (1993). *The Practice of Moral Judgment*, Cambridge University Press.

⁵³⁶ This is not only my thesis, but also the thesis of many other Kantian scholars, e.g. Onora O’Neill, from whose understanding of the Kantian duty-based ethics I have been influenced. More on this issue in section 3 below

⁵³⁷ Gregor (1996), p. 395

⁵³⁸ Guyer, P. (2002), p. 24

Consequently, **the notion of right can be seen as only *indirectly* coming from the CI, via the notions of duty and the autonomy of the will.**

Second, in the same passage Kant explicitly says that it is from the notion of duty that the concept of right can *afterwards* be *generated* (*entwickelt werden kann*). He writes: ‘... duty, from which the capacity for putting others under obligation, that is, the concept of right can afterwards be generated.’ Given that the German word ‘entwickelt’ means ‘generate’ or ‘develop’, that is to say, denotes something ‘coming into being after something else’, I think Mary Gregor correctly here renders the German word ‘werden’ into ‘afterwards’, in order to show that something is taking place in the future. Also, we must not ignore the fact that one of the uses of the German word ‘Werden’ is to build the future tense, and Germans do often use this word to talk about the future.

However, I do not think Gregor has correctly translated the word ‘entwickelt’ as ‘explicate’.⁵³⁹ In my translation, I render the German word ‘entwickelt’ into ‘generate’. Some synonyms of the English word ‘generate’ can also legitimately be used. For instance, Guyer uses the English word ‘develop’, which is also, I think, an accurate translation of the German word ‘entwickelt’. He writes: ‘... duty, from which the capacity for putting others under obligations, that is, the concept of a right, can afterwards be developed [*entwickelt*].’⁵⁴⁰ Guyer adds an important footnote in the relevant discussion, in which he confirms my translation of the word ‘entwickelt’: ‘The word *entwickelt*’, Guyer writes, ‘which Gregor translates as ‘explicated’, is one of those words that makes Kant’s arguments in this late work so obscure’. I recall here Flikschuh’s statement, according to which the derivation of rights from duties remains obscure within the Kantian opus. I believe the reason of this obscurity is the mistaken translation of the word ‘entwickelt’ by Gregor as ‘explicate’ instead of ‘generate’, or ‘develop’, or ‘derive’.

Consequently, although there does not seem to be a priority of duties over rights within the Kantian parenthesis, in 6:239, Kant actually *does* give priority to

⁵³⁹ Gregor (1996), p. 395

⁵⁴⁰ Guyer (2002), p. 24

duties over rights by writing that 1) duties are directly grounded in the CI, and 2) from the notion of duty the notion of right can afterwards be generated, or developed, or derived. Ultimately, I think this is the reason why the doctrine of virtue, as Kant says in 6:239, is called a doctrine of duties, and not, also, a doctrine of rights.⁵⁴¹ I think my conclusion does not only shed light on the admittedly ambiguous 6:239 passage in the *Metaphysics of Morals*, but it is also justified from Kantian premises, in the sense that Kant's ethics is typically seen as duty-based ethics, and Kant himself is, above all, a philosopher of duty rather than a philosopher of right. I am convinced that if Kant was asked nowadays in the so-called human rights era, in which we give priority to rights over duties, to prioritize the one concept over the other, he would still put duties first rather than rights, steadily abstaining from the work of many 20th century thinkers who do exactly the opposite.⁵⁴² In addition, if I have understood him well, I think he would never argue that duties and rights are normatively equivalent, or of mutual dependence. The fact that nowadays the emphasis is indeed on the idea of 'rights' rather than the idea of 'duties', should not affect us, and we needn't adjust the Kantian text to contemporary standards.

I return now to the initial question of this section, that is, the question of *how* exactly from 1) the Kantian duties of right, 2) the duties to others, 3) the perfect duties, and 4) the universal and specific duties, our human and socioeconomic rights are further developed. That which in the beginning seemed obscure is now clear. My analysis starting from the admittedly non-well-established by Kant, yet in many respects significant, 6:239 passage in the *Metaphysics of Morals*, according to which duties have priority over rights,⁵⁴³ has contributed to a better understanding of the uneasy Kantian derivation of rights from duties. Specifically, it has contributed to a better understanding of the derivation of human and socioeconomic rights from 1)

⁵⁴¹ Gregor (1996), p. 395

⁵⁴² For example, John Rawls

⁵⁴³ A normative priority of duties over rights is necessary to be established and highlighted for the argument of the thesis. Apparently, without showing the normative priority of duties over rights, we cannot further argue in favour of the grounding of the latter in the former.

the moral universal perfect duties of right to others, and 2) the moral specific perfect duties of right to others, respectively.

More specifically, I **first** argue that from our ‘universal perfect duties of right to others’, through what Kant discusses and shows in 6:239 and 6:240, our ‘universal human rights’ are *generated* or *developed*. It is not by accident the fact that Kant himself, in the right-hand side of his 6:240 schema, in particular between the ‘duty of right’ and the ‘perfect duty’, as well as the ‘duty to others’, he writes the phrase: ‘the right of human beings’. I am convinced that, even if Kant was not aware of the modern *specific body* of human rights (in plural), ‘the right of human beings’ (in singular) seems to me to reflect the modern *idea* of human rights. **Second**, I argue that, through the same Kantian passages, the ‘specific perfect duties of right to others’ can ground our ‘socioeconomic rights’. Of course, this category of rights is not shown in the Kantian 6:240 schema. It could then legitimately be argued that there cannot be a *truly* Kantian justification of socioeconomic rights. I totally agree with this statement. However, this does not mean that the modern concept of socioeconomic rights cannot legitimately be justified in broad deontological or Kantian terms. This is exactly the reason why, throughout the thesis, the word ‘Kantian’ in the phrase: ‘a new (Kantian) duty-based account for the justification of human and socioeconomic rights’ is placed in parentheses.

After the presentation of the (Kantian) duty-based justification of human and socioeconomic rights, or the justification of human and socioeconomic rights in Kantian mode, or simply the Duty-Based Approach, I focus on two more issues:

First, as has been mentioned above, my justification is based on and inspired by the *right-hand side* of the Kantian schema in 6:240; in particular on the top of it, where Kant refers to ‘duties of right’, ‘perfect duties’, ‘duties to others’, and ‘the right of human beings’. Nevertheless, the bottom of the right-hand side of the same Kantian schema is not of less importance. There, Kant refers to ‘duties of virtue’, ‘imperfect duties’, ‘duties to others’ (once more), and ‘the end of human beings.’ Following the above organization of the duties of right into two categories, namely into: 1) **moral universal perfect duties of right to others**, and 2) **moral specific**

perfect duties of right to others, one could further categorize duties of virtue into: 1) **moral universal imperfect duties of virtue to others**, and 2) **moral specific imperfect duties of virtue to others**. What should be stressed here is that contrary to the former categorization of duties (of right), from the latter categorization of duties (of virtue) *no rights* can be derived. It is not by accident the fact that at the bottom of the right-hand side of the schema in 6:240, between the phrases 1) duty of virtue, 2) imperfect duty, and 3) duty to others, Kant does not mention the phrase ‘the **right** of human beings’ as he does previously, but the phrase ‘the **end** of human beings’ (emphasis added).

The **second** issue on which I focus here is the Kantian moral concept of human dignity and its role and place within a justification of human and socioeconomic rights. What most Kantian (as well as non-Kantian) scholars argue is that from our autonomy, interpreted as our capacity to make our own decisions independently, without guidance or coercion from others, our dignity is derived. It is this dignity, through the Formula of Humanity (4:429), in which our human rights are grounded.⁵⁴⁴ However, such arguments are not correct. Their fundamental problem is the mistaken interpretations, by many scholars and legal practitioners, of the grounding basis of human dignity, namely the moral concept of autonomy; and, subsequently, of the *inner* (not *intrinsic* or *inherent*)⁵⁴⁵ value and moral feeling of dignity itself. Contrary to the mistaken interpretations of autonomy and dignity, my own understanding of them, according to the conceptual analysis of autonomy via the sublime (chapter 3), is that the Kantian autonomous person is not the person who does as she pleases. Rather, the Kantian autonomous person is the person who, although she feels humiliated by the omnipotence of the moral law, abandons ‘volition’, that is, her inclinations, ideologies, wishes and so forth. The abandonment of the ‘volition’ is accompanied by a free self-legislation, yet a legislation required from all others. Eventually, the autonomous person respects the moral ideas of reason, such as the fulfillment of her moral duties, realizing her higher self as

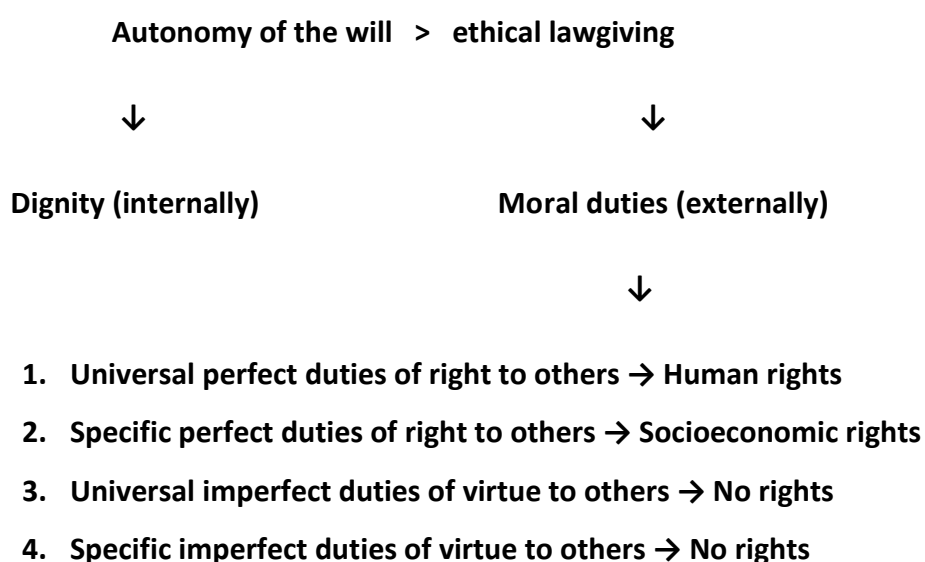
⁵⁴⁴ See for instance, Habermas (2010), pp. 464-480; Griffin (2008), p. 50; McCrudden (2013), pp. 313-325; Bennett (2015). pp. 76-77.

⁵⁴⁵ See also previous chapters

autonomous moral agent (*self-approbation*),⁵⁴⁶ while feeling (and being considered by others), at the same time, that she is a person with **dignity**.

What must be added here is that it is not by accident the fact that Kant writes in 4:394 in the *Groundwork of the Metaphysic of Morals* that the good will, namely the autonomy of the will, is the will of the person who *feels* an ‘inner value’ or ‘dignity’ in his own person.⁵⁴⁷ Eventually, the Kantian dignified person is not a person who is simply independent and free from external coercion, but a person who can do her duty in accordance with the moral law’s commands. Consequently, **the Kantian human dignity is not actually a feeling and value possessed by the *right-holders*. Rather it is a feeling and value attributed to the (autonomous) *duty-bearers*, who are capable of fulfilling their external moral duties, from which our human and socioeconomic rights are afterwards generated or developed.**

Overall, we may represent the new (Kantian) duty-based justification of human and socioeconomic rights, or the Duty-Based Approach (DBA), including the division between universal imperfect and specific imperfect duties, as well as the place of the moral concept (value/feeling) of human dignity, in the following diagram:



⁵⁴⁶ See 5:81, in Gregor (1996), p. 205

⁵⁴⁷ Gregor (1996), p. 50.

Eventually, the new philosophical justification of human and socioeconomic rights provides the grounds for the clarification of the concept of these rights revealing their true nature as *moral* rights. Apparently, both human and socioeconomic rights' ultimate sources are the moral law and the practical reason. Also, it clearly shows why only *human* rights can legitimately be considered as *universal* rights.⁵⁴⁸ In addition, through the new philosophical justification we can explain many of the rights found in the Universal Declaration of Human Rights. For example, we can explain *why* we have the human right to life, liberty, and security (article 3, UDHR), the right to recognition everywhere as a person before the law (article 6, UDHR), the right to freedom of thought, conscience, and religion (article 18, UDHR), the right to freedom of opinion and expression (article 19, UDHR), and so forth. Apparently, all these rights are owed to *all* people by *all* others. Further, the new justification shows why some rights are not genuine moral human rights. For example, the right to paid holidays (article 24, UDHR) is not actually a moral right; although this can be a legal right.⁵⁴⁹ Also, the new justificatory account offers the grounds for considering some new rights as genuine human or socioeconomic rights. For instance, the right of children to freedom from extreme poverty can be seen as a genuine socioeconomic right (chapter 5). Last but not least, the new Duty-Based Approach brings philosophy, in particular the Kantian duty-based ethics, at the heart of human rights law connecting the two disciplines.

In order to shed more light on the above diagram, in what follows I offer an example of the Duty-Based Approach to the determination of a daughter's (Celia) human and socioeconomic rights: 1) not to be injured and 2) to be taken care by her mother (Matina). These two rights are mentioned in article 19 of the United Nations Convention on the Rights of the Child.⁵⁵⁰ Specifically, as an autonomous moral agent,

⁵⁴⁸ For a more detailed analysis of these two issues, see section 4 below, and chapter 5.

⁵⁴⁹ See the Universal Declaration of Human Rights

⁵⁵⁰ See the United Nations Convention on the Rights of the Child. Available online from:

https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_united_nations_convention_on_the_rights_of_the_child.pdf?_ga=2.103049216.1428236091.1516953269-181085288.1516953269 [accessed 26 January 2018]

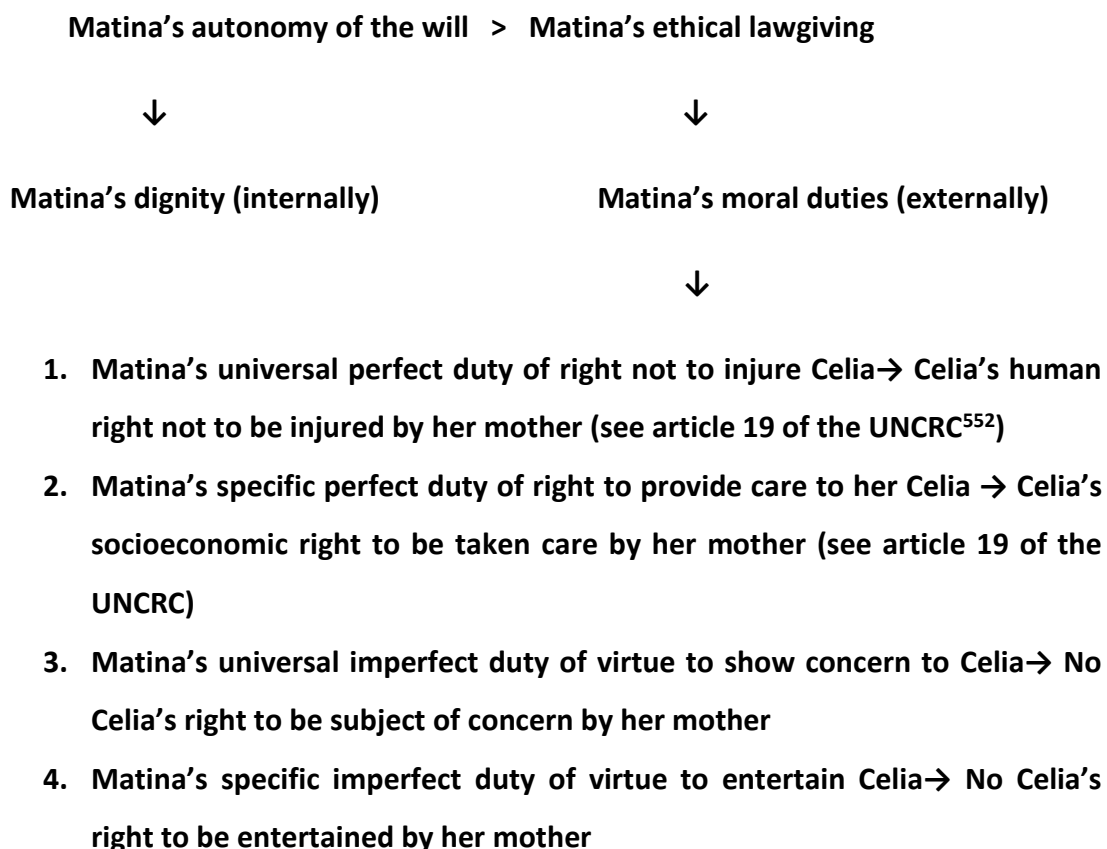
the mother (Matina) exercises her ethical lawgiving function of morality. Matina's external moral duties are grounded in her ethical lawgiving as has been described above. These external moral duties of the mother are further consisting of 1) her universal perfect duty of right, for example, not to **injure** her daughter (Celia), 2) her specific perfect duty of right, for example, to provide **care** to her Celia, 3) her universal imperfect duty of virtue, for example, to show **concern** to Celia, and, finally, 4) her specific imperfect duty of virtue, for example, to **entertain** Celia. If Matina's four duties did not exist, then Celia's rights derived from them would not exist either.

To be more specific, Celia has the right, for example, not to be injured by her mother (see article 19 of the UNCRC)⁵⁵¹ only because her mother has the duty not to injure her. The priority of the duties over the rights is further established in the following section. In the same vein, Celia has the right, for example, to be taken care by her mother (see article 19 of the UNCRC) because her mother has the specific perfect duty of right to provide care to her. However, Celia does not seem to have the right, for example, to be subject of concern by her mother, as Matina has only a universal imperfect duty of virtue to show concern to her daughter. Similarly, Celia does not have the right, for example, to be entertained by her mother, as Matina has only a specific imperfect duty of virtue to entertain her daughter.

Eventually, given that the mother, in this case, fulfils all her external moral duties, or at least the first two external moral duties, namely her duty not to injure and to provide care to her daughter, she feels *internally* that she is dignified. This *internal* or *inner* feeling or value of dignity must not be confused with an intrinsic or inherent value, namely a value that cannot be lost. Matina's inner feeling of dignity

⁵⁵¹ According to article 19 of the UNCRC: '1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.' Available from: https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_united_nations_convention_on_the_rights_of_the_child.pdf?_ga=2.103049216.1428236091.1516953269-181085288.1516953269 [accessed 26 January 2018]

can indeed be lost, if, for example, she does not fulfill her relevant duties towards her daughter. At the same time, this value (dignity) is also one attributed to Matina by others. This example of the relationship between a mother and daughter is application of what has already been argued at theoretical level in this and the previous chapter. Here is a schema representing my thoughts:



At this point, it might be argued that there can also be a 'specific imperfect duty of virtue' of Matina (mother) to **love** Celia (her daughter). Incidentally, the right to be loved and its corresponding duty are very popular today.⁵⁵³ However, in the *Metaphysics of Morals* Kant explicitly argues that there is not a duty to love (e.g. one's neighbour) because love is not a judgment that can be commanded by reason; rather it is a feeling that cannot be commanded.⁵⁵⁴ According to the 'commandability objection', to have a duty to do something, the action must be commandable. For

⁵⁵² See article 19 of the UNCRC

⁵⁵³ See for instance, Liao (2015)

⁵⁵⁴ Gregor (1996), p. 528.

instance, Taylor argues that ‘love, as a feeling, cannot be commanded, even by God, simply because it is not up to anyone at any given moment how he feels about his neighbour or anything else’.⁵⁵⁵ Consequently, if there is not a duty to love, it follows that there cannot conceptually be a right to be loved.

Nevertheless, as has been shown in the previous chapter, the sublime is a public feeling *arising from* the public validity of a judgment. Kant prioritizes the feeling and the judgment accordingly, that is, he puts the judgment first, and the feeling derived from it second. He claims that the universal communicability in the given representation underlying the aesthetic judgment of the sublime, as its subjective condition, *precedes* the feeling derived from the sublime.⁵⁵⁶ As has been stressed (chapter 3), the universal communicability underlying the aesthetic judgment of the sublime not only comes first but also it is to a great extent the *basis* of the feeling, in the sense that one’s ability to communicate one’s mental state carries the relevant feeling with it.

Here it might be claimed –of course not in strictly Kantian terms– that, similarly to the sublime, the feeling of love is a public feeling arising from the public validity of the judgment about love. That is to say, the universal communicability underlying the moral judgment of love, as its subjective condition, is the *basis* of the feeling of love, in the sense that one’s ability to communicate one’s mental state of love carries the feeling of love with it. Hence, a mother can genuinely feel that she loves her unborn baby even from the very first moment she learns she is pregnant. Apparently, the moment she learns she is pregnant mother does not love the foetus that she has not even seen yet.⁵⁵⁷ But, a (public) feeling of love to her unborn baby is derived after she ‘universally communicates’ the underlying moral judgment according to which it is *the right or moral thing* to love her unborn baby. That is to say, in giving her this *reason* to love her child, there is a good chance that she *will* love the child.⁵⁵⁸ Of course, the same applies not only to biological parents, but also

⁵⁵⁵ Taylor (1970), pp. 252-253.

⁵⁵⁶ Ak 217, Kant (1987), p. 61.

⁵⁵⁷ For a similar view see Liao (2015), p. 106.

⁵⁵⁸ Liao (2015), p. 106.

to same sex couples, step-parents, grandparents, even members of local authorities which can acquire the parental responsibility when all others are unavailable. Yet, this does not apply to *all others*, given that it would be impractical if everyone tried to fulfill the duty to love a child at the same time.⁵⁵⁹

One could counter here that by loving the child because this is the right or moral thing to do, or for duty's sake, or for the sake of moral law, mother is not actually motivated to love the child for child's sake.⁵⁶⁰ However, this is not always true. The taxi driver may bring me to the University because it is his duty, and not because he is doing it for my sake, e.g. in order to meet my supervisor. But many times, the two motives are identified. For example, a mother loves her child both because this is the right or moral thing to do, and for her child's sake. Also, my friend Joel, who is a professional cook, is motivated to prepare a delicious cheeseburger for me, when I visit him at the pub, not only because this is his duty, but also because he wants to do it for me. By cooking *for me* as well, Joel does not violate a normative requirement according to which in personal relationships we have the duty to do things only for *one* thing, that is, for the other person's sake.⁵⁶¹ Even in this case, there is not *one* reason only. By respecting his duty to cook *for me only*, Joel is actually acting from *two* motives, namely from the motive of duty and from the motive of cooking for me. Apparently, such an argument would be self-defeating. As Liao suggests, impartiality is important in personal relationships. In particular, Liao mentions the example of one whose wife is injured and another man is drowning. Obviously, the husband has to rescue the man who is drowning instead of his wife.⁵⁶² Ultimately, even Kant himself writes in the *Metaphysics of Morals* '... we have brought a person into the world without his consent and on our own initiative, for which deed the parents incur an obligation to make the child content with his condition so far as they can'.⁵⁶³

⁵⁵⁹ Liao suggests four criteria: responsibility, proximity, ability, and motivation; see Liao (2015), p. 135.

⁵⁶⁰ Williams (1981), p. 18.

⁵⁶¹ Williams (1981), p. 18.

⁵⁶² Liao (2015), pp. 127-128.

⁵⁶³ Gregor (1996), p. 64.

In addition, apart from the Kantian aesthetic theory, in the cognitive theory of emotions, it is clearly stated that all feelings and emotions are based on judgments. Under this view, it might similarly be argued that love involves a moral judgment from which the feeling of love is afterwards generated.⁵⁶⁴ Of course, that is not the case with other feelings, such as the feelings of lust, infatuation, Eros, which typically do not involve the exercise of one's judgment, but they all refer to one's instincts, inclinations, desires, and so forth. Finally, by arguing that cultivation does involve reflection, Aristotle leads us to the same conclusion, namely that a rational, autonomous, moral judgment may be the source of a genuine emotional capacity or/and feeling, such as the feeling of love.⁵⁶⁵

Eventually it can be argued that from the judgment of love which is commanded by pure practical reason, and precedes the relevant feeling of love, a commendable duty to love a child, or a neighbour and so forth, is legitimately derived. Here I must point out that my argumentation concerning the demandable character of the duty to love differs from Raz's claim that love can be commanded because it is an attitude.⁵⁶⁶ This is a misguided view. There might be a person A having all the *external* attitudes typically associated with love for a person B, yet it does not follow that A loves B. For example, B may be A's ex-boyfriend whom A had loved once but not anymore.⁵⁶⁷ Ultimately, it is up to someone, for example to a mother, to love her foetus or baby, or child.

Consequently, although Kant explicitly says that there cannot be a duty to love because love is not a judgment commanded by reason, his aesthetic theory, in particular his definition of the sublime, both as a judgment and a feeling following this judgment, allows for arguing that there can indeed be a duty to love (e.g. a child)

⁵⁶⁴ See for instance, Solomon (1977), pp. 28-30

⁵⁶⁵ Aristotle (1980)

⁵⁶⁶ Raz (1994), p. 11.

⁵⁶⁷ Recently Liao has argued that there can be both a duty to love a child, and a child's right to be loved as a fundamental condition for her to pursue a good life, see Liao (2015), pp. 4-5, 99-100. I am discussing this issue thoroughly in a separate paper titled '*Ex nihilo nihil*: the case of the duty and the right to love' (Work in progress)

arising from the judgment preceding the (subsequent) feeling of love. This duty to love to, e.g. a child, is in my view a 'specific imperfect duty of virtue'. First, it is a 'specific' duty because it cannot be owed to someone by all others; rather it can only be owed to someone by specific others. Second, it is an 'imperfect' duty because it requires only the setting of ends, leaving agents discretion on when and how to act. Third, it is a duty of 'virtue' because it is non-claimable, hence non-externally enforceable. Ultimately, this specific imperfect duty of virtue cannot conceptually ground a right of a child, or a neighbour, and so on, to be loved.

This brings me to the end of this section, in which the Duty-Based Account has been presented. The new (Kantian) duty-based justification of human and socioeconomic rights applies to the rights of all beings: normal adult human beings, immigrants, refugees, the 'apatrides', the poor, homosexuals, bisexuals, transsexuals, those who live in countries which have not the characteristics of a democracy, those who live in non-democratic countries, those who still live in isolated jungle tribes in the world, embryos, babies, children, the comatose, the mentally disabled, animals, plants, possible future human beings, beings from outer space, and so forth. In all these cases: 1) the duty-bearers are all rational beings; 2) the content of the duties owed corresponds to the two fundamental categories of rights, namely to civil/political and socioeconomic rights; and 3) the right-holders are those to whom the relevant duties are owed –in spite of the fact that there might be other people appointed to represent them in certain circumstances. Only the case of non-living human beings is slightly different; hence, it is discussed separately below.

To conclude, in this section, I have presented the new Kantian justification for *human* rights, as well as the new duty-based justificatory account for *socioeconomic* rights. What effectively characterizes the new Duty-Based Approach is: 1) the priority of the concept of duties over the concept of rights, and 2) the distinction between human and socioeconomic rights. Now regarding the first issue, the question here arises as to why duties are more fundamental than rights. Regarding the second issue, the question arises as to why human rights are distinct from socioeconomic rights. In the following section, these two issues are the first to be

discussed within the context of responding to possible objections against the new Duty Based Approach.

3. Possible objections against the new Duty-Based Approach

In this section, I respond to four possible objections against the new Duty-Based Approach. Within this context, I first *establish* the moral priority of duties over rights; second, I explain why *socioeconomic* rights are not actually human rights; third, I shed light on the *relation* between Kant's moral philosophy and his legal and political theory; and, fourth, I explain the reasons why Kant is not a moral *constructivist*.

3.1 'A paradigm shift' – from rights to duties

'To speak of a universal right is to speak of a universal duty...

Indeed, if this universal duty were not imposed,
what sense could be made of the concept of a universal human right?'

Maurice Cranston⁵⁶⁸

Here I respond to the first possible objection against the new Duty-Based Approach, namely that by putting duties first, the new (Kantian) duty-based justification of human and socioeconomic rights degrades the notion of rights.

As has been mentioned in chapter 1, since 1948, the moral, legal, and political concept of human rights has been widely accepted, and the relevant rights have further been ratified by most of the countries. The world has been dominated by the concept of human rights for more than five decades, that is, from the end of the Second World War until the beginning of the 21st century. However, during the

⁵⁶⁸ Cranston (1973), p. 69.

last two decades the dominance of the idea of human rights seems to have been weakened, and the general dominance of the concept of human rights has been greatly challenged. This was largely the result of the 'insistence' of a great number of rights violations in the world, despite the rich legal framework and the international political initiative for the promotion and protection of human rights. One need only read the weekly 'Human Rights Watch' reports to see how many infringements occur on a daily basis.⁵⁶⁹ As has already been mentioned, the two main problems of human rights are basically: 1) their indeterminacy, abstractness, and vagueness; and 2) their difficulty to be universally accepted. Hence, mainly because of the numerous violations which still persist, as well as these two problems, human rights have recently come under increasing attack. The opponents of human rights argue that human rights have failed to accomplish their objectives, that there may not be such things as human rights, and, eventually, that we should reject the idea of human rights. The critique against human rights comes not only from ordinary people, journalists, politicians, and legal practitioners, but also from a number of political theorists, legal scholars, and moral philosophers.

Among the contemporary thinkers who have vehemently attacked the concept of human rights is Alasdair MacIntyre. In his *After Virtue: A Study in Moral Theory*, MacIntyre claims that the concept of rights has generally a prominent role within the modern moral scheme. By 'rights', MacIntyre does not mean the rights conferred upon us by positive law or custom, but the rights possessed by human beings in virtue of their humanity, that is, 'human rights'. Hence, human rights, MacIntyre claims, are rights which are supposed to attach equally to all human beings independently of their sex, race, religion, talents, deserts and so forth.⁵⁷⁰ There is clearly no reason to counter MacIntyre's claims about human rights so far. It turns out to be his following claims about human rights which are questionable. Specifically, MacIntyre argues that it would be odd one to think that there could be rights attached to human beings as such, that is, simply qua human beings. Until the middle ages, he claims, there is actually no expression in any ancient or medieval

⁵⁶⁹ Available from: <https://www.hrw.org/publications> [accessed 1 November 2017]

⁵⁷⁰ MacIntyre (2007), pp. 68-69.

language that could be translated as 'right'. MacIntyre explicitly declares that 'there are no such rights, and belief in them is one with belief in witches and in unicorns', as well as that '...every attempt to give good reasons for believing that there *are* such rights has failed'.⁵⁷¹ He then argues that we consider human rights to be self-evident truths or intuitions; but we know very well, he continues, that there are neither self-evident truths, nor intuitions arising from good arguments. MacIntyre eventually concludes that human rights are just fictions.⁵⁷² In what follows I evaluate his stance towards the idea of human rights.

I do not agree with MacIntyre that the concept of human rights did not exist before the middle ages. Even before, say, the Magna Carta (1225), that is the English Charter of Liberties which influenced the development of the English Bill of Rights (1689) and, later, the United States Constitution (1789, year effective), the *idea* of rights did exist.⁵⁷³ For instance, under the Constitution of Medina drawn up in 622, non-Muslims had the same political and cultural rights as Muslims; they had autonomy and freedom of religion.⁵⁷⁴ Also, it is argued that some principles of human rights were established in the 6th century BC under Cyrus the Great.⁵⁷⁵ In any case, contrary to MacIntyre, I argue that from the fact that a concept has not (yet) been clearly expressed, it does not follow that it does not exist. That is to say, from every weakness or lack regarding the *use* of words, it does not follow that there is also weakness or lack concerning the *meaning* of words. Hence, from the fact that human rights were clearly expressed late in the history of humanity, it does not follow that their idea did not exist.

⁵⁷¹ MacIntyre (2007), p. 69.

⁵⁷² MacIntyre (2007), pp. 69-70.

⁵⁷³ For the Magna Carta, the United States Constitution, and the Bill of Rights, see online <https://plato.stanford.edu/entries/rights-human/> [accessed 20 January 2019]

⁵⁷⁴ Of course, on the condition they 'followed' Muslims; see Lecker (2004); also, Article 25, as quoted in Ahmad (1979), pp. 46-47.

⁵⁷⁵ See for instance, the Cyrus Cylinder or Cyrus Charter, which is regarded as the world's first Charter of human rights; see MacGregor, N. (2004)

Further, through MacIntyre's critique and objection to the idea of human rights, in particular his claim that 'there are no such rights', I am afraid that he seriously tends to nihilism. Through such statement, the contemporary discussion about human rights can only be led to the abyss of nothingness. But such a nihilistic stance would have little to offer to the world today, in which numerous violations of human rights take place on a daily basis, and we have the duty to react upon them in an urgent and decisive way. In the same vein, MacIntyre's claim that 'human rights are fictions', could be countered (yet in non-deontological or Kantian terms) through the claim that even if human rights are just 'fictions', there are indeed fictions which are very 'useful'. Also, the claim that human rights are just fictions is in effect identified with the claim that rights are the objects of construction (O'Neill) or procedure (Rawls).⁵⁷⁶ **But in neither a fictional right, nor in a right which is object of construction or procedure, can one believe more than in an *existing* right.** Apparently, the normative force of a fictional right, or a right which has been logically constructed, or is the result of a certain procedure, is limited because rational beings, including human beings, by nature, believe in and show respect to what *exists* rather than what has just been constructed or created. For example, if both Heidegger and some of his greatest works were in danger, e.g. the former was drowning and the latter were to be burned, we would give more priority to the living human being (Heidegger) rather than the non-living things (his books).

Consequently, claims, such as that 'there are no human rights, and that 'human rights are fictions', should be avoided within the contemporary human rights discourse. The main goal of the present thesis is to show that human rights, as well as socioeconomic rights, are neither fictions/constructions/objects of procedure, nor 'useful' fictions/constructions/objects of procedure, but they do *exist*, they can be *discovered*, and they are *real*. Specifically, because rights are grounded in *moral* duties, which are real –if one is inclined at least to accept that the moral is real in some way and to some extent– they (rights) are real too. Eventually, the moral existence of human and socioeconomic rights which has been established in the

⁵⁷⁶ For instance, both O'Neill and Rawls believe that justice may well be the result of a specific *construction* and *procedure*, respectively.

previous section directly opposes MacIntyre's and others' nihilistic statements that rights are just self-evident truths or intuitions based on bad arguments. Rather, it is obvious that there are actually some *moral* or *good* reasons for believing in and respecting both human and socioeconomic rights.

Nevertheless, in spite of the significance of human rights, we must not overlook the fact that numerous rights violations still occur worldwide, that human and socioeconomic rights still remain an indeterminate, vague concept, and finally that they have not been accepted by all people and states around the world. The U.N. High Commissioner for Human Rights Zeid Raad al-Hussein, a strong advocate for human rights, in a recent email to his staff announced that he will step down after his term ends in summer 2018. He explained that the climate for human rights has gotten too bad, and that a second four-year term would require compromises contradicting his own moral judgments. Such a decision shows that even the UN human rights system cannot function effectively anymore within the current geopolitical context.⁵⁷⁷ All these obstacles are actually the main reasons why, during the last decade, a great number of rights-based justifications have been proposed by moral, legal, and political thinkers, in order to show more clearly the grounds and the nature of these rights. However, as has previously been shown (chapters 1, 2, and 3) most of these justificatory accounts suffer from serious flaws; hence the formulation of the new (Kantian) duty-based account proposed in the present chapter.

More specifically, contrary to the discussed rights-based, dignity-based, and the two Kantian-based justificatory accounts, which have been built on the basis of the priority of rights/dignity over duties, the account, in section two above, has been built on the general ideas that 1) we must not be afraid of questioning our established truths, such as the truth of rights/dignity; and 2) that what eventually gives meaning to our lives is not ourselves, but our concern for others through the fulfilment of our external moral duties. Hence, the justification in the present thesis is a *duty-based*

⁵⁷⁷ See Erickson (2017)

justification aimed to give precedence to the duties that have to be met **to secure rights**. Here, it could be argued that, for instance, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) do actually assign to the signatory states the duties which have to be met, in order to secure the rights in the Universal Declaration of Human Rights (UDHR). My counter-argument is that what they actually do, both the ICCPR and the ICESCR, is to assign to states only ‘second-order’ duties to allocate and enforce some duties that simply ensure respect, or support the realization of the rights in the two Covenants. For example, in article 2 of the ICESCR, is written that ‘each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.⁵⁷⁸

Nevertheless, taking into consideration only ‘second-order’ duties does not effectively reassure rights.⁵⁷⁹ Thus, within the context of the international justice today, more emphasis has to be given to ‘first-order’ duties as well. My claim then is that through the elaboration and development of the first-order duties, we would more effectively secure the rights in the declarations, conventions, and treaties. My further claim is that these first-order duties are morally more significant than rights. The reasons why duties have in effect moral priority over rights is answered in the following section.

⁵⁷⁸ Available from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> [accessed 2 March 2018].

⁵⁷⁹This crucial point was thoroughly discussed by Onora O’Neill on 22 February 2018 in QUB Symposium with C. McCrudden and O. O’Neill, <https://www.qub.ac.uk/International/global-challenge-debates/human-rights-age-trump-brexit/> [accessed 1 March 2018]

3.1.1 Taking duties seriously⁵⁸⁰

‘The notion of obligations comes before that of rights, which is subordinate and relative to the former. A right is not effectual by itself, but only in relation to the obligation to which it corresponds, the effective exercise of a right springing not from the individual who possesses it, but from other men who consider themselves as being under a certain obligation towards him.’

Simone Weil⁵⁸¹

Before I explain why I think duties take moral precedence over rights within the context of an autonomous society, I provide a brief overview of the history of the concept of ‘duty’, which shows that the concept of ‘right’ was not always in the front line as it is today. On the contrary, duties were considered as more important than rights in the past; and many thinkers believed that we can enjoy the latter only if we exercise the former. Hence, the new Duty-Based Account for the justification of human and socioeconomic rights, may be unfamiliar for most of the 20th century thinkers, yet absolutely familiar, even favorable, for other thinkers in the past. Within this context, I go back to Cicero, Aquinas, Kant, and Hohfeld, who are considered to be the prominent contributors to the literatures that take duties seriously.

To begin with, the concept of ‘duty’ and its priority over the concept of ‘right’ were both central ideas in the philosophical work of Cicero. In his last treatise *De Officiis (On Duties)*, Cicero expands his notion on moral duties emphasizing the meaning of them in relation to ourselves and our communities.⁵⁸² More specifically, Cicero distinguishes between ‘middle’ and ‘complete’ duties. On the one hand, a middle duty is a duty for which a convincing reason must be given as to why it has to

⁵⁸⁰ For the development of this section, I am grateful to Onora O’Neill for all our discussions during the last three years.

⁵⁸¹ Weil (1952), p. 3.

⁵⁸² Cicero (1991)

be done; and, on the other hand, a complete duty is what is 'right'.⁵⁸³ Cicero's distinction between 'middle' and 'complete' duties resembles Kant's distinction between 'imperfect' and 'perfect' duties, respectively. That is to say, while a middle or imperfect duty is a more *flexible* duty that can be overridden, a complete or perfect duty is a duty that must be fulfilled under any circumstances. Also, of all duties, Cicero emphasizes the significance of the duties of justice which, looking to the flourishing of mankind, should be seen as sacred. To this, Cicero adds that when one has to choose between duties, he or she must give priority to the duties which are associated with the human fellowship.⁵⁸⁴ Ultimately, what must be stressed is that according to Cicero all duties are grounded in human reason. Contrary to animals, says Cicero, men do not just respond to senses, but their reason drives them to devote themselves to providing whatever may comfort themselves and others.⁵⁸⁵

In the same vein, Thomas Aquinas emphasizes the significance of the concept of 'duty'. More specifically, the *Summa Theologiae* is a work through which men are called to do their duties for duty's sake putting aside their egoistic considerations, in order to serve not only the collective good, but also the *bonum universal*, which is God.⁵⁸⁶ Similarly to Cicero, Aquinas here seems to adopt not just a purely deontological perspective regarding the concept of duty, and its role in morality, but a mixed perspective, that is, one that combines deontological and utilitarian elements. Through this perspective is eventually stressed that people who do their duty flourish themselves and their communities (Cicero and Aquinas), and are led to the highest pleasure, that is, to the enjoyment of the transcendent good, that is, God (Aquinas).

Aquinas also claims that only by doing voluntarily, that is, by own free will, our duty, or what we ought to do, we acquire value as human beings.⁵⁸⁷ Aquinas

⁵⁸³ Cicero (1991), pp. 4-5, 105

⁵⁸⁴ Cicero (1991), pp. 60, 62

⁵⁸⁵ Cicero (1991), p. 6.

⁵⁸⁶ Aquinas (1969), pp.140-141, 159-162

⁵⁸⁷ Aquinas (1969), p. 21

argues that such a will is a good will which is grounded in God, who directly *inclines* our wills to good, and does *not hinder* them (our wills) from evil.⁵⁸⁸ By implying that our own free will is what locates good and evil within the realm of human morality, Aquinas effectively accepts men's moral responsibility in the realm of human affairs; hence, he does not exclude punishment as a result of crime being committed.⁵⁸⁹ Within this context, he explicitly says: 'Reason and eternal law are introduced into the explanation of sin, not to substitute external obligation for inner finality, but because of the proper and formal way in which man is subject to his own inner finalization'.⁵⁹⁰ Eventually, Aquinas does not seem to recognize only God's contribution to good and evil in humanity, but also our own reason's contribution to it, bridging the gap between the principles of Christianity and Humanity.

Moreover, in Kant's deontological theory duties are displayed prominently. Duty or what is owed is at the centre of the Kantian ethics. Kant writes in 5:82 in the *Critique of Practical Reason*: 'Duty and what is owed are the only names that we must give to our relation to the moral law'.⁵⁹¹ Kant does not present a full system of duties in the *Groundwork*. Yet, he does present a system of duties in the *Metaphysics of Morals*, which is typically seen as the Kantian work directed at the 'empirical'. More specifically, Kant distinguishes between duties of right and duties of virtue. In 6:239, in the *Metaphysics of Morals*, Kant writes: 'All duties are either *duties of right (officia iuris)*, that is duties for which external lawgiving is possible, or *duties of virtue (officia virtutis s. ethica)*, for which external lawgiving is not possible'.⁵⁹² Kant further divides duties into duties to oneself and duties to respect others, as well as into perfect and imperfect duties, namely duties which cannot be overridden, and duties which allow for freedom concerning their fulfillment. The Kantian divisions of moral duties have analytically been shown in the previous section.

⁵⁸⁸ Aquinas (1969), p. 207

⁵⁸⁹ Aquinas (1974), p. 10, note a.

⁵⁹⁰ Aquinas (1974), p. 101, 103

⁵⁹¹ Gregor (1996), p. 206.

⁵⁹² Gregor (1996), pp. 394-395

Ultimately, the Kantian supreme principle of morality, that is, the autonomy of the will, or the good will, is the basis of all Kantian moral duties (see section two). Here I recall the full definition of the Kantian autonomy of the will, after its conceptual analysis through the aesthetic judgment and feeling of the sublime in the previous chapter:

Autonomy of the will is both the judgment and feeling of autonomous moral agents who, although they feel humiliated by the omnipotence of the moral law, they abandon 'volition', that is, their inclinations, ideologies, wishes and so forth, and, freely self-legislating –yet requiring the same legislation from all others– respect the moral ideas of reason, such as the fulfillment of their moral duties, realizing their higher self as autonomous moral agents (self-approbation⁵⁹³).

Finally, Wesley Newcomb Hohfeld argues that the concepts of 'rights' and 'duties' are correlative concepts, i.e. the one must always be matched by the other.⁵⁹⁴ Hence, Hohfeld uses the term 'claim-right' to denote a right which is correlated with the duties of another or others. These duties typically refer to either refraining from actions impeding the right-holder in her exercise of the right, or performing actions through which the duty-bearer gives the right-holder the thing she has a right to, or helps her to have, or does the thing the right-holder has a right to. That is to say, a claim right refers to the idea that a person has a moral or legal claim to something; and this right is correlated with a duty of others (duty-bearers) to refrain from the enjoyment, or to perform acts leading to the enjoyment of the relevant thing by the right-holder.

Following Cicero, Aquinas, Kant, and Hohfeld, I generally argue that duties or obligations are more fundamental than rights, and that, contrary to the twentieth century ethical approach according to which rights have priority over duties, it is actually a mistake for one to emphasize rights overlooking duties or obligations. As

⁵⁹³ See 5:81, in Gregor (1996), p. 205

⁵⁹⁴ Hohfeld (1917), pp. 710-770

O'Neill has recently argued, a shift is necessary today from the perspective of reciprocity focused on the question of 'what ought we to receive?' to the perspective of agency focused on the fundamental question of 'what ought we to do?'⁵⁹⁵ Incidentally, although the term 'obligation' is more often associated with law, while the term 'duty' is typically related to morality, in the present thesis the terms 'duty' and 'obligation' are used interchangeably as *approximate* synonyms.⁵⁹⁶ Hence, I use both the words 'duty' and 'obligation' to denote the 'ought', that is, something that *has* to be done by someone.

However, even though I agree with all the aforementioned thinkers that duties are more basic or fundamental than rights, I do not think they have thoroughly shown *why* the former are more fundamental than the latter. Simply to argue that duties are more basic than rights does not automatically render the latter less morally important than the former. Through the passages 6:239 and 6:240 in the *Metaphysics of Morals*, a moral priority of duties over human rights can be justified. I briefly repeat here the relevant Kantian claims.⁵⁹⁷ In 6:239 in the *Metaphysics of Morals*, Kant argues: '... nur durch den *moralischen Imperativ*, welcher ein pflichtgebieten der Satz ist, aus welchem nachher das Vermögen, andere zu

⁵⁹⁵ From Onora O'Neill's talk on 22 February 2018 in QUB Symposium with C. McCrudden and O. O'Neill, <https://www.qub.ac.uk/International/global-challenge-debates/human-rights-age-trump-brexit/> [accessed 1 March 2018]

⁵⁹⁶ However, to be more precise, it must be pointed out that the relevant text, in the *Metaphysics of Morals*, which defines 'obligation' (Verpflichtung, obligatio) is 6:222-223. Obligation is defined as 'the necessity of a free action under a categorical imperative of reason.' Then Kant defines 'duty' (Pflicht) as 'that action to which someone is bound'. I understand this 'binding' as rational necessitation under a categorical imperative. Eventually, one could argue that the Kantian obligation generates duty, in the sense that an obligation, being necessitated by a CI, when it applies to a particular action, counts as duty. Ultimately, responsibilities are discussed right after obligation and duty, at *Metaphysics of Morals* 6:223-224. Responsibilities are different, since they are not generated directly by moral law, but rather by that combined with one's roles. I am grateful to Allen Wood and Christine Korsgaard for our discussions on the meaning of these three crucial terms.

⁵⁹⁷ The establishment of the priority of duties over rights is provided in section two above

verpflichten, d.i. der Begriff des Rechts, **entwickelt** werden kann'. [Bold mine] ⁵⁹⁸
That is to say, '... only through the moral imperative, that is, the proposition which commands duty, from which the capacity for putting others under obligation, that is, the concept of right can afterwards be **generated**'.

In addition, in 6:240, Kant clearly shows that the 'right of human beings', or 'human rights', are generated, or developed, from our moral perfect duties of right to others. Consequently, in the Kantian opus a *moral* priority of duties over claim-rights is actually vindicated. Kant does not mention socioeconomic rights. Thus, my claim is that only the moral priority of our (universal) perfect duties of right to others over *human* rights is truly justified in strictly Kantian terms. As regards socioeconomic rights, we can only speak of a moral priority of specific perfect duties of right to others over them (socioeconomic rights) simply *inspired* by the Kantian opus.

Apparently, my claim regarding the relation between our perfect duties of right to others and human/socioeconomic rights is stronger than Hohfeld's and many other thinkers' thesis that rights and duties are *correlative* or *corresponding* ideas. Also, it is stronger than O'Neill's argument according to which the fulfillment of duties or obligations is more *basic* than the fulfillment of rights, because of the fact that any rights' claim is in effect no more than rhetoric unless the *counterpart* duties or obligations are allocated accordingly to individuals and institutions.⁵⁹⁹ All these claims simply indicate a *correlation* or *correspondence* without any deeper, morally established, connection of rights with duties. Further, my claim is stronger than the claim that rights and duties *go together* in the usual sense of the phrase that right-holders are at the same time duty-bearers. If we considered rights and duties as simply 'going together', then, because of their physical or mental immaturity, children would not actually be protected given that the attribution of rights to them would be vindicated only under the condition of the fulfillment by them of certain duties. **Eventually, my thesis shows that in Kantian terms what is meant by the**

⁵⁹⁸See Kant (2013), p. 346

⁵⁹⁹ For a similar claim see also: O'Neill (2016), p. 35.

statement that duties are more fundamental than rights is not that rights do not matter, but that duties are their *source*. Hence in the absence of the (owed) duties, from which they actually derive, the relevant rights alone *do not exist*.

3.2 Human and socioeconomic rights⁶⁰⁰

In this section, I focus on another possible objection against the new Duty-Based Account, namely that socioeconomic rights are human rights. Initially, it is true that not all authors distinguish between these two types of moral rights. Thus, I explain why, even though both types of rights are *moral* rights, the socioeconomic rights are not actually *human* rights. This is an important clarification which is reflected in the new (Kantian) duty-based argument concerning the philosophical foundations of human and socioeconomic rights. Additionally, through this clarification, it becomes clear why the word ‘Kantian’ above is placed in a parenthesis; hence why a truly Kantian justification can be argued only for *human* rights, while in the case of *socioeconomic* rights we can only speak of a justification simply inspired from the Kantian opus.

One the one hand, *human rights* are typically seen as moral rights (with political connotations, further protected by law) owed to all human beings by all others: individuals, states, institutions, organizations, and corporations. What must be stressed here is that human rights exist prior to any political recognition and prior to

⁶⁰⁰ I do not think it is necessary this section, and the thesis in general, to engage with the debates concerning the topic of ‘welfare’ in Kant; although, this is admittedly a topic on which there is growing literature. See, for instance [in chronological order]: Pinheiro Walla, Alice (2015). When the strictest right is the greatest wrong: Kant on Fairness. In: *Estudos Kantianos*. Vol. 3 (1); Baiasu, S. (2014). Kant’s Justification of welfare. In: *An Online Journal of Philosophy Diametros*, (39): 128; Varden, H. (2006). Kant and dependency relations: Kant on the state’s right to redistribute resources to protect the rights of dependents. In: *Dialogue*. Vol. 45: 257–284; Weinrib, E. (2003). Poverty and property in Kant’s system of rights. In: *Notre Dame Law Review*. Vol. 78: 795–828 Kaufman, A. (1999). *Welfare in the Kantian State*. Oxford University Press; LeBar, M. (1999). Kant on Welfare. In: *Canadian Journal of Philosophy*. Vol. 29: 225-250

any codification and ratification of them by law. Through the philosophical foundation of rights in the present chapter, it is clearly shown that it is *moral* and *rational* all others to respect them, independently of their political recognition, as well as codification and ratification within the context of international, regional, and domestic law. For example, all have the duty not to kill someone not because this is proclaimed by the Universal Declaration of Human Rights; but because killing other people is immoral and irrational. Under this definition of moral *human* rights, it seems that, even though these rights exist independently of their political recognition, and codification and ratification by law, they still cannot strictly be seen as *natural* rights, namely as entitlements independent of the existence of duties.⁶⁰¹ That is to say, human rights are effectively rights, which are valid against all those with the duties or obligations to respect them. A theory of human rights should not treat them as innate powers that give others reason to act or not act in certain ways; rather they should be seen as the *result* of others' external, moral duties, which derive from their moral and rational reason, to act or not act in a certain way. In other words, human rights are *non-existent* unless all duty-bearers, individuals, states, institutions, and so on, fulfill their respective moral duties. Ultimately, to this category of *human* rights, only our civil and political rights (not our socioeconomic) belong, which exist independently of any institutionalization.

On the other hand, socioeconomic rights (for example, the right to work, the right of everyone to form trade unions, the right of everyone to social security including social insurance) generally provide the conditions necessary for our prosperity and wellbeing.⁶⁰² Similarly to human rights, socioeconomic rights are moral rights, with political connotations potentially protected by law. Also, as human rights, socioeconomic rights cannot strictly be seen as *natural* rights, namely as entitlements independent of the existence of other's duties. Further, socioeconomic rights are understood and treated as rights which derive from the duties of individuals, states, and institutions. These duties of others derive from their moral

⁶⁰¹ In: Cruft, R., Liao, S.M., Renzo, M. (2015), p. 657.

⁶⁰² See articles 6, 8, 9 in the ICESCR, available from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> [accessed 5 February 2018]

and rational reason, which ‘commands’ them to act or not act in a certain way. However, even though, as moral rights, socioeconomic rights exist prior to any political recognition, and codification and ratification by law, they still cannot be considered as *human* rights, because they are not owed to *all* people by *all* others. Instead, they are owed to *specific* others by *specific* duty-bearers, either individuals, or states and institutions, which are responsible for their fulfillment and enforcement.⁶⁰³ Thus, even though we can speak of universal *human* rights and duties, we cannot similarly speak of universal *socioeconomic* rights and their grounding duties. What must be stressed here is the fact that even in the case of civil and political rights, in which the first-order obligations to *respect* them are universal, the second-order obligations, that is, the obligations to *ensure* that the first-order obligations are respected, still have to be allocated.⁶⁰⁴

Here are some examples. The rights in the International Covenant on Economic, Social, and Cultural Rights (ICESCR), e.g. the right to food in article 11, are not actually *universal* human rights, as they often presented to be by the advocates of human rights, but *specific* moral rights. That is to say, even though it is moral and rational one to respect the socioeconomic right to food, this is not a burden to *all*, but only to *some* individuals and institutions. For example, not all have the duty to feed each hungry child in the world; and, prior to its allocation, the issue of who bears the relevant duty remains indeterminate. Hence the relevant duty, which must be properly allocated, is carried only by *specified* persons and institutions, rather than by *all* individuals and institutions in the world.⁶⁰⁵ In the case in which these persons and institutions are not specified, the socioeconomic rights fall under the category of the so-called ‘manifesto’ rights in Feinberg’s sense. That is to say, in the absence of the specified duty-bearers, socioeconomic rights are just rhetoric.⁶⁰⁶

⁶⁰³ O’Neill (1996), pp. 130, 131, 134

⁶⁰⁴ O’Neill (2005), pp. 427-439.

⁶⁰⁵ O’Neill (2016), pp. 131, 145

⁶⁰⁶ Feinberg (2016), p. 153; also, Beitz (2009), p. 121

Unfortunately the Declarations and the Covenants do not actually provide a concrete allocation account. For example, in the Universal Declaration of Human Rights, it is not clear whether the relevant obligations refer to individuals or states.⁶⁰⁷ Hence, a state can violate a socioeconomic right, and yet escape the unwelcome implications of its violation.

Ultimately, I would like to stress the fact that the aforementioned distinction between human and socioeconomic rights does not render the second category of rights less important than the first one. It is only in the respect of the allocation of duties to specified duty-bearers, and its importance in the practical domain, that these rights differ from the so-called *human* rights, e.g. one's right not to be tortured. While the violators of human rights can easily be identified, the violators of socioeconomic rights can hardly be identified. For example, who is responsible in a distant part of the world for a child lacking food, health, and education? In such cases, it is argued that if there is no appropriate allocation of the duties, these seem to lie with nobody.⁶⁰⁸ Someone could claim here that the fault lies with governments. In the face of the 2017 Grenfell Tower fire in London, I recall the first paragraph of article 11 **of the ICESCR**:

'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'⁶⁰⁹

It seems that in the case of the UK, the relevant duty was fulfilled to some extent by the State. But, unfortunately, there are many cases in which governments cannot

⁶⁰⁷ For further comments on confusions about obligations in the UDHR, see O'Neill (2001), pp. 188-203.

⁶⁰⁸In: Cruft, R., Liao, S.M., Renzo, M. (2015), p. 77.

⁶⁰⁹ Available from: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> [accessed 14 January 2018].

fulfill the relevant duties. There are many poor countries around the world. For instance, if such a tragedy had happened in Greece, I doubt whether the Greek Government would be able to fulfill its obligations, given the current Greek debt crisis. It is no accident that the Greek Government has been criticized for its treatment of refugees and asylum seekers in the Greek territory during the last five years. In many cases the Governments of poor countries easily claim no responsibility in view of their failure to fulfill their relevant duties. Consequently, the allocation of the duties, especially in the case of socioeconomic rights, must always be accurate and determinate, so that the accusations not to be gestured towards violators in imprecise terms.

3.3 The reasons why Kant is not a moral constructivist

In this section, I focus on and respond to another possible objection against the new Duty-Based Approach. It could be argued that Kant, from which the aforementioned justification is inspired, is not actually a foundationalist, but a constructivist, who would oppose my idea of a *foundation* for human and socioeconomic rights based on his opus. There are indeed some significant Kant scholars who argue in favour of Kant's *constructivism*. In their view, a Kantian *foundation* of human (and socioeconomic) rights cannot plausibly be supported and proposed.⁶¹⁰ In this section, I discuss specifically Onora O'Neill's constructivism on reason, ethics, politics, and justice. At the same time, more light is shed on my claim, in chapter 3, that Flikschuh's reading of Kant as a constructivist is mistaken. My aim is to show that Kant is not actually a moral constructivist, but there is room in his opus for legitimately arguing that he is a foundationalist.

To begin with, I agree with O'Neill's approach regarding the issue of human rights in general, namely her thesis that the fulfillment of duties or obligations is more basic than the fulfillment of rights; and that any rights' claim is no more than rhetoric, unless the counterpart duties or obligations are justified and allocated

⁶¹⁰ O'Neill, O. (2015b); also, Flikschuh (2015)

accordingly to individuals and institutions.⁶¹¹ That is to say, we cannot actually know what a right amounts to until we know: 1) who is the duty-bearer, 2) what exactly is the content of his or her obligation, and 3) to whom (right-holder) the fulfillment of the relevant obligation is owed. As O'Neill argues, if we take rights seriously, we must take the counterpart duties or obligations even more seriously; otherwise, rights remain only aspiration claims with high cost. That is to say, when rights are violated, there is no way one to see who has infringed the relevant right, and who owes redress.⁶¹²

Although I generally agree with O'Neill's claim that duties have priority over rights within the context of a moral, autonomous society, I disagree with her constructivist approach to reason, ethics, politics, and justice. More specifically, one of the most weighty constructivist claims of O'Neill is that, recognizing that a plurality of agents may lack antecedent principles of coordination, Kant eventually *builds* an account of reason, ethics, politics, and justice on this basis.⁶¹³ Hence, in her view, Kant introduces the Formula of Universal Law, according to which there is a categorical imperative, namely to '*act only in accordance with that maxim through which you can at the same time will that it become a universal law*'.⁶¹⁴ That is to say, given the plurality of agents, and the need of an agreement of all with some principles, O'Neill claims that Kant introduces, or *constructs*, or *builds* the Formula of Universal Law through which he eventually aims the principles adopted not be ones that could not be willed by all agents. Eventually, O'Neill characterizes the Formula of Universal Law as 'the best-known version of Kant's procedure of construction', and Kant's accounts on reason, ethics, politics, and justice as pure constructivist accounts without foundations.⁶¹⁵ In what follows, I discuss her anti-foundationalist reading of Kant.

⁶¹¹ O'Neill (2016), p. 35.

⁶¹² O'Neill (2016), pp. 196-197.

⁶¹³ O'Neill (2015), pp. 77, 84

⁶¹⁴ Gregor, (1996), p. 73.

⁶¹⁵ O'Neill (2015), pp. 23-24, 77, 84

Initially, what should be pointed out is that even if O'Neill understands correctly the Kantian Formula of Universal Law as a construction, still a constructivist account in reason, ethics, politics, and justice needs foundation. How can it be possible a construction without foundations? A foundation or base is the most crucial element of an architectural structure that connects it to the ground. There are either shallow or deep foundations, but, in any case, the crucial point is that *all* building structures should not lack a specific foundation. This is a pragmatic claim that directly opposes O'Neill's moral constructivist thesis that there can be constructions without foundations.⁶¹⁶ Consequently, even if it is indeed a Kantian construction, the Formula of Universal Law needs a deeper foundation. As has been shown in the previous chapter, as one of the three formulations of the Categorical Imperative (CI), the Formula of Universal Law (FUL) is grounded in the Moral Law commanded by Pure Practical Reason.⁶¹⁷ Consequently, I do not actually read Kant as O'Neill does, namely as a constructivist or anti-foundationalist philosopher. Instead, concerning his alleged constructivism, or anti-foundationalism, my claim is that, throughout his opus, Kant does not essentially show anything about the *construction* of reason, ethics, politics, and justice. Rather he directly points to *foundationalism*.

More specifically, we should focus on passages such as the passage 4:439, in the *Groundwork of the Metaphysics of Morals*, in light of which Kant cannot be read as a constructivist or antirealist. Kant writes: 'The essence of things is not changed by their external relations; and that which, without taking account of such relations, alone constitutes the worth of a human being is that in terms of which he must also be appraised by whoever does it, even by the supreme being'.⁶¹⁸ Further, one must consider the notorious passage in the *Groundwork of the Metaphysics of Morals*, in which Kant describes the moral concept of human dignity. As already mentioned in chapters 1 and 2 above, Kant writes in the *Groundwork of the Metaphysics of Morals*: 'that which constitutes the condition under which alone something can be

⁶¹⁶ O'Neill (2015), p. 24.

⁶¹⁷ See also Gregor (1996), pp. 164-5.

⁶¹⁸ Gregor (1996), p. 88

an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*' (4:434-5). He then argues that '*Autonomy* is therefore the ground of the dignity of human nature and of every rational nature' (4:436).⁶¹⁹ Apparently, here the role of the fundamental moral principle of autonomy as the *foundation* of the dignity of human beings does not allow for attributing to Kant the characterization of the constructivist, or non-foundationalist, philosopher. Additionally, one must also take into consideration the 5:47 passage in the *Critique of Practical Reason*, in which Kant argues that '*... the moral law... as a fact of pure reason of which we are a priori conscious*'.⁶²⁰ Here again, Kant expresses his foundationalism or moral realism. Consequently, because of these passages, and many other ones, I cannot see Kant, as O'Neill does, namely as a constructivist or antirealist philosopher.

Apparently, O'Neill has been influenced by the writings of her mentor, John Rawls; especially those in which Rawls argues that Kant is a contractualist.⁶²¹ O'Neill admits that, **although not identical, Rawls's classical Kantian *contractualism* has much in common with her own Kantian *constructivism***.⁶²² While the former indicates the grounding of ethical, political, and legal justification in an agreement, the latter indicates the grounding of ethical, political, and legal justification in some conception of reason. That is to say, a contractualist focuses on a specific agreement which is supposed to provide further the basis for reasons; while a constructivist focuses on a specific reasoning, or reason, or conception of reason, which is supposed to provide further a way of achieving agreement.⁶²³ Contrary to Rawls and O'Neill, I argue that there is indeed something deeper in the Kantian opus, than plain 'reasons' or 'agreements' on which a system of ethics, politics, and justice can be based. This deeper ground is our reason (in singular), of which 'voice' is heard by all rational, autonomous beings, including human beings.

⁶¹⁹ Gregor (1996), pp. 84-85

⁶²⁰ Gregor (1996), p. 177

⁶²¹ See Rawls (1980), pp. 515-572; also, Rawls, J. (1993)

⁶²² O'Neill (2003), pp. 319-331

⁶²³ O'Neill (2003), pp. 319-331

To be more specific, **first**, I do not see plain reasons, or some conceptions of reason, as a truly Kantian justification of our ethical, political, and legal systems because a commitment to them would illegitimately mix Kantianism with consequentialism. Parfit is one of the most vehement proponents of this move.⁶²⁴ But I am afraid that Kant himself would hardly mix his duty-based ethics with consequentialism. Of course, this does not mean that reasons, or conceptions of reason, are meaningless. What is claimed is that our primary concern must be our responsiveness to our inner reason (in singular) that tells us what is the right/wrong thing to do, or what we must/must not do in certain circumstances. Effectively, I agree with Susan Wolf who says that Parfit's focus on reasons introduces a concern for optimistic results.⁶²⁵

Second, I do not see some sort of agreement, or contract, or consent, as the genuine basis of our ethical, political, and legal systems. As has been explained in the previous chapter, although significant and central to Kant, the agreement, or the contract, or the consent is not the primary concern of the rational, autonomous person of whose autonomy and reason are actually the grounds of our ethical, political, and legal systems. Instead, the primary concern of the Kantian autonomously reflective-judging person is getting in touch with her inner, 'voice' of reason (in singular), that is to say, her authentic moral self.

Within this context, it could be argued that we should resist killing the innocent passengers, in the German Airliner Case,⁶²⁶ not because they are innocent, or because we must not kill innocent people (reasons < Kantian constructivism). Also, we should resist killing them not because we can imagine some sort of agreement against their killing (consent < Kantian contractualism).⁶²⁷ Rather, we should not kill them as a result of our respect to pure practical reason that reveals that killing them

⁶²⁴ Parfit (2011), p. xxviii

⁶²⁵ Parfit (2011), p. xxviii; also, Kirchin (2017), pp. 10-26

⁶²⁶ The German Airliner Case (2006), BVerfGE 115, 118 / 15

⁶²⁷ Also, not because the passengers have dignity (see chapter 2)

is the wrong thing to do, or that not killing them is the right thing to do (negative duty).

Ultimately, through the (Kantian) duty-based justification of human and socioeconomic rights, in the present thesis, is offered a ‘foundationalist’, or ‘moral realist’ account. The phrase ‘moral realism’ here is not associated with any kind of metaphysical realism, such as the *metaphysical* realism often invoked in the Christian ethics; but with a kind of *human* realism, according to which rights and duties are not objects of a constructivist or contractualist task. Instead, they do exist and can be discovered through ‘listening’ for/to our reason (in singular).⁶²⁸

3.4 The relation between Kant’s moral philosophy and his legal and political theory

Finally, the fourth possible objection against the new Duty-Based Approach might be that the new justification is not correct, because it is based on the mistaken idea that –in spite of the Kantian sharp distinction and tension between the internal domain of morality and the external domain of law– there is some degree of continuity within the Kantian opus. But this continuity, might be said, does not actually exist. In what follows I thoroughly discuss the relation between Kant’s moral philosophy and his system of justice and politics, in order to show that there is some coherence between the *Groundwork of the Metaphysics of Morals* and the *Metaphysics of Morals*. Incidentally, this is one of the most controversial issues within the modern Kantian literature.

Initially, it must be pointed out that in the *Metaphysics of Morals*, Kant himself explicitly argues that there is no relation between the domain of morality and the domain of justice in the strict sense. More specifically, in 6:232, Kant writes: ‘... strict right, namely that which is not mingled with anything ethical, requires only external grounds for determining choice; for only then is it pure and not mixed with

⁶²⁸ See also O’Neill (1996), p. 39, note 2

any precepts of virtue'.⁶²⁹ Kant continues mentioning the example of a creditor who has the right to require his debtor to pay his debt. This does not mean, Kant claims, that the creditor can remind the debtor that his reason puts him under obligation to perform this, since the coercion constraining the debtor to pay his debt coexists with the freedom of everyone in accordance with a universal *external* law. That is to say, Kant claims here that a right in the strict sense has nothing to do with morality since it refers only to the external domain of law which is not related to the internal domain of morality. Hence, the fulfillment of the relevant duty is not grounded in duty-bearer's (*internal*) reason, rather the coercion comes from outside, that is, from an *external* law. Eventually, Kant seems to argue that in the case of morality the authority that has power over us, namely over the autonomous persons, is our internal reason, which 'commands' respect to the moral Law; while, on the contrary, in the case of legality, it is an external legal law which we have to obey, independently of whether we are autonomous persons in the Kantian sense.⁶³⁰ The relation between Kant's morality and legality has born a 'rivalry' between those Kant scholars who interpret Kant as claiming that the two domains are distinct from each other and those other Kant scholars who insist that Kant's principle of right is straightforwardly derived from his moral philosophy. In what follows, I first present this 'rivalry', before I conclude that a more modest stance is preferable.⁶³¹

To begin with, following the above Kantian passage, in particular focusing on Kant's phrase that '...right, namely that which is not mingled with anything ethical', some Kant scholars, such as Allen Wood, argue that Kant's moral philosophy is completely divorced from his legal theory. Wood claims that there are indeed some

⁶²⁹ Gregor (1996), p. 389

⁶³⁰ For the full definition of the Kantian autonomous person, see chapter 3.

⁶³¹ For the development of my opinion regarding the relation between Kant's morality and legality/politics, very helpful were the two following papers of Sorin Baiasu: Baiasu (2016a), pp. 2 -33; and Baiasu (2016b), pp.59-76. In these papers, Baiasu discusses thoroughly the three main positions on the relation in Kant between ethical and politico-juridical principles, upon which the structure of this section is based. Also, I am grateful to Paul Guyer and Howard Williams who helped me to consolidate my soft dependentist position.

points in the *Metaphysics of Morals* that show that the principle of right may be derived from the fundamental principle of morality, e.g. Kant's remark in 6:237 that the innate right to freedom belongs to human beings by virtue of their *humanity*.⁶³² Also, Wood mentions Kant's 6:219, in which it is claimed that legal duties can *also* be considered as ethical duties.⁶³³ Here Wood claims that insofar as legal duties can *also* be considered as moral duties, then they may be brought under the principle of morals, so that it could legitimately be argued that, to some extent, Kant's theory of right falls under the principle of morality.⁶³⁴ Nevertheless, Wood generally disagrees with the association of the principle of morality with the principle of right. He says that Kant explicitly discredits the idea that the principle of right is derived from the fundamental principle of morality by declaring in 6:396 in the *Metaphysics of Morals* that, unlike the doctrine of virtue, which is synthetic, the principle of right is analytic; hence it would be nonsense one to derive an analytic proposition from a synthetic one.⁶³⁵

Not all Kant scholars agree with the above understanding of the (non-) relation between Kant's moral and legal theory. For instance, Jurgen Habermas argues that Kant's legal and political theory is straightforwardly derived from Kant's moral philosophy. That is to say, legal laws derive from the moral law by limitation, namely by limiting the application of the CI to actions characterised by externality.⁶³⁶ Hence, Habermas seems to understand Kant's moral philosophy, in the *Groundwork of the Metaphysics of Morals*, and his system of justice, as it is developed in the *Metaphysics of Morals*, as two interconnected domains. Habermas writes:

⁶³² Gregor (1996), p. 393; see also Wood (2002), p. 6.

⁶³³ Gregor (1996), p. 383.

⁶³⁴ Wood (2002), p. 9.

⁶³⁵ Gregor (1996), p. 526; see also Wood (2002), p. 7. Also, Willascheck has argued in favor of the independentist position in: Willascheck (1997), pp. 205-227

⁶³⁶ Baiasu, S. (2016): 2 -33

'... starts with the basic concept of the moral law and obtains juridical laws from it by way of *limitation*. Moral theory supplies the overarching concepts: will and free choice, action and incentive, duty and inclination, law and legislation serve in the first place to characterize moral judgment and action. In the legal theory, these basic moral concepts undergo limitations... According to Kant, the concept of law does not refer primarily to free will, but... it pertains to the *external relations* of one person to another; finally it is furnished with the *coercive power* that one person is entitled to exercise with respect to another in the case of infringement... Thus limited, moral legislation is *reflected* in juridical legislation, morality in legality, duties of virtue in legal duties, and so forth. This construction is guided by the Platonic intuition that the legal order imitates the noumenal order of a 'kingdom of ends' and at the same time embodies it in the phenomenal world'.⁶³⁷

Finally, there are some Kant scholars who do not follow either a strict or pure independentist (e.g. Wood), or a dependentist (e.g. Habermas) view regarding the relation between Kant's moral and legal theory. For instance, Paul Guyer writes: 'Strictly construed, the claim that Kant's universal principle of right is not derived from the Categorical Imperative, understood as the requirement to act only on maxims that can also serve as universal law, is correct because the principle of right... does not concern our maxims at all, a fortiori their universality. However, any broader claim that the principle of right is not derived from the fundamental principle of morality, in the sense of the fundamental concept of morality, is surely implausible'.⁶³⁸ That is to say, according to Guyer, Kant's legality cannot *typically* be seen as derived from his morality, given that the latter refers to our maxims, namely to our subjective principles of volition, while the former does not concern our maxims at all, rather it refers only to practical law.⁶³⁹ However, Guyer does not

⁶³⁷ Habermas (1996), pp. 105-106

⁶³⁸ Guyer (2002), pp. 25-26

⁶³⁹ For the distinction between the subjective principle of volition, and practical law, see 4:400 in the *Groundwork of the Metaphysics of Morals*, in Gregor (1996), p. 55.

exclude the *possibility* of such a derivation in the case in which the principle of right is considered to be derived from the ‘fundamental concept of morality’.

Considering the three approaches to the relation between the Kantian morality and legality above, I cannot accept Wood’s sharp independentist thesis concerning Kant’s morality and legality; and, of course, the possible subsequent claim that because of the sharp independence between Kant’s morality and legality, the new Duty-Based Approach, which is based on their dependence, is not correct. This does not seem to be plausible, given that Wood actually misunderstands the concept of ‘right’ in the Kantian passage he invokes. In particular, when Kant writes that ‘...right, namely that which is not mingled with anything ethical’, Kant means only the right in the *strict* or *narrow* sense, for example, a creditor’s right to require his debtor to pay his debt.⁶⁴⁰ Kant explicitly says in 6:232, both in the title of the relevant section and the main text, that by this ‘right’ he means *only* a strict right, or a right in a narrow sense, namely a pure *legal* right with practical scope that simply makes transactions more efficient.⁶⁴¹ Apparently, this does not exclude the possibility of a right in a broad sense, for example, a human right, as we understand it today, or as Kant himself understands and states it in the diagram of 6:340.⁶⁴² Even if Kant has not fully developed such an argument, a thorough examination of his opus does leave room for arguing that a right in a broad sense, or a moral right, or a non-strictly *legal* right, such as a human right, can indeed be derived from the principle of morality.

Also, Wood’s claim that Kant’s explicit discretion of the possibility that the principle of Right is derived from the fundamental principle of Morality in 6:396, based on the idea that the principle of Right, unlike the doctrine of virtue, is analytic, refers only to *legal* rights corresponding to *legal* duties. However, as Wood himself mentions, in 6:219 Kant claims that legal duties can *also* be considered as moral

⁶⁴⁰ Gregor (1996), p. 389.

⁶⁴¹ Gregor (1996), pp. 388-389.

⁶⁴² Gregor (1996), p. 395.

duties.⁶⁴³ Hence, insofar as a legal duty, which typically belongs to the external domain of Right, can also be considered as a moral duty, which typically belongs to the internal domain of Morality, the possibility of a right in the broad sense, that is a moral right, or a non-strictly legal right, or a human (and socioeconomic) right to be derived from morality is plausible. Eventually, contradicting himself, Wood admits that it could legitimately be argued that Kant's theory of right falls under the principle of morality in this case.⁶⁴⁴

Further, a dependentist thesis such as Jurgen Habermas's seems to be, in principle, implausible as well. It cannot simply be argued that Kant's legal and political theory is straightforwardly derived from Kant's moral philosophy. According to Kant, the domain of morality is, in principle, distinct from the domain of law in the strict sense, or of *legal* law. As has been mentioned above, Kant claims in 6:232 that by 'right' he means *only* a strict right, or a right in a narrow sense, namely a pure *legal* right with practical scope that just makes transactions more efficient;⁶⁴⁵ for example, the right of the seller of a property in England to use the buyer's deposit between exchange of contracts and completion, in order to purchase another property.⁶⁴⁶ Apparently, such a right cannot belong to the moral realm. Consequently, Habermas's view is a generic view, through which it is ignored Kant's original distinction between the internal domain of morality and the external domain of *legal* law. Habermas's view might be plausible only in the case of a right in a broad sense, or a moral (human and socioeconomic) right. As has been mentioned, insofar as a *legal* duty can *also* be considered as a *moral* duty, the possibility of a right in the broad sense, that is a *moral* right, or a non-strictly legal right, to be derived from morality is plausible within the Kantian opus.

⁶⁴³ Gregor (1996), p. 383.

⁶⁴⁴ Wood (2002), p. 9.

⁶⁴⁵ Gregor (1996), pp. 388-389.

⁶⁴⁶ Letsas, G. (2014)

For my part, a sober approach is the third one, that is, Guyer's view.⁶⁴⁷ To be more specific, it is true that legality cannot, in principle, be derived from morality, given that in the case of morality the person has to act on certain internal maxims, while this is not the case for legality in the *strict* or *narrow* sense. For example, when one is not lying because this is the right thing to do, she acts on certain maxims; while when she is not lying, because she considers the consequences of lying, e.g. a certain penalty, she does not act on internal maxims. However, as Guyer says (yet he does not fully argue), any broader claim that the Kantian principle of right in general is not derived from the fundamental principle of morality, in the sense of the fundamental concept of morality, is implausible.⁶⁴⁸ Otherwise, how can a principle of distributive justice, for example a principle of distribution of the World Health Organization, which serves as a standard for distributing qualitative, safe, and effective pharmaceutical products to the market, be seen as non-derivable from morality? In the following two paragraphs, I try to fill in the gap in Guyer's argumentation by showing that there is indeed coherence between Kant's morality and legality.

More specifically, the Kantian principle of right, or legality, 'in a broad sense', does not refer to rights in the 'strict or narrow sense', but to *human* rights (as well as to socioeconomic rights by extension). While in 6:232 in the *Metaphysics*, Kant argues that 'strict right... is not mingled with anything ethical', in 6:239, as well as in his 6:240 diagram, he clearly shows that 'the right of human beings', or 'human rights', are actually derived from morality, namely from moral duties. Therefore, while the claim that strict rights, or rights in the narrow sense, cannot be derived from morality seems to be correct in Kantian terms, this is not the case for rights in a broad sense, that is, human rights, or 'the right of human beings' (in Kant's 18th century terminology).

⁶⁴⁷ A sober approach is also supported by Sorin Baiasu. Baiasu argues that the complexity of Kant's account makes it possible for him to accommodate both independentist and dependentist views of the relation between moral law (in singular) and legal laws (in plural); in: Baiasu: 2 -33

⁶⁴⁸ Guyer (2002), pp. 25-26

Further, it must not be ignored the fact that the supreme principle of morality, that is, the autonomy of the will, or the good will, as it is defined in 4:440, in the *Groundwork*, does not actually disappear in the *Metaphysics of Morals*. Recently Oliver Sensen has argued that Kant is still committed to autonomy while writing the metaphysics of morals, although he fails to mention it.⁶⁴⁹ I think Sensen's point is correct. Thus, contrary to other authors who argue that the autonomy of the will disappears in the *Metaphysics of Morals*,⁶⁵⁰ my claim is that Kant still persists in considering it the *supreme* principle of morality in his legal and political theory. It is no accident that in 6:219-221, in the Introduction to the *Metaphysics of Morals*, Kant specifies it through the analysis –admittedly in an obscure and abstract manner– of its two main functions, namely the ethical and the juridical lawgiving.⁶⁵¹ Ultimately, the Kantian moral autonomy is discussed in 6:383 and 6:480 as the property of practical reason to being the source of moral laws independently of inclinations.⁶⁵²

Finally, given that human and socioeconomic rights are derived from Kant's ethics, hence they are moral rights, even in the case in which they have become law through codification and ratification, their normativity cannot be divorced from ethical normativity. Hence, when they are invoked by the relevant parties, either by the right-holders, or by the duty-bearers, human and socioeconomic rights should not be considered just as pure legal norms,⁶⁵³ but primarily as moral laws (in plural), of which normativity is derived from the moral law (in singular).⁶⁵⁴ Overall, in the case of human and socioeconomic rights, in particular, legality cannot remove morality. Ultimately, the (Kantian) duty-based philosophical foundation of human and socioeconomic rights, in the present thesis, shows that we can override the

⁶⁴⁹ Sensen (2013)

⁶⁵⁰ See for instance Kleingeld (2018)

⁶⁵¹ Gregor (1996), pp. 383-385.

⁶⁵² Gregor (1996), pp. 515, 593

⁶⁵³ See Kelsen, H. (1967)

⁶⁵⁴ For a similar view, see Demiray and Baiasu. (2016), pp. 11-20

discussed 'rivalry', between the independentists and the dependentists scholars above, treating the Kantian opus as a philosophical work with at least some degree of continuity and coherence, in spite of numerous antinomies and contradictions.

4. Why we have the duty to treat the dead with dignity?

'April is the cruellest month, breeding
Lilacs out of the dead land, mixing
Memory and desire, stirring
Dull roots with spring rain...'

T.S. Eliot, The Burial of the dead, *The Waste Land*

In this last section, I discuss an intriguing issue that has been only mentioned above. As has previously been indicated, within the context of rights discourse, the case of non-living human beings differs from other cases, such as the case of a normal adult human being, an embryo, a baby, a child, a comatose patient, a mentally disabled, an immigrant, a refugee, an 'apatris', a poor, a homosexual, and so forth. Obviously, in the case of a non-living human being we cannot speak of a rights-holder. Additionally, although it still has the genetic basis for moral agency (DNA), a corpse cannot realize this intrinsic capacity anymore. Thus, it cannot be considered as a duty-bearer.⁶⁵⁵ It might be argued then that the new Duty-Based Approach could hardly be applied to the case of non-living human beings. However, such a claim is too hasty. The new Duty-Based Approach has its place even in this difficult case.

⁶⁵⁵ I think the same could be claimed for androids and humanoid robots (AHR). Although AHR may acquire the genetic basis for moral agency (DNA), e.g. through infusion, they cannot actually realize it, given that the realization of moral agency presupposes the exercise of autonomous agency. But AHR cannot exercise their autonomous agency, as, by definition, they lack one of its basic elements, that is, the freedom to self-legislate. AHR are doomed to remain machines in the hands of software programmers and developers, who shall (and should) always set the standards of their operation, and control their development properly (duty-bearers) in favour of all others (right-holders).

More specifically, in what follows, I develop an argument for the justification of our duty to treat the dead with dignity.

The day before my father's funeral, I remember my mother saying that we have a duty to treat my father with dignity. Recently, I read in the Guardian that, among all other indignities Syrians have endured during the last 7 years, from poor treatment at the border and residency offices to humiliation and abandonment by immigration hostile countries, they have also faced the indignity to finding a place for those who have died. For weeks or months corpses are left in morgues, cardboard boxes, even in the backs of taxis. The problem does not only consist in the lack of space to bury the dead bodies, but also in the fact that most Syrians cannot afford the cost of burial.⁶⁵⁶ Finally, about a week ago, I noticed that the name of one of the finest funeral directors throughout the UK is 'Dignity'.⁶⁵⁷ The question then arises as to why we have the duty to treat the dead with dignity? For those of us who believe that intuitions, or universally held beliefs, are not adequate enough to explain why things should happen in a certain way, deeper reasons must be found to support these intuitions or universal beliefs. In the following analysis some explanations are given as to why we have the duty to treat the dead with dignity.

To begin with, it could be argued that it is a violation of the dignity of the dead if, for example, we leave their bodies unburied to be eaten by animals, because the dead had human dignity while they were alive. Additionally, it can be argued that we have to treat them with dignity because they still have dignity. Further, it could be claimed that the dead have to be treated with dignity because, through such a treatment, we, in effect, show reverence toward God who has created us all. Moreover, it could be claimed that the dead have to be treated with dignity not because *they* have dignity, but because this is a virtuous act that benefits the

⁶⁵⁶ For further information regarding this issue, read the Guardian, available from:

<https://www.theguardian.com/world/2017/mar/30/lebanon-no-space-syrian-refugees-graves-bury-dead> [accessed 27 February 2018]

⁶⁵⁷ <https://www.dignityfunerals.co.uk/funeral-services/about-us/our-branches/#> [accessed 27 February 2018]

virtuous agent herself. For instance, it could be said that the fulfillment of the relevant duty by relatives and/or friends of the dead, makes them feel contentment, which further promotes the flourishing of their own lives. Recently, inspired by the Kantian Formula of Humanity, according to which we must act so that we use humanity whether in our own person, or in the person of any other, always at the same time as an end never merely as a means, Michael Rosen concluded that a dignified treatment of the dead eventually denotes honor or respect of humanity in our own person.⁶⁵⁸ In what follows, I show why all the aforementioned reasons are inadequate to explain why we actually have the duty to treat the dead with dignity.

1. Initially, concerning the claim that it is a violation of the dignity of the dead if, for example, we leave their bodies unburied to be eaten by animals, either because they had human dignity in the past, or because they still have dignity, it could be argued that, even though the dead could have had dignity while they were alive, they can no longer possess it, given that, as has previously been analyzed, dignity is, in Kantian terms, effectively an inner value and feeling arising from the *realization* (consciousness) that one has done a morally good act.⁶⁵⁹ But, apparently, the dead lack any cognitive and emotional capacities.

2. Further, treating the dead with dignity as an expression of reverence towards God who has created us has nothing to do with the dead him/herself. Rather it is a symbolic act which simply refers to our personal relationship with God. Incidentally, not all people are religious believers; there are indeed many atheists in the world. Hence such a claim cannot apply to them.

3. Moreover, virtue ethicists argue that treating the dead with dignity benefits the agent herself. This is, in my view, an egoist claim, which actually annihilates the moral value of the treatment of the dead with dignity.

4. Finally, concerning Rosen's thesis, this could be counter-argued by the clear Kantian distinction at 6:240 in the Doctrine of Right, between moral duties to oneself and moral duties to others.⁶⁶⁰ Considering this distinction, it can hardly be argued

⁶⁵⁸ Rosen (2012), p. 157; see also Kant's Formula of Humanity in 4:429, in Gregor (1996), p. 80.

⁶⁵⁹ See also 4:394 in Gregor (1996), p. 50.

⁶⁶⁰ Gregor (1996), p. 395.

that the fulfillment of a duty towards others, e.g. the dead, is identified with the fulfillment of a duty towards oneself.

Contrary to all previous claims, my deontological view is that **we have a duty derived from our good/autonomous will to treat the dead with dignity because this is the right thing to do**, independently of any other religious, consequentialist, and virtue ethicist considerations. Through the application of the new Duty-Based Approach, four issues are specified: 1) the grounds of the moral duty to treat the dead with dignity, 2) who the duty-bearers are, 3) the content of this moral duty, and finally 4) the consequences of its non-fulfillment. I start with the determination of the grounding basis of our moral duty to treat the dead with dignity.

1. Our moral duty to treat the dead with dignity, namely our duty to bury the dead body, or cremate the corpse, is grounded in our **good will**. That is to say, the burial of the dead body, or the cremation of the corpse, by us, is the result of our positive response, as rational human beings, to the categorical ‘voice’ of reason, or the common to all rational human beings’ genetic basis/intrinsic capacity⁶⁶¹ for moral agency (rationality). This ‘voice’ of reason in us ‘commands’ compliance with the moral law, according to which we must bury the dead body or cremate the corpse because this is our moral duty, or because this is the right thing to do, or for the sake of moral law alone, independently of any other concerns related to ourselves, or the dead, or any other.⁶⁶² All rational human beings can listen for/to the *same* inner ‘voice’, if they pay attention to their inner self, and learn to quiet their minds.⁶⁶³ Ultimately, it must be pointed out that the reason ‘commanding’ compliance with the moral law is not an absolute ruler, or despot. If reason was a tyrant, then there wouldn’t be millions of people who do not respect it. For example, Hazel Maddock would not have left the corpse of her mother unburied for up to six months, in order to keep her benefits.⁶⁶⁴ Rather, reason is understood in Aristotelian terms as the

⁶⁶¹ See further Liao (2015), pp. 18, 19

⁶⁶² Gregor (1996), p. 89.

⁶⁶³ See 4:421, in Gregor (1996), p. 73

⁶⁶⁴ Hazel Maddock pleaded guilty at Liverpool Crown Court to unlawful prevention of burial and benefit fraud, see further: <http://www.bbc.co.uk/news/uk-england-merseyside-13987322> [Accessed 6 May 2018]

'right reason' (*orthos logos*), or rational inner 'voice' which can only be 'listened' for/to by those whose opposite 'voices' of natural inclinations, personal interests, wishes, desires, and so on, are not 'screaming'.

2. The duty to treat the dead with dignity is a '**specific**' duty.⁶⁶⁵ More specifically, it is not a duty of *all* others, but a duty of *specific* others, e.g. the relatives or/and the friends of the dead, and local authorities. For instance, not all others had the duty to bury the dead body of my father. It was only the duty of his relatives, friends, and the local authority to bury him. Apparently the same applies to the example of the Syrian corpses above. Eventually, the duty to treat the dead with dignity does not require actions or omissions by all, but only by specific duty-bearers.

3. The duty to treat the dead with dignity consists, in principle, only in the duty of relatives or/and friends, as well as the local authority, to bury the dead body, or cremate the corpse. This duty cannot also be extended to the duty of individuals and the local authority to carry out all other ceremonies held in commemoration of the dead. Apparently, all these commemorations are related to specific religious dogmas, or philosophical worldviews, that cannot be generally compelled or enforced.

4. The duty to treat the dead with dignity, that is to say, the duty to bury or cremate the dead body is a specific perfect duty of right, that is, a duty which cannot be overridden, with further legal consequences arising from its non-fulfillment. Apparently, contrary to the duty to bury or cremate the corpse, any other rituals related to specific religious dogmas or philosophical worldviews, of which omission may only lead to cognitive or emotional experiences, e.g. the feeling of guilt of relatives or/and friends of the dead man, are simply regarded 'imperfect duties of virtue', which can be overridden, without any legal consequences. It is not accident that only the burial and the cremation of the dead are mentioned in the Public Health (Control of Disease) Act 1984.⁶⁶⁶

⁶⁶⁵ See Kant's division of duties in the *Metaphysics of Morals*, in Gregor (1996), p. 395.

⁶⁶⁶ See <https://www.legislation.gov.uk/ukpga/1984/22/part/III/crossheading/disposal-of-dead-bodies> [accessed 20 February 2018].

Overall, because the duty to treat the dead with dignity, in the form of the duty to bury or cremate the corpse, (1) is grounded in the moral concept of the good will, (2) refers to specific individuals and local authorities, (3) is a perfect duty of right which cannot be overridden, and (4) has legal consequences, is regarded eventually as a moral specific perfect duty of right.⁶⁶⁷ At this point, three significant issues must be clarified: **first**, who has the right (if there is such a right) to the fulfillment of the aforementioned duty; **second**, how this right is specifically derived from the duty to treat the dead with dignity; and **third**, to whom the inner value of human dignity, in the phrase ‘to treat the dead with dignity’, is ultimately attributed.

Regarding the first issue, apparently the dead body cannot claim such a right. Only the living human beings, whose hygiene and health are in danger in the case of the non-fulfillment of the relevant duty, can claim it. Further, given that duty-bearers are not all, individuals, states and institutions, but only specific others, namely the relatives and friends of the dead, as well as the local authorities, the aforementioned right to hygiene and health is not regarded as a human, but as a socioeconomic right, which is typically entailed in the socioeconomic right to health, as it is stated in article 12 of the International Covenant on Economic, Social, and Cultural Rights.⁶⁶⁸ Ultimately, this claim-right is effectively grounded in the moral specific perfect duty of right of relatives, friends, and the local authorities to bury or cremate the corpse.

Moving on to the second issue, that is, the issue of how this socioeconomic right is specifically derived from our specific perfect duty of right to treat the dead with dignity, once again I invoke the 6:239 passage, in the *Metaphysics of Morals*, in which Kant argues that ‘... welcher ein pflichtgebieten der Satz ist, aus welchem nachher das Vermögen, andere zu verpflichten, d.i. der Begriff des Rechts, **entwickelt** werden kann’;⁶⁶⁹ or ‘... the proposition which commands duty, from which the capacity for putting others under obligation, that is, the concept of right

⁶⁶⁷ See also Kant’s division of duties in the *Metaphysics of Morals*, in Gregor (1996), p. 395.

⁶⁶⁸ See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> [accessed 22 February 2018]

⁶⁶⁹ See Kant (2013), p. 346

can afterwards be **generated**.⁶⁷⁰ Eventually, it could be claimed that without the moral specific perfect duty of right to treat the dead with dignity, that is to say, to bury or cremate them, the right to hygiene and health of other living human beings would not even exist. The living human beings, whose health is in danger, have the (socioeconomic) right to claim the burial, or the cremation, of the dead body by the relevant duty-bearers because these duty-bearers have a specific duty to fulfill a moral duty arising from their good or autonomous will, independently of any other considerations or concerns.

Finally, concerning the third issue, that is, the issue of dignity, it can be claimed that dignity, in the statement ‘we have the duty to treat the dead with dignity’, does not refer, or attributed, either to the dead himself, as it is often mistakenly thought, or to those other living human beings who have the right to claim the burial or the cremation of the dead body. Instead, it is attributed or refers to the autonomous duty-bearers, who have the capacity to respect the moral idea of reason, such as the idea of the fulfillment of their moral duty to treat the dead with dignity. Eventually, the dignity of duty-bearers here is identified with an ‘inner value’ attributed to them by others, as well as an ‘inner feeling’ of their own value resulting from the realization, through the treatment of the dead with dignity, of their higher self as autonomous or good persons in the Kantian sense.⁶⁷¹

Overall, we may represent this intriguing duty to treat the dead with dignity, as well as the subsequent socioeconomic right of the living human beings to claim the fulfillment of the aforementioned duty, in the following diagram.

⁶⁷⁰ The passage is translated by the author of the present thesis.

⁶⁷¹ Gregor (1996), p. 50.

(Kantian) good or autonomous will



Dignity (inner feeling)



(External) moral duties



- 1. Specific perfect duty of right to treat the dead with dignity → Socioeconomic (claim) right of living human beings**
- 2. Specific imperfect duty of virtue to carry out commemorative ceremonies → No right**

Ultimately, the relatives and friends, as well as the local authorities, wherever Syrians die, either in Lebanon or in Greece, have the specific perfect duty of right to bury or cremate them. Apparently, I had myself, along with all our relatives and friends, as well as the local authority in Athens, exactly the same duty to bury the dead body of my father. However, my duty to carry out all other commemorative ceremonies is just a specific imperfect duty of virtue, which can be overridden – although, none of my ‘unburied’ memories can actually be overridden.

What must be pointed out here, before I move on to the conclusion of the present chapter, is that my focus in the previous analysis was on those who have died; and not those who, for example, because of a terminal illness, claim their alleged right ‘to die with dignity’, hence they often call on organizations, such as the Swiss organization ‘Dignitas’, for support and assistance to die.⁶⁷² These, i.e. euthanasia and assisted suicide, are two controversial issues, a (Kantian) concrete negative response to which is given through the analysis of the moral concept of human dignity in chapter 2, as well as through the main argument of the thesis in the

⁶⁷² See: <http://www.dignitas.ch/?lang=en> [accessed 29 November 2017]

present chapter.⁶⁷³ As has been shown, human dignity is not actually possessed by the *right-holders*. That is to say, dignity is not the grounding basis of our rights, as it is often argued. Rather dignity is a feeling possessed by, as well as a value accorded to the (autonomous) *duty-bearers*, who fulfill their external moral duties, from which our human and socioeconomic rights are further derived. Consequently, those (right-holders) who claim that they have the right to die with dignity because *they* have dignity cannot legitimately invoke this reason in order to claim their alleged right to assisted suicide. This thesis may also be considered along with the popular Kantian claim that suicide is an irrational act because it debases humanity in one's person.⁶⁷⁴

In addition, it cannot legitimately be claimed that doctors, relatives, and friends have the *specific* duty to assist those who, suffering from a chronic and irreversible illness, wish to commit suicide. My Kantian counter-argument here is that, through such an act (crime, killing, murdering), doctors, relatives, and friends intentionally transgress or disobey their moral perfect duty to respect the right to life of the terminally ill, independently of whether they (the terminally ill) are enjoying their life.⁶⁷⁵ Ultimately, this reasoning applies not only to the assisted suicide, but also to all other hard cases in law today, such as euthanasia, abortion, animal rights, and so forth.

5. Conclusion

In this chapter I presented the new (Kantian) duty-based account for the justification of human and socioeconomic rights, or the Duty-Based Approach (DBA). Within this context, it became clear why a truly Kantian justification can actually be supported and proposed for *human* rights only; while for socioeconomic rights we can speak of

⁶⁷³ According to the NHS definitions, while euthanasia is the act of deliberately **ending** one's life, assisted suicide is the act of deliberately **assisting** or **encouraging** another person to kill themselves; see <https://www.nhs.uk/conditions/euthanasia-and-assisted-suicide/> [accessed 10/2/2019]

⁶⁷⁴ See 6:240 and 6:422-423, in Gregor (1996), pp. 395, 546-547.

⁶⁷⁵ See 4:430 and 6:239, in Gregor (1996), pp. 80, 395.

a duty-based justificatory account simply inspired by the Kantian opus. This distinction is important given that the Kantian, as well as any other philosophical text from the past, has to be respected by contemporary thinkers, whose primary duty is not to project their own thoughts or obsessions onto it. After this, I responded to four possible objections against it, namely that the Duty- Based Approach: 1) degrades the idea of rights, 2) wrongly distinguishes between human and socioeconomic rights, 3) is not correct because it is based on the idea that Kant was a moral foundationalist; while he was actually a moral constructivist, and 4) is not correct because it considers the Kantian moral and legal/political philosophy as two domains with at least some degree of continuity and coherence. Finally, I focused on and discussed a case which differs from other cases (e.g. the case of a normal adult human being, an embryo, a baby, a child, a comatose patient, a mentally disabled, an immigrant, a refugee, an 'apatris', a poor, a homosexual, and so forth), namely the case of non-living human beings. Ultimately, having answered the main question of the thesis, namely 'what is the philosophical basis of human and socioeconomic rights?', I can move on to the final chapter (*Summary and Implications*), in which, along with the summary of the main points of the thesis, I provide some significant practical implications, especially in the areas of **law** and **politics**. In addition, I discuss the DBA in relation to one of the most urgent problems in the world today, that is, the problem of 'extreme child poverty'. Finally, I take a step further arguing that the DBA may be seen as the starting point for the formulation of a future duty-based account of international justice in the form of a new Bill of duties in international level.

1. Introduction

In the previous chapter I have presented and analyzed the new (Kantian) duty-based justification of human and socioeconomic rights, or the Duty-Based Approach. Having answered the main question of the thesis, namely ‘what the philosophical foundation of human and socioeconomic rights is’, it is now clear why the word ‘Kantian’ is in parentheses. The reason is that, as has been shown, one can legitimately argue in favour of a *truly* Kantian philosophical foundation of *human* rights; yet the same cannot legitimately be claimed for *socioeconomic* rights, for which a duty-based justificatory account can be formulated simply *inspired* by the Kantian opus.

My purpose in this chapter is twofold: first, to review the findings presented in chapters 1 to 4 and, second, to discuss some further implications of them, especially in the areas of **law** and **politics**. In section three I shall attempt the **application** of the new duty-based justificatory account to one of the most urgent, yet still unstated, rights today, namely the right of children to freedom from extreme poverty. Finally, I shall take a step further arguing that the new duty-based justification for human and socioeconomic rights may be seen as the starting point for the formulation of a future duty-based account of international justice, in the form of a new **Bill of duties** in international level. A hasty reader could find in this final chapter all the core concepts of the dissertation, and the way in which they are interconnected. However, the patient reader has to pass through all the preceding chapters in order to really fathom them.

2. Thesis summary and implications

In the first chapter of the thesis I have provided a concise account of the historical development of the idea of human rights. It has been stressed that after the end of World War II the concept of human rights has been widely accepted. Relevant rights have further been ratified by most of the countries, contributing to a great extent to the establishment not only of our contemporary international and regional legal orders, but also of our constitutional institutions. However, as has been pointed out, the domination of the idea of human rights for more than five decades, that is, from the end of the Second World War until the beginning of the 21st century, seems to have been weakened during the last two decades, in which human rights have been challenged a lot. The opponents of human rights now argue that these rights have failed to accomplish their objectives, that there may not be such things as human rights, and, eventually, that we should reject the idea of human rights. The critique against human rights comes not only from ordinary people, journalists, politicians, and legal practitioners, but also from a number of political theorists, legal scholars, and moral philosophers.⁶⁷⁶ In chapter 1, I have focused on and discussed the two main problems, because of which human rights have come under increasing attack in recent years.

First, I have argued that the core human rights documents, which have been mentioned above, have actually been described in extremely abstract terms. But, for human rights to be respected, they have first to be understood. This is helped only if the expression of such rights is clear and specific. Also, a non-clarified human right cannot easily be interpreted in courts, hence to be properly enforced. Finally, an abstract concept, in general, cannot further be implemented by political institutions. Second, I have claimed that because of the fact that human rights are typically seen as a western product, imposed top-down by western circles unto the rest of the world, it is difficult to be universally accepted and respected.

Recognizing the weight and urgency of these two problems, yet insisting on the value of human rights, I have further argued that we should avoid a nihilistic

⁶⁷⁶ See for instance, MacIntyre (2007), pp. 68-69

stance towards them. Hence, I have proposed a new philosophical foundation for them aiming to contribute to the resolution of the aforementioned problems, as well as to the enhancement and restoration of our confidence to them. Thus, contrary to legal positivists, who claim that we do not need to know what the nature of law is, and whether it applies universally, I have argued in favour of a deeper philosophical justification of the standards that are set out in the documents. Within this context, in the first three chapters of the thesis, I have discussed some noteworthy contemporary rights-based, dignity-based, and Kantian-based justifications. In what follows, I focus on their deficiencies, and their treatment through the DBA.

2.1 Naturalistic and political justifications

Initially, as has been pointed out, according to the 'rights-based' naturalistic, or traditional, or orthodox accounts, human rights are moral rights, which are possessed by all people in all times and all places simply in virtue of their humanity. In spite of the popularity of these justifications, in the first chapter of the thesis, it has been claimed that these accounts face a number of problems.

More specifically, by focusing only on the actual normative agency of human beings, Griffin's agency-based justificatory account encounters problems with respect to human beings who lack the capacity to act as autonomous moral agents, e.g. children, the severely mentally disabled, the dementia sufferers, and so forth. Similar problems appear in Nussbaum's capabilities approach. Hence, contrary to Griffin's justification, the Duty-Based Approach in the present thesis avoids the relevant flaw. To be more precise, while Griffin's agency-based account presents the relation agency-rights in such a way that the attribution of human rights to individuals is the result of their normative agency, according to the new duty-based justificatory account, the attribution of human and socioeconomic rights, respectively, is not the result of a distinguishing feature of *right-holders*, but of the commitment of autonomous, rational *duty-bearers* to their universal perfect duties of right to others, as well as to their specific perfect duties of right to others.

Consequently, within the context of the new Duty-Based Approach, *all* human beings, including embryos, children, the mentally disabled, coma patients, even criminals, are protected, not because *they* have normative agency, but as a result of the fact that there are *others* (duty-bearers), from whose dutiful judgments and actions, their human and socioeconomic rights originate. One could invoke here the 6:314-315 in the *Metaphysics of Morals*, in which Kant makes the distinction between *active* and *passive* citizens. Kant writes: ‘... these are mere underlings (*Handlanger*) of the commonwealth because they have to be under the direction or protection of other individuals, and so do not possess civil independence’.⁶⁷⁷ One could easily conclude that, given their lack of rationality, children, the mentally disabled, the coma patients, and so forth, should also be *protected* and *directed* by those who fully exercise their rational capacities, and fulfill their duties; hence, the former acquire human and socioeconomic rights, as a result of the fact that the latter fulfill their universal perfect and specific perfect duties of right towards them.

Moreover, in chapter 1, I have discussed Finnis’s seven fundamental goods, as well as Raz’s interest-based accounts for the justification of human rights. Within this context, I have argued that one might legitimately object to these theories that what distinguishes rights from goods and interests is the fact that, in contrast to the former, the latter do not involve duties, so that they can be impaired without any wrong being committed. For example, my interest in being someone’s lover can be unsatisfied or ‘violated’ without any wrongdoing. But this is not the case for rights, which are typically seen as closely connected with duties. Hence, contrary to these goods/interests-based accounts for the justification of rights, the Duty-Based Approach does not simply presuppose that duties are *connected* with rights, or that duties and rights *correspond* to each other, or that those who have rights *have also* duties, and vice versa; but that our human and socioeconomic rights are *generated* or *developed* from moral duties.

Furthermore, as has been pointed out in the first chapter of the thesis, through the ‘basic needs’ justificatory accounts, a number of significant rights, such

⁶⁷⁷ Gregor (1996), pp. 458-459.

as the civil and political rights, remain unsupported within the constrained context of this type of justificatory approaches. That is to say, within the context of a basic needs account, the real source of civil and political rights is not determined. For example, there is no room left for the justification of the right to fair trial.⁶⁷⁸ But civil and political rights are a significant part of the International Bill of Rights. Incidentally, given the aforementioned distinction between human and socioeconomic rights, civil and political rights are identified with *human* rights. An account through which our civil and political rights, that is, our human rights are not effectively protected is implausible. Contrary to the 'basic needs' accounts, the new Duty-Based Approach gives special attention to these rights: in particular, it is clearly shown that they derive from our universal perfect duties of right to others.

Further, apart from the naturalistic, or traditional, or orthodox justifications of human rights, in chapter 1, I have also discussed some significant political and practice-based accounts, according to which human rights are considered to be *legal* and *political* rights generated within the international political practice. The definition of rights within the context of this family of justifications directly clashes with the Duty-Based Approach. Contrary to the former, the latter clearly shows that human and socioeconomic rights *derive* from morality, hence they are *moral* rights. In what follows, I explain why the Duty-Based Approach is more preferable than the political and practice-based accounts discussed in chapter 1.

As has been pointed out, Rawls's *The Law of Peoples* was developed within the narrow horizon of the political system of liberalism, and it is strictly restricted to it. But not all countries in the world are liberal democracies. Thus, one could argue that human rights should be based on a wider, or more universal, basis than a liberal democracy, which would be able to guarantee their protection all over the world. Contrary to Rawls's liberal account for the justification of human rights, the Duty-Based Approach is indeed broader, as it originates from our common practical reason, so that by definition it refers to *all* human beings. That is to say, the duty-bearers, from whose fulfilment of duties our human rights derive, are, in principle,

⁶⁷⁸ Cruft, R., Liao, S.M., Renzo, M. (2015), pp. 14-15

all rational (human) beings. Only in the case of socioeconomic rights the burden falls under specific duty-bearers, so that it could be said that the horizon here is narrower than the horizon in the case of human rights which are typically seen as universal rights.

Moreover, as has been stressed in chapter 1, I do not actually understand Raz's claim that human rights are *moral* rights, yet they exist only when the institutional structures favour their fulfilment. As it is clearly shown in chapter 4, only socioeconomic rights are moral rights which need specific institutional structures in order to be fulfilled. But this is not the case for *human* rights, which are, by definition, institution-independent. Hence, Raz's claim is a kind of schema oxymoron. It seems to me that Raz confuses here human rights with the so-called socioeconomic rights which are institution-dependent.

The same counter-argument applies to Beitz's claim that human rights exist and are grounded only in 'modern' societies which have been structured in a way that favours their fulfilment. Contrary to Beitz's account, the new Duty-Based Approach allows for the fulfilment of duties and the protection of the relevant rights, not only in modern societies, but in every society, even in the most isolated societies on earth. Also, through the new duty-based justification, not only states, as Beitz argues, but *all*, individuals, states, and institutions are responsible for the fulfilment of duties, from which rights are afterwards generated. Consequently, the Duty-Based Approach is compatible with the Preamble of the UN's Declaration of Human Rights, according to which: 'every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction'.⁶⁷⁹

⁶⁷⁹ [Online] Available from: <http://www.un.org/en/universal-declaration-human-rights> [Accessed 23rd January 2017]

Furthermore, as has been stressed in chapter 1, the ‘overlapping consensus’ approaches have basically to deal with the problem that the idea of ‘right’ does not look at all familiar to the non-western world. What Michael Ignatieff has found in his recent micro-ethnographic research is that while rights are the language of the states and liberal elites, yet this language is not shared by ordinary people all over the world.⁶⁸⁰ Consequently, I do not consider as successful arguments such as Martha Nussbaum’s which are based on the idea of an ‘overlapping consensus’. Eventually, as has been previously explained, a duty-based approach may be more successful given the fact that, contrary to the idea of rights, which is mostly recognized within the western societies, the old category of ‘duty’ is recognized all over the world.

Ultimately, these intercultural agreements, which have been built upon a contractualist base, without any other moral considerations, cannot effectively be respected by individuals given that they are mostly seen as technical products without any deeper moral background. But deeper moral considerations are necessary given that by nature human beings respect only what they actually understand in depth. Besides, whenever a human right is violated, e.g. a children’s human right, no one claims that the relevant act consists a violation because there is a relevant provision in a human rights document or treaty which has been signed by some nations, e.g. the UN’s Convention on the Rights of the Child. Instead, what it is actually argued is that a children’s human right has *indeed* been violated.

Finally, and that brings me to the end of the review of the justificatory accounts discussed in chapter 1, by giving emphasis solely to the *legal* character of international human rights, Buchanan seems to disregard the fact that *not all* human rights are legal. Ultimately, as has been discussed in chapter 1, Buchanan does not adequately support his justificatory pluralism, as well as the association of morality and legality.

⁶⁸⁰ Ignatieff (2017)

2.2 Dignity-based accounts for the justification of human rights

Following the examination of the naturalistic and political accounts for the justification of human rights, in chapter 2, I have discussed the 'official' justification of human rights, that is, the concept of human dignity. Initially, I have provided a concise account of the historical development of the notion of dignity, from archaic societies until the 21st century, aiming to show its deep legal, philosophical, and theological roots. In addition, I have discussed some critiques against dignity throughout history arising from the fact that dignity is not actually expressed precisely in documents; so that it still remains an abstract concept, which does not allow us to say with certainty that it is the genuine basis of human rights. In particular, I have focused on the attacks against dignity by Arthur Schopenhauer, Friedrich Nietzsche, Oscar Schachter, Ruth Macklin, David Albert Jones, Costas Douzinas, and Michael Rosen.

Moreover, I have stressed the fact that dignity is today on the focus of the human rights discourse. Despite all criticisms, dignity is still claimed to be the genuine basis of human rights. Within this context, I have discussed four of the most important contemporary dignity-based accounts for the justification of human rights: 1) Waldron's legal status conception of dignity as the basis of human rights, 2) Tasioulas's moral status conception of dignity as the foundation of human rights, 3) the Catholic value conception of dignity as the basis of human rights, and 4) the popular Kantian value conception of dignity as the justification of human rights.

Apart from the particular problems of these four dignity-based accounts, which have thoroughly been discussed in chapter 2, here I focus on what appear as the basic flaws of *all* these justifications of human rights. To be more specific, in these dignity-based accounts, a foundationalist claim regarding dignity and rights, that is, a claim that we all have rights because we are all persons with dignity, cannot be legitimately defended. Here are the reasons why such a claim is implausible.

Initially, the moral concept of human dignity is not, as it is popularly argued, an intrinsic or inherent value possessed by the *right-holders*, but an inner value, as well as a moral feeling, acquired by the *duty-bearers* after the fulfillment of their

(external) moral duties. The main problem here is in effect the mistaken interpretation by scholars and legal practitioners of the moral concept of human dignity. As I have argued in chapter 3, through the conceptual analysis of the moral concept of autonomy via the Kantian aesthetic category of the sublime, human dignity appears to be an inner *value* attributed to human beings who fulfill their duties, and, at the same time, a *feeling* of those persons who judge and act in accordance with moral laws commands, namely of persons who do their duties (duty-bearers). Here is the true meaning of dignity as it has been stated in chapter 3 of the thesis:

Autonomy of the will is both the judgment and feeling of autonomous moral agents who, although they feel humiliated by the omnipotence of the moral law, they abandon 'volition', that is, their inclinations, ideologies, wishes and so forth, and, freely self-legislating –yet requiring the same legislation from all others– respect the moral ideas of reason, such as the fulfillment of their moral duties, realizing their higher self as autonomous moral agents (self-approbation⁶⁸¹), while feeling (and being considered by others), at the same time, that they are persons with dignity.

Hence, it is no accident that not only in the *Critique of Judgment* (e.g. Ak. 273), but also in many other parts of his opus, Kant explicitly associates (yet *not* identifies) the moral feeling of dignity with the aesthetic feeling of the sublime. For instance, in 4:426 in the *Groundwork of the Metaphysics of Morals*, Kant writes: '... the **sublimity** and inner **dignity** of the command in a duty...'⁶⁸² Also, in 4:439, Kant writes: '... the mere **dignity** of humanity as rational nature... is yet to serve as an inflexible precept of the will, and that it is just in this independence of maxims from all such incentives that their **sublimity** consists and the worthiness of every rational subject to be a lawgiving member in the kingdom of ends'.⁶⁸³ Further, in 4:439-440, Kant writes: '... we thereby represent a certain **sublimity** and **dignity** in the person

⁶⁸¹ See 5:81, in the *Critique of Practical Reason*, in: Gregor (1996), p. 205

⁶⁸² Gregor (1996), p. 77.

⁶⁸³ Gregor (1996), p. 88.

who fulfills all his duties...'⁶⁸⁴ Finally, in 6:435 in the *Metaphysics of Morals*, Kant describes the person who does her duty without disavowing her **dignity**, but with consciousness of her **sublime** moral predisposition.⁶⁸⁵ [Bold letters mine]. Ultimately, what must be stressed is that in spite of the fact that dignity is mentioned several times, it has obviously a secondary role within the Kantian opus. Instead, the concepts of 'autonomy' and 'duty' seem to be Kant's primary concerns.

What must also be pointed out here is that dignity is actually an *inner*, not an *intrinsic*, e.g. in the Catholic sense⁶⁸⁶, value; that is to say, dignity is a moral *capacity*, the realization of which truly takes place only after the actual fulfillment of the relevant moral duties. This is the correct interpretation of the Kantian moral concept of human dignity. Nowhere does Kant mention the word 'intrinsic' or 'intrinsically'. In 4:436 in the *Groundwork*, characterizes dignity as 'an unconditional, incomparable worth';⁶⁸⁷ and in 4:434-435, he writes that '...morality, and humanity *insofar* as it is capable of morality, is that which alone has dignity' [italics mine].⁶⁸⁸ Consequently, the characterization of dignity as an 'intrinsic' or 'inherent' value, either by Catholics, or by Kantians, and others is incorrect.

Further, dignity cannot be the foundation of human rights as it belongs to the *internal* domain of morality, while human and socioeconomic rights typically belong to the *external* domain of law. Here I agree with Andrea Sangiovanni. As has been mentioned previously, Sangiovanni argues that dignity is '... a moral notion that governs the character of our internal attitudes, reasons, and action. It does not govern the "external" domain of Right which sets limits to our actions but remains silent on the character of our reasons or attitudes towards those actions or towards the law governing those actions'.⁶⁸⁹

⁶⁸⁴ Gregor (1996), p. 88.

⁶⁸⁵ Gregor (1996), p. 558.

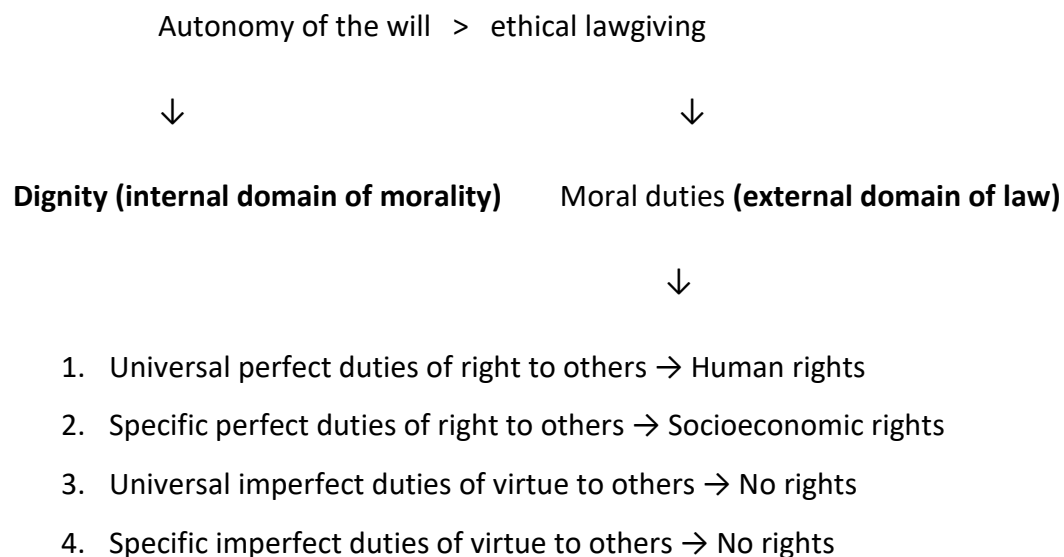
⁶⁸⁶ See chapter 2 of the thesis.

⁶⁸⁷ Gregor (1996), p. 85.

⁶⁸⁸ Gregor (1996), p. 84.

⁶⁸⁹For a similar claim, see Cruft, R., Liao, S.M., Renzo, M. (2015), pp. 684-685

In the similar vein, according to the Duty-Based Approach, dignity seems to be the *internal* value and feeling resulting from the fulfillment of our *external* moral duties, from which our human and socioeconomic rights are afterwards generated or developed. Eventually, dignity does not straightforwardly appear on the external domain of law and justice. Hence it has a secondary role within the contemporary human rights discourse. The fact that dignity cannot be the foundation of human (and socioeconomic) rights is clearly shown in the schema depicting the new duty-based justification of human and socioeconomic rights in chapter 4:



Overall, under the understanding of the moral concept of human dignity as an inner value and feeling which belongs to the internal domain of morality, and is possessed by the duty-bearers, the four popular dignitarian accounts for the justification of human rights, which are discussed in chapter 2 of the thesis, seem to be flawed as they are based on tenuous grounds, that is, on a mistaken interpretation of the concept of dignity itself. Eventually, human beings are respected not because *they* (*right-holders*) have dignity, but because *others* (*duty-bearers*), by showing respect on them, have dignity. Ultimately, **dignity and duties** – from which rights are afterwards developed– are *coordinate* ideas. Incidentally, this claim opposes Waldron’s impression –originating from the formulation of the first

article of the Universal Declaration of Human Rights, according to which: ‘All human beings are born free and equal in dignity **and rights**’ [bold letters mine]– that **dignity and rights** seem to be coordinate ideas.⁶⁹⁰

After the discussion of the reasons why the claim that ‘we all have rights because we are all persons with dignity’ cannot be defended, in what follows, I point out some further implications of the research on the concept of human dignity in the present thesis.

Initially, in the practical domain of law there are many cases where the mistaken conception of dignity is popularly argued as the foundation of human rights. These cases are not only the so-called paradigmatic cases of offence against human dignity, e.g. torture, but also some of the most controversial cases in justice today, e.g. the dignity of the embryo and the pregnant mother in the case of abortion, the dignity of children, the dignity of the mentally disabled or patients in coma, the dignity of those who wish to commit an assisted suicide in a case of a chronic, non-reversible illness, the dignity of plants and animals, even the dignity of the dead people. As has already been mentioned in chapter 2, according to the correct interpretation of human dignity, slavery or torture, or any other paradigmatic case of offence against human dignity, is not wrong because it is incompatible with the idea that slaves or the tortured woman, and so on, have to be treated as ends, that is, as dignified persons. Rather, they are wrong because they are irrational acts performed by non-dignified persons (duty-bearers) who actually fail to do their duties towards others (right-holders). In the following analysis, I focus on the so-called hard legal cases, which are of great concern today.

According to the mistaken interpretation of the concept of human dignity, it might be wrongly claimed that the embryo, young children, the mentally disabled, patients in coma, those who wish to or commit an assisted suicide, animals, plants, dead people, and so forth, have rights because they have dignity. However, as has been discussed above, such a justificatory claim is implausible not only because

⁶⁹⁰ Waldron (2015), p. 118.

dignity belongs to the internal domain of morality, which is not associated with the external domain of law, but also because dignity is possessed not by the aforementioned beings-right-holders, but by the duty-bearers. Consequently, according to my interpretation of dignity, all these beings-right-holders are fully respected not because *they* have dignity, but because *other* persons (duty-bearers), who show (externally) respect on them, by fulfilling their external moral duties to them, have dignity. For example, a person who wishes to commit an assisted suicide cannot legitimately invoke her dignity in order to justify her right to this kind of suicide.⁶⁹¹ Therefore, the legal decisions, according to which a suicide act breaches one's human right to dignity, are profoundly wrong.⁶⁹² Besides, what would happen if all terminally ill made court claims for assisted suicide?

In addition, dead people must be buried not because *they* have dignity. Apparently, they do not have dignity any more as a result of the fact that death ceases any kind of autonomous judgment and action (on which dignity is based). Rather, they must be buried because *other* dignified living human beings have the duty to bury them. According to *Rees v Hughes*: 'There is an obligation at common law, in the nature of a public duty, which rests on certain persons in whose possession a dead body may be — a husband being one — to bury it ... [W]here a man dies possessed of personal property, the duty of burying his body falls primarily on his personal representatives ... and this duty entitles the personal representative to absolute priority of reimbursement out of the estate'.⁶⁹³

⁶⁹¹ See Jones (2013) and Kass (2008); also, majority opinion in *Rodriguez v British Columbia* (Attorney General), 1993, 3 S.C.R. 519 [1993] S.C.J. No 94. para. 129.

⁶⁹² See for instance the recent case of the terminally ill Noel Conway. Available from: <https://www.theguardian.com/society/2017/jul/17/assisted-dying-suicide-act-high-court-challenge-royal-courts-of-justice> [accessed in 30 January 2018].

⁶⁹³ See *Rees v Hughes* [1946] KB 517, 523-524. Available from: https://www.lawjournals.co.uk/cases_referred/rees-v-hughes-1946-kb-517/ [accessed 30 January 2018]

Generally, in the so-called ‘hard’ cases in law, the concept of human dignity should be understood as a value possessed by the duty-bearers who have the duty to engage in autonomous rational practice, in order to fulfill their duties towards all the aforementioned beings-right-holders.

2.3 Two more Kantian accounts for the justification of human rights

After the evaluation of the status-based and value-based dignitarian accounts for the justification of human rights, including the popular Kantian value conception of dignity as the basis of rights, with the intention of not abandoning a Kantian orientation or perspective regarding the philosophical foundations of human rights, in chapter 3, I have discussed two noteworthy contemporary Kantian philosophical foundations of human rights. These are: 1) Arthur Ripstein’s argument according to which human rights are grounded in the Kantian notion of the ‘innate right to freedom’ in the Doctrine of Right, the Rechtslehre, in the *Metaphysics of Morals*;⁶⁹⁴ and 2) Katrin Flikschuh’s *transcendental* approach to the justification of human rights.⁶⁹⁵ Along with the Kantian dignity-based argument for the justification of human rights, these accounts are considered to be three of the most important contemporary Kantian justificatory approaches to human rights today. In what follows, I provide some further implications of Ripstein’s and Flikschuh’s accounts.

Initially, after the development of the new Duty-Based Approach in chapter 4, and the new reading of the notion of the ‘ethical lawgiving’, it can further be stressed that *autonomy*, that is, the moral principle which by definition (see chapter 3) entails limits, and not *freedom*, as Ripstein argues, through which no restrictions are imposed, is the protagonist in rights discourse. In spite of the tension between Kant’s moral and legal philosophy, the notion of the ‘ethical lawgiving’, that is, the interface between Kant’s morality and legality, leads to the conclusion that Kant’s legal/political philosophy is actually consistent with his ethics –at least in the case of

⁶⁹⁴ Ripstein (2009)

⁶⁹⁵ In: Cruft, R., Liao, S.M., Renzo, M. (2015), pp.653-670

human and socioeconomic rights. That is to say, if we want to justify human and socioeconomic rights in a Kantian way, we have to read the *Metaphysics of Morals* in light of the *Groundwork*. Thus, contrary to most of recent Kantian work on human rights of liberal orientation, which is focused on the idea of *freedom*, without any other moral considerations, it could generally be claimed that Kant's practical philosophy –and a Kantian philosophy of human and socioeconomic rights, in particular– is in effect a philosophy of *autonomy*.⁶⁹⁶

Also, concerning Flikschuh's account, according to which we cannot help but take ourselves and others as right-bearers, apart from the criticisms which have already been discussed in chapter 3, it can further be argued that, by insisting on her transcendental argument for the justification of human rights, Flikschuh seems to ignore the fact that we now live in a post-post-modern, or meta-modern, era, in which, even though the Enlightenment ideals have been weakened, we still cannot return to the pre-Enlightenment unexamined metaphysical world. That is to say, although the Enlightenment, or modernist rationalism, seems to have been in decline during the last decades, the reformulation of our meta-modern world according to the dogmas and unexamined beliefs of the pre-Enlightenment period is not plausible either, given that all these belong irrevocably to the past.

Consequently, as regards the foundation of human rights in today's meta-modern world, I do not see as successful either a *purely* metaphysical, e.g. Flikschuh's, or a *purely* modernist, e.g. Rawls's, argument. On the one hand, a purely metaphysical argument cannot be really fathomed by most people; while, on the other hand, a typical modernist argument contradicts the recent tendency to overcoming rationalism, originating from the Enlightenment tradition, which has further led to the disenchantment of the world. My view then is that only a foundation that avoids both the *purity* of a metaphysical account, and the *purity* of a secularist account, creatively combining elements from both traditions, can 'speak' to people today. Such a foundation happens to be the one attempted in chapter 4 of the thesis.

⁶⁹⁶ For the opposite claim, see Varden (2015), pp. 213-237

Specifically, in this chapter, I have turned my attention to the Kantian moral and legal/political philosophy, of which mixed, metaphysical and secular character, may enable us to move from the Enlightenment, modernity, and post-modernity to our contemporary post-postmodern or meta-modern world. The mixed character of the Kantian moral and legal/political philosophy is apparent in the Duty-Based Approach in the present thesis. As has already been shown and explained in chapter 4, although the new justificatory account starts from the notion of the 'autonomy of the will', which typically resides in the *Groundwork of the Metaphysics of Morals*, hence it is undoubtedly a transcendental concept, yet, through the notion of the 'ethical lawgiving', it actually allows for the derivation of human and socioeconomic rights, which dwell in the external, secular domain of law and justice, and generally in the empirical sociability.⁶⁹⁷ Eventually, it could be argued that **through the new Duty-Based Approach a kind of 'de-transcendentalization' of the Kantian moral and legal/political theory is taken place**; yet one deeply respecting the transcendental character of Kant's opus in general.

2.4 The conceptual analysis of the autonomy of the will via the Kantian aesthetic category of the sublime

After the review and the reference to some further implications of the discussed in the first three chapters of the thesis philosophical foundations of human rights, I now move on to the second part of chapter 3 (the bridging part of the thesis), in which I have: 1) argued in favour of a Kantian perspective concerning the justification of human and socioeconomic rights, and 2) analyzed the starting point of the new Duty-Based Approach, namely the moral concept of autonomy, through the aesthetic notion of the sublime.

Contrary to those who argue that there cannot be a truly Kantian theory of human rights, e.g. Andrea Sangiovanni, I have claimed that there is still room in Kant's opus for the formulation of a truly Kantian justification. I have argued that the

⁶⁹⁷ For the opposite claim see Beiner and Nedelsky (2001), p. 96

ideal starting point of this new account should be the Kantian supreme principle of morality, that is, the moral concept of autonomy of the will. The reason is that the ethical lawgiving, within the context of the supreme principle of morality, allows for the justification of rights which typically reside in the external domain of law rather in the internal domain of morality. Further, my academic interest in the Kantian autonomy of the will, in general, is not the result of a Kantian, or deontological, orientation in philosophy, but comes basically from the realization that the concept of autonomy is meant to play significant role in future. For instance, autonomy is the protagonist today in the lethal autonomous weapon (LAWs) discourse. Recently, it has been claimed that AI-empowered robots pose new dangers, possibly of an existential kind.⁶⁹⁸ Also, in March 2018, a statement on artificial intelligence, robotics, and autonomous systems was released by the European Group on Ethics in Science and New Technologies (EGE) aiming at a wide-ranging process of public deliberation.⁶⁹⁹

However, the notion of autonomy, both in the Kantian opus and in the contemporary discourses, still remains indeterminate and abstract. Hence, what I have suggested, in the third chapter of the thesis, is its conceptual analysis. Only then it could legitimately be used as the starting point of the new DBA. In particular, I have proposed the analysis of the Kantian moral concept of autonomy via the Kantian aesthetic notion of the sublime, as it is developed by Kant in the *Critique of Judgment*, in Book II, in the Analytic of the sublime, especially in paragraphs: 23-29.⁷⁰⁰ Specifically, I have argued in favour of an *analogy* (yet not absolute identity) between the moral concept of autonomy and the aesthetic notion of the sublime. On the one hand, by arguing that both the autonomy and the sublime are *judgments*, I have pointed out the **'structural' similarity** or analogy between them.

⁶⁹⁸ See for instance: 25 January 2018, 'Autonomous weapons are a game-changer' in *The Economist*, available from: <https://www.economist.com/news/special-report/21735472-ai-empowered-robots-pose-entirely-new-dangers-possibly-existential-kind-autonomous> [accessed in 13 March 2018].

⁶⁹⁹ See <http://designforvalues.tudelft.nl/2018/ethics-of-ai-statement-european-expert-group-released/> [accessed 13 March 2018].

⁷⁰⁰ Kant (1987), pp. 97-140

On the other hand, by arguing that both the autonomy and the sublime refer to agents' *feelings*, I have pointed out their '**contextual**' **similarity** or analogy.

Generally, by stressing the similarities between these two areas, namely the moral and aesthetic reasoning, I have engaged with an **interdisciplinary task**, through which it has been aimed the vindication of the coherence between the domain of morality and the domain of aesthetics. Given that the concept of autonomy is a concept not only used in the context of morality, but also widely used in politics and law, the new Duty-Based Approach effectively restores an account of justice and politics in which ethics are not abandoned. Also, because of the fact that the moral concept of autonomy is interpreted through the aesthetic category of the sublime, the present thesis is generally considered to be an integrated, interdisciplinary project embracing the *consilience*⁷⁰¹ between **four** independent disciplines and domains of *activity*: **morality**, **law**, **politics**, and **aesthetics**.

In particular, the position of the spectator/actor in the view of the sublime does not only mirror the position of one who judges and acts morally, but also of those who judge/act legally and politically. That is to say, the moral agent, the legal judge, the political ruler, and the aesthetic spectator/actor are considered as 'perfect similarities' of three relations between entirely dissimilar things. Eventually, these four domains could be viewed in a unified perspective indicating, or expressing, the unity of the Kantian 'reason', as well as the unity of moral, legal, political, and aesthetic value judgments.⁷⁰² The core idea and purpose behind the task of bridging these four disciplines together was that the relevant dialogue across them may contribute to the debates arising within the contemporary moral, legal, political, and aesthetic discourses. For instance, within the context of the present thesis, the interpretation of the moral concept of autonomy through the aesthetic judgment and feeling of the sublime has contributed to the formulation of the new duty-based

⁷⁰¹ The term 'consilience' has been widely discussed by philosophers of science; however, it became broadly known after the publication of the *Consilience: The Unity of Knowledge* by the humanist biologist Edward Wilson. See Wilson (1999)

⁷⁰² For the unity of reason see further Neiman (1994); for the unity of moral and political values, see in particular Dworkin's argument in Dworkin, R. (2013)

account for the justification of human and socioeconomic rights, that is, an issue of great moral, legal, and political concern today.

In order to show the fruitful dialogue between these four domains of human activity and inquiry, that is, the domains of morality, law, politics, and aesthetics, and also to better explain the starting point of the new duty-based justification of human and socioeconomic rights, that is, the concept of autonomy, in chapter 3, I have turned my attention to the Kantian opus, in particular to the *Critique of Judgment*. Hence, following Ricoeur's (undeveloped) intuition and suggestion that 'the theory of justice could be taken up in another way within a broadly Kantian problematic, if we were to shift our angle of attack from the *Critique of Practical Reason* to that of the *Critique of Judgment*',⁷⁰³ I have set as my starting point of the formulation of a new justification of human and socioeconomic rights the moral concept of autonomy –yet interpreted via the Kantian aesthetic category of the sublime.

Incidentally, most Kantian legal and political scholars today do not pay too much attention to Kant's aesthetic theory. But, as has been argued in chapters 3 and 4, Kant's aesthetic philosophy is valuable in order for one to understand other Kantian abstract and vague concepts originating from his moral, legal, and political theory (e.g. autonomy and dignity). Here, it could be argued that my approach resembles Hannah Arendt's perspective.⁷⁰⁴ In other words, it could be said that similarly to Arendt who has insisted that Kant's third *Critique* is actually the true Kantian unwritten *politics* my claim is that Kant's aesthetic notion of the sublime is the key-notion in the understanding of Kant's unwritten *legal* theory. However, this is not the case. It is true that similarly to Arendt I have turned to Kant's third *Critique*, in order to clarify the obscure moral concept of autonomy, of which meaning is misunderstood today, especially in the context of legal and political discourses (see for example Griffin's account in chapter 1). Also, it is true that there is not a complete legal theory in Kant's opus. As has already been shown, the Doctrine of Right is basically focused on rights in the strict or narrow sense, not on human and

⁷⁰³ Ricoeur (2003), p. xxi

⁷⁰⁴ See Arendt (1989)

socioeconomic rights as we understand them today. Incidentally, this can be explained as a result of the fact that Kant has lived in an era in which the idea of human rights had not yet been developed.

Nevertheless, the turning of my point of view to Kant's third *Critique* does not mean either that I reject Kant's *existing* legal and political philosophy –even if they are both incomplete in a sense–, or that I argue that the *Critique of Judgment* is Kant's true legal and political theory. Hence, I generally disagree with Arendt's innovative, yet mistaken, argument in her 10th Lecture, in which she describes Kant's third *Critique* as his true politics.⁷⁰⁵ In spite of the significance of the notions of 'sensus communis', enlarged mentality, disinterestedness, and Kant's own claim that beauty is the symbol of morality,⁷⁰⁶ as well as (conversely) the weaknesses and incompleteness of Kant's legal and political theory, one cannot ignore, or discard, either the *Perpetual Peace*, or the Doctrine of Right, in which Kant effectively develops his legal and political theory.⁷⁰⁷ Eventually, I am afraid that Arendt's project to express a politics from aesthetic judgment leads to Walter Benjamin's idea of 'aestheticization of politics', which is often found in fascist regimes.⁷⁰⁸

Consequently, contrary to Arendt's 'perpetration' (if I may) of Kant's *Critique of Judgment* (obviously for her own purposes),⁷⁰⁹ my more modest claim is that **Kant's aesthetic notion of the sublime, in the third *Critique*, is the key-notion in understanding Kant's obscure concept of the autonomy, which is further the starting point of the formulation of a contemporary justificatory account for human and socioeconomic rights.** In that respect, it can be argued that Kant's practical philosophy and his aesthetics are shaped by the same moral ideal, that is, by the supreme principle of morality (autonomy). Under this idea, namely that Kant's aesthetic sublime is the key-notion in understanding the obscure concept of

⁷⁰⁵ Arendt (1989); also Riley (1992), pp. 305-319; and Beiner (2001), pp. 91-101

⁷⁰⁶ See for instance Guyer (1979), pp. 348-349.

⁷⁰⁷ See respectively, Kant (1983), pp. 386-397.

⁷⁰⁸ Jay (1992), pp. 41-61.

⁷⁰⁹ For a similar claim see Riley (1992), pp. 305-319.

autonomy I have examined the aesthetic category of the sublime, as it is presented by Kant in the *Critique of Judgment*.⁷¹⁰ In particular, I have focused on the nine core characteristics of the sublime: 1) It is a **reflective judgment**; 2) it is an **aesthetic judgment**; 3) it is a **disinterested judgment**, 4) it concerns not only the form of the object, but it can also be found in a **formless object**, 5) it contains a '**high (counter)purposiveness without purpose**'; 6) it is a judgment which has **universal validity**; 7) its universality is based, in particular, on the notion of '**common sense**'; 8) it is a **feeling of pleasure and displeasure**; 9) in the judgment and feeling of the sublime, the **dignity** of humanity in our own person is reflected.

After the examination of the Kantian sublime, I have shown how these nine characteristics supplement the Kantian incomplete definition of the autonomy of the will as: 1) the property of the will by which it is a law to itself; 2) the principle through which we choose only in such a way that the maxims of our choice are also included as universal law in the same volition; and 3) the principle through which we choose independently of any property of the objects of volition. Eventually, I have given the full definition of the autonomy of the will, or the good will, as: **the judgment and feeling of autonomous moral agents who, although they feel humiliated by the omnipotence of the moral law, they abandon 'volition', that is, their inclinations, ideologies, wishes and so forth, and, freely self-legislating –yet requiring the same legislation from all others– respect the moral ideas of reason, such as the fulfillment of their moral duties, realizing their higher self as autonomous moral agents (*self-approbation*⁷¹¹), while feeling (and being regarded by others), at the same time, that they are persons with dignity.** Ultimately, the aforementioned definition of autonomy has been supplemented by the analyses of Virginia Woolf's *Mrs. Dalloway* and Bill Viola's *Five Angels*.

It must further be pointed out here that the principle of autonomy is not only a *moral* principle well-described in *aesthetic* terms, but also a concept which is used extensively in *law* and *politics*. Hence, we are not only talking about moral

⁷¹⁰ Ak 244-356, Kant (1987), pp. 97-232

⁷¹¹ See 5:81, in the *Critique of Practical Reason*, in: Gregor (1996), p. 205

autonomy, but also about legal and political autonomy in the respective fields. In order to show the 'direct mirroring' of the position of the spectator/actor in the view of the sublime to the position of those who judge/act in the legal and political sphere, in what follows, I focus on five significant practical implications of the preceding conceptual analysis, particularly in these two areas, that is, in the areas of **law and politics**.

First, as has already been mentioned, similarly to the sublime, the autonomy of the will is a *reflective* judgment, according to which the autonomous person (e.g. the judge, the politician etc.) starts from a 'particular' (e.g. a particular case) in order to find a 'universal' (e.g. a law, a principle etc.). Apparently, this '**bottom-up**' understanding of the autonomy of the will, inspired by the sublime is of great importance both in politics and law. In the era of globalization, a 'top-down' approach, favouring the 'universal', may lead to the extinction of the 'particular' in our contemporary multicultural societies. But it is only through the respect to the 'particular' that the 'universal' makes sense; so that a 'bottom-up' movement is favorable in politics. Also, in the so-called 'hard cases' in law, e.g. euthanasia, infanticide,⁷¹² for which the judge has not a 'precedent', that is, a principle or rule established in a previous legal case, starting from the 'particular' (legal case), in order to find the universal (principle, rule), is equally important.

Second, as has been claimed, similarly to the sublime, which is a *subjective* judgment, yet a judgment not mingled with the least interest, hence a pure *disinterested* judgment, the autonomy of the will refers to a moral judgment indifferently to the existence of the object. Now, the concept of **disinterestedness** applies not only to aesthetic, but also to practical matters including the legal and political matters. For example, in law there is the category of the 'disinterested witness', namely of one who is impartial and not biased; hence, one who is lawfully competent to testify.⁷¹³ Also, the concepts of disinterestedness and impartiality are two of the most important values of a judge. Finally, in the political sphere, the

⁷¹² For a controversial argument regarding abortion and infanticide, see Tooley, M. (1972), pp. 37-65.

⁷¹³ See the Law Dictionary

concept of disinterestedness, along with the notions of objectiveness and impartiality, are traditionally considered to be some of the greatest virtues of politicians.

One could argue here that from a transcendental category, e.g. the 'disinterestedness' as it appears in the third *Critique*, we cannot move on to the empirical sociability (e.g. justice, politics).⁷¹⁴ I counter this claim through the new duty-based justification of human and socioeconomic rights, in chapter 4 of the thesis. As has been clearly shown, through the notion of the 'ethical lawgiving', the autonomous, and disinterested person can actually fulfill her external, *secular*, moral duties, from which our human and socioeconomic rights (of legal and political character) are afterwards generated.

Third, the Kantian 'subjective universal communicability', or the **universalizability** of the aesthetic judgments, which applies to moral judgments, as well as the idea of 'sensus communis', are quite important notions both in politics and law. The comparison of the judgment of the politician or the judge with the judgments of all others, putting herself in the position of them, is apparently of great importance in both domains, in which agents must be judging and acting: 1) without prejudices and superstitions, and 2) in broad terms overriding the private conditions of their judgments. Here it must be pointed out that the deliberation of the judge or the politician is not necessarily an *actual* deliberation in a literal sense; for example, through elections or referendum. Rather, it is an *imagined* legal or public deliberation, of which characteristics, e.g. the disinterestedness and the enlarged mentality, guarantee the processes of inclusiveness and interaction, that is, the conditions sine qua non for a fair system of justice and a fair democratic system.

More specifically, the judge is giving law (*judgment*) for a particular case in court. Also, in accordance with the democratic system, the legislator is giving law (a *statute* or an *act*) in the presence of an empirical evidence, or political pressure, or social situation, and so forth. Both the legal and the policy formulation, in principle, rely upon a particular case or situation. However, judges and legislators do not

⁷¹⁴ See for instance Beiner's argument in Beiner (2001), pp. 91-101.

judge, or act, considering only a particular case or situation. Rather, when they are giving law, ideally, they are moving (in aesthetic terms) ‘bottom-up’; that is to say, even though they start from a *particular*, their judgment, or statute, or act refers to *all*, including those who are not (yet or anymore) involved, and themselves as well. Hence their legal or political judgments, just like the aesthetic judgments, may be seen as having ‘subjective universality’ or ‘universal validity’.⁷¹⁵

For instance, in the case in which the legislation of judge concerns an alleged violated human or socioeconomic right, the judge must first identify the relevant duty of right and the duty bearer, following the (aesthetic) procedure, as it has been described in chapters 3 and 4. That is to say, she must exercise her lawgiving function of morality conceiving of herself as autonomy requires, namely as a moral judge legislating for herself and others, without hierarchical considerations. The same applies to the case of the politician who is called to formulate policy relying upon a particular situation. Similar to the judge, the politician must exercise her lawgiving function of morality conceiving of herself as autonomy requires, namely as a moral politician legislating for herself and others simultaneously. I therefore think Pauline Kleingeld’s claim that the legislation in such cases refers *primarily* to others, or to others *in the first instance*, is incorrect.⁷¹⁶ Rather, the legislation refers to the legislator and all others *simultaneously*.

Within this context, any political or legal principle that cannot be willed by everyone is not justifiable as universal; hence it must be rejected. For example, coercion and deception cannot be adopted by all, given that the victims of those who adopt such principles cannot themselves act upon the same principles.⁷¹⁷ This is an important claim that further responds to the argument according to which the Kantian universalizability may offer the grounds for the adoption of pernicious

⁷¹⁵ Ak 244, Kant (1987), p. 97; see also chapter 3 of the thesis.

⁷¹⁶ Kleingeld (2018)

⁷¹⁷ Here I am arguing along the same lines as has Onora O’Neill argued on 22 February 2018 in QUB Symposium with C. McCrudden and O. O’Neill, <https://www.qub.ac.uk/International/global-challenge-debates/human-rights-age-trump-brexit/> [accessed 1 March 2018]

principles by contingent 'opponents of humanity'. For example, Adolf Hitler's command that all Jews, or homosexuals, or any 'x' group of people, have to be killed is not universalizable because *at least* the Jews, or homosexuals, or the 'x' group, that is, the victims of those who adopt the relevant principle, apparently cannot adopt and act upon the same principle.⁷¹⁸ Consequently, such a command must be rejected either by the deliberator him/herself, or by all others in the case in which the deliberator is an 'opponent of humanity' or a mentally disordered man or woman. Eventually, under the 'subjective universal communicability', or 'universalizability', it could further be argued that an idea of a 'conversation' of humanity is feasible. Incidentally, other beings who possibly inhabit a distant planet, hence they are *not communicable*, they are not taken into (moral) consideration by the judging person –not even in the case in which those other beings are discernible, or detectable, yet not *communicable* (the crucial criterion).

Fourth, the notion of 'autonomy' is typically associated with the Enlightenment and the liberal tradition. However, under the new understanding of it in the present thesis, arising from the conceptual analysis of autonomy via the aesthetic category of the sublime, autonomy is actually **disconnected from the Enlightenment and the liberal thought**, according to which it is identified with one's sheer independence or freedom from coercion. Autonomy denotes one's capacity to fulfill one's moral, political, and legal duties, realizing one's higher self. Apparently, this new interpretation of the concept of autonomy destigmatizes it both in the area of politics and law.

Fifth, today's global economic crisis (e.g. Southern Europe's economic crisis), social crisis (e.g. Greek's social and refugee crisis), and political crisis (e.g. the rise of far-right and populism, e.g. Marine Le Pen, Nigel Farage, and Donald Trump), which are linked to a long-running capitalist crisis, arising in effect from neoliberalism's demand many governments to shrinking themselves via austerity and privatization,⁷¹⁹ has led to the enhancement of the practices of solidarity, charity,

⁷¹⁸ I am thankful to Jens Timmermann for this example

⁷¹⁹ Within the context of the present discussion, the term 'neoliberalism' is not associated with the term 'liberalism', or 'classical liberalism', which is traditionally connected with 'social liberalism'.

and benevolence for the *love* of humanity. According to Kant the proper motive for benefiting others can have nothing to do with any sort of affective involvement with them. In 6:402 in the *Metaphysics of Morals* Kant writes: 'To do *good* to other human beings insofar as we can is a duty, whether one loves them or not'.⁷²⁰ Yet, this does not mean that a feeling of love is excluded for those who are benefited. Kant explicitly argues in 6:399 that '... it is by virtue of them (e.g. a feeling of love) that he (the duty-bearer) can be put under obligation' [parentheses mine].⁷²¹

However, Kant's focus remains on the notion of 'duty'. The enhancement of the notion of duty would be very important within the contemporary global crisis. The dominance of the notions of charity, solidarity during the last decades has led to the weakening of the idea of duty, and further to the absolving of states and institutions from their responsibilities and obligations. But this apparently is not a welcome consequence within the international, regional, and domestic politics. Hence, the **enhancement of the concept of duty would positively contribute to tackling the global crisis** at all levels. In what follows, I focus on two significant implications of the conceptual analysis of autonomy via the sublime specifically on the **Kantian philosophy**.

First, according to the definition of the autonomy of the will, or the good will, the autonomous moral agent respects the moral ideas of reason. One could argue here that the Kantian moral agent is actually *commanded* by reason to fulfill his moral duties. However, this is not true. In my view, the Kantian reason is not our absolute ruler, or despot; hence, I prefer not to write the word 'reason' with capital 'R'. Apparently, if reason was a tyrant, then there wouldn't be millions of people who do not respect it. Also, there wouldn't be human rights violations in the world. Even the present thesis, of which the main topic is the protection of our human and socioeconomic rights, would be superfluous. The Kantian reason **is** –to speak in Aristotelian terms—⁷²² the 'right reason' (*orthos logos*) inside us. Reason's authority can be seen only in relation to the (autonomous) willingness of the rational agent to

⁷²⁰ Gregor (1996), p. 530.

⁷²¹ Gregor (1996), p. 528.

⁷²² I think we must not overlook the Aristotelian background of the Kantian philosophy, in general

freely respect it or not. Eventually, reason's authority is identified with persons' authority. As Gadamer says, authority is earned, not bestowed.⁷²³ To this, I would add that authority is earned by the *autonomous* or *good* person. Thus, the external moral duties of the person, who exercises her autonomous or good will, do not resemble to external *rules*. Rather, they are *principles* which derive from the (inner) will of the autonomous or good person herself.

Second, the Kantian autonomous, or good will, is typically seen as a steely will. However, through the conceptual analysis of it via the aesthetic judgment and (the *mixed*) feeling of the sublime, in chapter 3, it seems that the Kantian autonomous/good will is not actually a *holy* will, but an ordinary rational (and human) will, consisting not only of one's strength to accomplish a rational task, such as the fulfillment of a (moral, legal, political) duty, but also of one's desires, inclinations, and wishes contradicting one's strength. Under this understanding of the Kantian autonomous will, resulted from the engagement with the philosophy of the psychology of an agent who does her duty despite her opposite inclinations, Kant cannot be seen as the typical Enlightenment philosopher. Contrary to Descartes, who typically favours our freedom from passions, the blind obedience to reason, and the instrumentalization of all our desires and wishes, Kant *admires* and *respects* only those who, in spite of their *simultaneous* opposite inclinations, they fulfill their duties, without condemning their weaknesses and passions.⁷²⁴

Consequently, the appraisal for the fulfillment of our duties is not grounded in the victory of our reason and the *extermination* of our opposite inclinations, but in the victory of our reason *in the face of* our opposite and authentically recognisable (as part of our nature) passions, inclinations, emotions, and feelings. It is not an accident that in 6:241 and 4:397 Kant argues that duties and obligations do not actually apply to God, or other holy entities, e.g. the angels, but only to ordinary rational (and human) beings with passions.⁷²⁵ This Kantian moral psychology is

⁷²³ See Gadamer (1975)

⁷²⁴ Taylor (1989), p. 149; also *Critique of Practical Reason*, 5:72 – 5:89 in Gregor (1996), pp. 198-211.

⁷²⁵ In Gregor (1996), pp. 396, 52-53

something disregarded by the opponents of Kant; hence, the Kantian autonomy or good will, interpreted via the sublime, is I think important in shedding light on this crucial ontological issue.

2.5 The new (Kantian) duty-based justification for human and socioeconomic rights

After the conceptual analysis of the Kantian autonomy of the will, as well as the examination of Virginia Woolf's *Mrs. Dalloway* and Bill Viola's 'five angels for the millennium' (chapter 3), I have moved on to chapter 4, in which I have presented and explained the new Duty-Based Approach (DBA). More specifically, the new philosophical foundation of human and socioeconomic rights has been built indirectly, that is, by justifying duties first, and then explaining how human and socioeconomic rights can afterwards be generated or developed from them.

To be more specific, I have started from the notions of autonomy and the 'ethical lawgiving', namely the lawgiving, which makes an action a duty, and also makes this duty the incentive of the action. In particular, I have argued that the autonomous or good person, through the exercise of her ethical lawgiving function of morality, is gradually led to the fulfillment of her external moral duties. After this, I have shown the distinction between: 1) the moral universal perfect duties of right to others, and 2) the moral specific perfect duties of right to others. Following the aforementioned distinction, I have argued that from our moral universal perfect duties of right to others, our human rights are derived; while from our moral specific perfect duties of right to others, our socioeconomic rights are further generated. Additionally, I have focused on and analyzed the categorization of duties into: 1) moral universal imperfect duties of virtue to others, and 2) moral specific imperfect duties of virtue to others. Finally, I have shown the place and role of the moral concept of human dignity within the new duty-based justification. Here is the schema depicting my thoughts concerning the new (Kantian) duty-based philosophical account for the justification of human and socioeconomic rights:

Autonomy of the will > ethical lawgiving



Dignity (internally)



Moral duties (externally)



- 1. Universal perfect duties of right to others → Human rights**
- 2. Specific perfect duties of right to others → Socioeconomic rights**
- 3. Universal imperfect duties of virtue to others → No rights**
- 4. Specific imperfect duties of virtue to others → No rights**

What must be stressed at this point is that my argument for the justification of human and socioeconomic rights refers to all *rational* beings (duty-bearers). That is to say, a specific characteristic, namely our *rationality*, which is expressed in the **autonomous** agency, allows for the fulfillment of our **moral** duties, in spite of any other opposite inclinations we might have. Apparently, under this understanding of the source of duties, the justificatory account in the present thesis cannot actually be constrained only to *human* beings, but can be legitimately extended to all *rational* beings that can equally be considered as duty-bearers in certain circumstances.

Having reviewed the new Duty-Based Approach, it is now time to answer, in more detail, the question posed from the beginning of the thesis, that is, the question of how the proposed, in chapter 4, philosophical foundation of human and socioeconomic rights **confronts the main problems of human rights** today.

1. As has already been shown, the new philosophical justification of human and socioeconomic rights provides the grounds for the clarification of the concept of these rights revealing their true nature as *moral* rights (interpretation problem). Incidentally, the resolution of the human rights interpretation problem, contributes to the resolution of four other particular problems of rights derive, namely: 1) the non-intelligibility of human rights, 2) the non-respect of human rights, 3) the non-

enforceability of human rights, and 4) the non-implementation of human rights.⁷²⁶ For instance, the specification of the duty bearer, the content of his or her obligation, and the right-holder in the case of an imprecise or indeterminate right, such as the right of children to freedom from severe poverty contributes to a better understanding of the relevant right in practice, e.g. in a legal case in court, as well as to its strengthening, that is, to be respected, to be enforced, and to be implemented by the relevant institutions.

2. Also, the new Duty-Based Approach shows why only *human* rights can legitimately be considered as *universal* rights (problem of the universal validity of rights).⁷²⁷ Hence, the emphasis on a theory of duties or obligations, from which rights are afterwards generated or developed, does help us regarding the second main problem of human rights today, that is, the problem of their universal validity. As has already been stressed, the idea of duties in general is more easily acceptable in the non-western world, given that it is deeply rooted in the core of human nature. It is not accident that to his negative response to the English evolutionary theorist and director-general of UNESCO, Huxley, who asked him to contribute an essay to a collection of philosophical reflections on human rights, Gandhi pointed out that all rights to be deserved and preserved come from duty well done.⁷²⁸

3. In addition, through the new philosophical justification we can explain many of the rights found in the Universal Declaration of Human Rights. For example, we can explain *why* we have the human right to life, liberty, and security (article 3, UDHR), the right to recognition everywhere as a person before the law (article 6, UDHR), the right to freedom of thought, conscience, and religion (article 18, UDHR), the right to freedom of opinion and expression (article 19, UDHR), and so forth. Apparently, all these rights are owed to *all* people by *all* others.

⁷²⁶ See also O'Neill (2016), pp. 130, 145.

⁷²⁷ The debate between Universalists and cultural Relativists has been intense throughout the 20th century, and it is still intense at the beginning of the 21st century; see further Huntington (1996); Velleman (2013); Rorty (1993), pp. 111-34.

⁷²⁸ See Moyn (2016)

4. Further, the new justification shows why some rights are not genuine moral human rights. For example, the right to paid holidays (article 24, UDHR) is not actually a moral right; although this can be a legal right.⁷²⁹

5. Moreover, the new justificatory account offers the grounds for considering some new rights as genuine human or socioeconomic rights. For instance, the right of children to freedom from extreme poverty can be seen as a genuine socioeconomic right (see below).

6. Finally, it is obvious that the new Duty-Based Approach brings philosophy, in particular the Kantian duty-based ethics, at the heart of human rights law.

It could be claimed that because of their nature as *moral* rights –as the result of their grounding in moral duties, of which enforcement by means of legal coercion is unacceptable, because it is considered as a wrongful violation of our autonomy of the will– both human and socioeconomic rights are not, in principle, legally binding; hence they cannot typically be enforced. Surely, this does not apply to some human and socioeconomic rights which have already become law. For example, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the international human rights law which is typically made up of treaties, the decisions of the European Court of Human Rights, and also the national legislations concerning human rights after the relevant ratifications, are *all* legally binding and enforceable.

In the case in which (moral) human and socioeconomic rights have become law, the agent *still* does her duty because it is the right thing to do. Yet, this does not mean that no other external motives cannot be present, e.g. her fear of punishment. It does only mean that in the absence of the external motives, the moral imperative is sufficient to motivate compliance.⁷³⁰ For example, if a homeless woman is not afraid of prison, she may still do her duty, e.g. not to steal, out of respect for the

⁷²⁹ See the Universal Declaration of Human Rights

⁷³⁰ See further Baiasu (2016a), pp. 2 -33; and Baiasu (2016b), pp.59-76

moral law. Incidentally, this is the reason why I insist on emphasizing the moral nature and character of all human and socioeconomic rights.

Nevertheless, contrary to documents such as the ICCPR and the ICESCR, the rights in the Universal Declaration of Human Rights (UDHR), as well as in the European Convention on Human Rights (ECHR), although politically powerful, they are considered to be just *moral* rights, lacking any legal bindingness and enforceability; hence their failures in practice in several cases. Incidentally, this is the reason why **the UDHR and the ECHR are not seen as functioning within a normal legal system. The question then arises as to what is eventually the purpose of these two major documents if they are not legally binding and enforceable. In my view, both documents were made to serve political rather than legal purposes.** Consequently, although many of their principles have become legally binding and enforceable, they themselves have not.

However, in spite of the fact that *human* rights in the above two major documents (UDHR, ECHR), lack legal bindingness and enforceability, they still have their own 'sui generis' normativity through which they eventually become binding and enforceable in an *alternative* way. The exceptional normativity of human rights, from which their bindingness and enforceability are generated, is not derived from the external domain of law, or from their arrangement into law (codification), but from the internal domain of morality from which they actually derive. That is to say, the compliance with *human* rights in the UDHR and the ECHR requires, or demands, not a *legal*, but a *moral* attitude. This has to be explained in more depth.

As has been shown in the previous chapter, *human* rights derive from universal perfect duties of right to others, namely from external moral duties, which are grounded in the autonomy of the will interpreted via the aesthetic judgment of the sublime. In chapter 3, it has been said that the aesthetic judgment of the sublime raises a normative claim which is valid for all; hence it is considered to be a universally valid judgment.⁷³¹ This is apparent even in grammatical terms: We do not

⁷³¹ For the normativity of the aesthetic judgment see further: Ferrara (2008), pp. 16, 42.

say ‘this ocean seems to be sublime *to me*’; rather we categorically state that ‘this ocean is sublime!’ As the aesthetic judgment, the moral judgment of the autonomous or good person requires the same judgment from all others. Hence, the autonomous or good person speaks of the moral duty *as if* it was something having general validity, or as being *public* –not just a personal opinion.

Consequently, the moral judgment of the autonomous or good person raises a normative claim which is valid for all (normativity). Given that human rights derive from external moral duties grounded in the judgment of the autonomous or good person which entails the aforementioned normativity, one easily concludes that, although human rights lack external, or in the form of law, bindingness and enforceability, they still have their own ‘*sui generis*’ internal normativity originating from or depending on the judgment of the autonomous or good person who ultimately does her duty.

Here the question arises as to whether *socioeconomic* rights, which are also stated in the UDHR and in the ECHR, have the same normativity as *human* rights. As has been shown in the previous chapter, socioeconomic rights derive from *specific* perfect duties of right to others. These duties are, similarly to the *universal* perfect duties of right to others (in the case of human rights), external moral duties which are grounded in the autonomy of the will interpreted via the aesthetic judgment of the sublime. Consequently, similarly to human rights, socioeconomic rights have their own internal normativity originating from, or depending on the judgment of the autonomous or good person who ultimately does her (socioeconomic) duty. However, contrary to human rights, in which the moral judgment of the autonomous or good person raises a normative claim which is valid for *all*, in the case of socioeconomic rights, the judgment of the autonomous person must be interpreted as a judgment which raises a normative claim which is valid not for *all* individuals, states, and institutions, but only for *all specific*, or for *all of the relevant kind* individuals, states, and institutions.

In particular, as stated in article 25 of the UDHR, ‘everyone has the right to a standard of living adequate for the health and well-being of himself and of his family,

including food...'⁷³² Regarding the aforementioned socioeconomic right (to food), the judgment of the autonomous person must be interpreted as one which raises a normative claim valid not for *all* individuals, states, and institutions, but only for *all specific* or for *all of the relevant kind* individuals, states, and institutions. For example, according to the moral judgment of the autonomous or good person, in this case, *all parents* have the duty to feed their children, or *all states* have the duty to provide an adequate standard of living, including food, for children who live in their territories. Under this understanding of the judgment of the autonomous person in the case of socioeconomic rights, which are stated in the UDHR and in the ECHR, not *all* people, or states, or institutions have the duty to feed each hungry child in the world. Incidentally, this is explained or justified by the distinction between human and socioeconomic rights which, as has been stressed in the previous chapter, is necessary in order to safeguard socioeconomic rights from falling under the category of 'manifesto' rights.⁷³³

Ultimately, after the presentation of the new Duty-Based Approach, in chapter 4, I have responded to four possible objections against it, namely that the Duty-Based Approach: 1) degrades the idea of rights, 2) wrongly distinguishes between human and socioeconomic rights, 3) is not correct because it is based on the idea that Kant was a moral foundationalist; while he was actually a moral constructivist, and 4) is not correct because it considers the Kantian moral and legal/political philosophy as two domains with at least some degree of continuity and coherence. In what follows, I focus on **the main goals of the DBA**, as they have been set in chapter 3, and examine whether eventually they have been achieved or not:

1. The new Duty-Based Approach is effectively a justification through which *all* beings, including embryos, babies, children, the mentally disabled, those who live in countries which have not the characteristics of a democracy, those who live in non-democratic countries, those who still live in isolated jungle tribes in the world and so forth, are protected. To be more specific, under the Duty-Based Approach, all the

⁷³² Available online from <http://www.un.org/en/universal-declaration-human-rights/> [accessed 9 February 2018].

⁷³³ Feinberg (2016), p. 153; also, Beitz (2009), p. 121

above right-holders are fully respected not because *they* have a particular characteristic, e.g. rationality, or because they live in a state with certain characteristics, e.g. a modern, liberal state, but because *others*: individuals, states, institutions, and so on (duty-bearers), respect their human and socioeconomic rights, as a result of their rational capacity of fulfilling their relevant external moral duties towards them.

2. Also, within the context of the Duty-Based Approach, not only our civil and political, that is, our *human* rights, but also our *socioeconomic* rights are protected. This is apparent in the schema depicting the derivation of human and socioeconomic rights from the external duties, which are grounded in the ethical lawgiving function of morality and, further, in the autonomy of the will. Incidentally, in spite of the fact that socioeconomic rights are not mentioned by Kant, the Kantian opus allows for such derivation as has been shown in chapter 4.

3. Further, a Duty-Based Approach, such as the one in the present thesis, may be more easily acceptable by the majority of people around the world given that the main idea on which it is based is not the idea of 'right', which is often understood as a western product, hence it can hardly be accepted, but the idea of 'duty', which is an idea deeply rooted in the core of human nature. We must not ignore the fact that even a cruel suicide bomber thinks that he fulfills an alleged 'divine' duty.

4. Additionally, the Duty-Based Approach does not refer only to the duties of *individuals*, but also to the duties of states, institutions, GOs, NGOs, and MNEs. We do not only speak of the *moral* autonomy of individuals, but also of the *political* autonomy of states and any other self-governing group of persons. Under this reading of autonomy, this may offer more effective protection of the rights of *all* people, even of those who live in corrupted states, or work in corrupted MNEs, in the sense that not only individuals but any other established *group* of persons can eventually be considered as a duty-bearer.

5. Also, given that the new Duty-Based Approach is not based, as, for example, Ripstein's account, on a formalistic concept, a substantive positive body of laws can be developed afterwards. To be more specific, the new justification leaves room for

the improvement of the existing body of human and socioeconomic rights. It is true that there are numerous human and socioeconomic rights, and to speak of the development of more of them, would probably be superfluous. However, the existing body of rights has to be improved in the sense that in many cases the corresponding duties are not clarified or clearly presented. Additionally, the Duty-Based Approach leaves room for the development of a new body of duties from which human and socioeconomic rights are generated. This is an important task given that duties are actually more fundamental than rights within the context of a moral, autonomous society.

6. Ultimately, the Duty-Based Approach is important as it brings the theory and the practice of human rights closer to each other. That is to say, contrary to metaphysical accounts, e.g. Flikschuh's justificatory account, which can hardly be applied to human rights practice, the justification in the present thesis is a justification which, although it originates from a transcendental concept (*autonomy*), yet, it eventually finds its way/avenue –through the notion of 'ethical lawgiving– to the practical/external domain of law and justice (*rights*).

7. Finally, it might be argued that the new Duty-Based Approach has a mixed character in the sense that it combines elements of both types of rights justifications. To be more specific, the *naturalistic* accounts typically focus on what is the grounding basis of rights, while the *political* accounts seem to be concerned with the issue of who is the duty-bearer. Since the philosophical foundation of human and socioeconomic rights in the thesis does respond to both issues, namely to what is the ground of rights (*moral duties*), as well as to who is the duty-bearer in certain circumstances, it can legitimately be claimed that it is a *mixed* justification, or a justification which bridges the gap between the two typically contradicting families of human and socioeconomic rights justifications.⁷³⁴

⁷³⁴ For an argument about the proximity of naturalistic and political accounts see further Liao (2015), pp. 67-69.

3. Application: A duty-based approach to children's right to freedom from extreme poverty

After the presentation of the Duty-Based Approach, and the discussion of four possible objections against it, at the end of chapter 4, I have attempted the application of my duty-based justificatory account to the case of non-living human beings. In particular, it has been argued that we have the duty to treat the dead with dignity because, to speak in Kantian terms, this is the moral/right thing (act) to do. Specifically, I have indicated: 1) the grounds of the moral duty to treat the dead with dignity (autonomy ← CI ← moral law ← practical reason); 2) who the duty-bearers are (relatives, friends, and the local community); 3) the content of this moral duty (to bury the dead body or cremate the corpse); and 4) the (moral and legal) consequences of its non-fulfillment.

This attempt indicates that the new Duty-Based Approach is not only a *formal*, but also a *substantive* account of rights. As Liao states, 'a formal account provides criteria for distinguishing human rights claims from those that are not human rights claims. A substantive account, by contrast, provides criteria for generating the content of human rights'.⁷³⁵ For example, Nussbaum's account of rights is a substantive account, while Raz's account is a formalistic account.⁷³⁶ Given that the application of the Duty-Based Approach to the case of the dead body provides criteria not only for distinguishing human rights claims from those that are not genuine human rights claims, but also for specifying the content of the generated rights, it can legitimately be considered both as a formal and substantive account of rights. Eventually, in spite of the plethora of human and socioeconomic rights today, the Duty-Based Approach does not exclude the creation of new rights;

⁷³⁵ Liao (2015), p. 69.

⁷³⁶ See chapter 1 of the thesis.

of course, under the condition of their derivation from specific duties generated from Practical Reason through the autonomy of the will, the CI, and the moral law.⁷³⁷

Similar to the application of the new duty-based justificatory account to the case of non-living human beings, one could apply it to the case of severe or extreme child poverty. The extreme poverty of children is one of the most severe problems in the world today, as well as one of the most urgent ethical issues. Globally, almost 385 million children are living in extreme poverty (World Bank Group and UNICEF 2016). Extreme or severe or absolute poverty differs from poverty. According to the World Bank, the global *extreme* poverty line is about US \$1.90 a day per person.⁷³⁸ This kind of poverty is when one cannot sustain even a basic acceptable standard of living. Hence, contrary to children's poverty, children's *extreme* poverty is a direct life-threatening situation. It is not only in developing countries, such as Ghana, that children suffer from extreme poverty, but also in developed countries, such as the US and the UK (United Nations Human Rights, Office of the Higher Commissioner 2018). The situation is not better in other European countries today; for instance, in Greece, especially after the migration crisis. The conflicts in Syria, Afghanistan, Iraq, and Kosovo have led to high growth in immigration, which has further increased children's extreme poverty rates in the Continent. According to the 2017 Annie E. Casey Foundation report, children of immigrants are more likely to live in extreme poverty.⁷³⁹

However, despite the urgency, the extreme or severe child poverty is only tacitly addressed within the United Nations Convention on the Rights of the Child (UNCRC). Specifically, according to the UNCRC, a child is defined as a 'human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier' (United Nations Human Rights, Office of the Higher Commissioner 1989). Within the UNCRC special attention is paid to the right of children to survival and physical development. For instance, in article 6 of the

⁷³⁷ For the derivation of the autonomy of the will from the CI; and the derivation of the CI from Practical Reason through the Moral Law, see chapter 3 of the thesis.

⁷³⁸ Revenga 2016

⁷³⁹ Annie E. Casey Foundation 2017

UNCRC, it is mentioned that States parties have the duty to ensure to the maximum extent possible the survival of the child. Also, in article 19 it is written that States parties shall take all appropriate measures to protect the child from all forms of neglect or negligent treatment. Additionally, according to article 24, States parties have the duty to combat malnutrition through the provision of adequate nutritious foods and clean drinking-water. Finally, according to article 27, States parties must recognize the right of every child to a standard adequate for the child's physical development. In the same article, it is also stated that States parties must in case of need provide material assistance and support programs, particularly with regard to nutrition, clothing and housing.

In spite of the fact that attention has been paid to children's right to survival and physical development, nowhere, within the UNCRC, is clearly stated a right to children's freedom from extreme poverty. All the aforementioned articles do not actually translate specifically into 'freedom from extreme poverty'. Hence, even though children's freedom from extreme poverty is a general concern both in political practice and legal structures, the relevant right: 1) is not explicitly declared; 2) its content and grounds are not delineated; and 3) the allocation of the relevant duties, either to individuals, or to states, institutions, and organizations is not at all clear. Therefore, a more comprehensive analysis is required. It is imperative that we formulate specifically a clear and unambiguous right of children to freedom from extreme poverty as soon as possible. Even though there are many other rights whose compound might be seen as equating to freedom from extreme poverty, e.g. the right to water, food, shelter, and so forth, only the right of children to be free from severe, or extreme, or absolute poverty can protect their life in all its aspects simultaneously.

Consequently, in this section, I philosophically examine 1) the grounds of children's right to freedom from extreme poverty, 2) its content, and 3) who the duty-bearers are. Surely, philosophical discussion cannot be in the agenda of everyday law and politics. When a kid dies in circumstances of extreme poverty somewhere in the world, there is no time for philosophizing. Nevertheless, this does not mean that the philosophical questions and investigations are legally and

politically meaningless. I suggest then that, although independent, justice and politics should be supplemented and enhanced by their philosophical justification. I first provide a new objective, duty-based, grounding of the indeterminate and unstated right of children to freedom from extreme poverty; and, second, I respond to three possible objections against the proposed philosophical foundation.

To begin with, the new duty-based justification of children's right to freedom from extreme poverty, which is proposed in this section, is formulated *indirectly*, that is, by the justification of the relevant duties first, and then the derivation of the right of children to freedom from extreme poverty, from these duties. The starting point of this duty-based account is the Kantian supreme principle of morality, that is, the autonomy of the will, or the good will. According to the Kantian definition of autonomy in the *Groundwork of the Metaphysics of Morals*, one of the basic characteristics of the autonomous or good person is that she *freely self-legislates, yet requires the same legislation from all others*. Kant writes in 4:440, in the *Groundwork of the Metaphysics of Morals*, that 'autonomy of the will is the property of the will by which it is a law to itself'.⁷⁴⁰ Here the question arises as to what exactly is meant by 'self-legislation', 'law to itself', or 'lawgiving function of morality'. Kant does not answer this question, in full, in the *Groundwork of the Metaphysics of Morals*; yet he does explain it in the *Metaphysics of Morals*.⁷⁴¹

More specifically, Kant starts in 6:218 by generally claiming that there are two elements in lawgiving: first, a law representing objectively an action that has to be done, that is, a law which makes the action a duty; and, second, an incentive, whose role is to connect subjectively a ground for determining choice to the action with law's representation.⁷⁴² Kant then distinguishes between two types of lawgiving with respect to the incentive. He writes: 'All lawgiving can therefore be distinguished with respect to the incentive... That lawgiving which makes an action a duty, and also makes this duty the incentive is ethical. But that lawgiving which does not include

⁷⁴⁰ Gregor (1996), p. 89

⁷⁴¹ Gregor (1996), pp. 383-385

⁷⁴² Gregor (1996), p. 383.

the incentive of duty in law, and so admits an incentive other than the idea of duty itself is juridical'.⁷⁴³ Apparently, the exercise of the lawgiving function by the *morally* autonomous person is identified not with the 'juridical' but with the 'ethical' lawgiving, according to which an action is made a duty, and this duty is also made the incentive of the action. Eventually, the Kantian autonomous or good person is the ethically lawgiving person, who does not simply *presuppose* that everyone else gives the same law, but also *requires* the giving of the same law from all others, according to the Formula of Universal Law.⁷⁴⁴

Moreover, the autonomy of the person, who exercises her ethical lawgiving, directly refers to the idea of moral duty, whose fulfilment transcends her limited human powers. As Kant writes in 5:80 and 5:81, in the *Critique of Practical Reason*, the autonomous person is impelled to an activity or action, which is called 'duty';⁷⁴⁵ a duty (action) which, according to Kant, is fulfilled or performed by someone who, being bound to it, acts not *in conformity with duty* (mere legality), but *from duty*, that is, for the sake of the moral law alone.⁷⁴⁶ Eventually, the Kantian autonomy of the will leads to the realization of one's moral duties, and the 'good' in general, towards oneself and others. Now the question arises as to *what kind* of duties the autonomous person, who is exercising her ethical lawgiving, is impelled to.

According to Kant, on the one hand, duties in accordance with the juridical lawgiving are *external* duties, as this type of lawgiving does not require the idea of duty to be the determining ground of the agent's choice, but it needs an incentive suited to the law (external incentive).⁷⁴⁷ On the other hand, from 6:219 to 6:221, Kant explicitly argues that the ethical lawgiving refers both to *internal* and *external* duties. In particular, he says that ethical lawgiving does not exclude external actions, but applies to everything that is a duty in general.⁷⁴⁸ Within this context, the

⁷⁴³ Gregor (1996), p. 383

⁷⁴⁴ Gregor (1996), p. 73

⁷⁴⁵ Gregor (1996), p. 205

⁷⁴⁶ Gregor (1996), pp. 205, 377

⁷⁴⁷ Gregor (1996), pp. 383-384

⁷⁴⁸ Gregor (1996), pp. 384-385

autonomous person, who is exercising her *ethical* lawgiving, is impelled not only to *internal*, but also to *external* actions and duties, or to *enforceable* duties. The question here arises as to *which are*, in particular, these ‘external moral duties’ that derive from the aforementioned ethical lawgiving. In order to answer this question, one needs first to recall Kant’s general division of duties in the *Metaphysics of Morals*.⁷⁴⁹

More specifically, in 6:239-240, in the *Metaphysics of Morals*, Kant claims that ‘all duties are either *duties of right (official iuris)*, that is, duties for which external lawgiving is possible, or *duties of virtue (official virtutis s. ethica)*, for which external lawgiving is not possible’.⁷⁵⁰ On the one hand, duties of right are claimable by those who have the *right* to be protected by others’ wrongdoing against them, or the right to positive action by the duty-bearers; hence these are externally enforceable. On the other hand, duties of virtue are non-claimable; thus, in this case, there are no right-holders. Eventually, given that in the Introduction of *the Metaphysics of Morals* Kant has explicitly argued that all duties, including the external duties of right or juridical duties, just because they are duties, belong to ethics, one can conclude that both duties of right and duties of virtue are in effect *moral* duties. Incidentally, in the Doctrine of Virtue in the *Metaphysics of Morals*, Kant similarly argues that even in the case in which law lays down a duty of right, the action or duty springing from it can be moral.⁷⁵¹

Consequently, we may divide the Kantian duties, in general, to ‘moral duties of right’ and ‘moral duties of virtue’. This is the first Kantian general division of duties. In addition, Kant distinguishes between ‘moral duties to oneself’ and ‘moral duties to others’; as well as between ‘moral perfect’ and ‘moral imperfect’ duties, that is, duties which cannot be overridden and require actions or omissions, and

⁷⁴⁹ Gregor (1996), pp. 394-395

⁷⁵⁰ Gregor (1996), p. 394

⁷⁵¹ Gregor (1996), p. 525

duties which require only the setting of ends allowing for freedom concerning their fulfilment. Here are the Kantian divisions of moral duties:⁷⁵²

Perfect duties of right:

- **Duty to oneself → The right of humanity in our own person**
- **Duty to others → The right of human beings**

Imperfect duties of virtue:

- **Duty to oneself → The end of humanity in our own person**
- **Duty to others → The end of human beings**

Overall, the Kantian moral *external* duties deriving from the ethical lawgiving, as it has been described above, are divided into three main categories: First, into duties of right and duties of virtue; second into duties to oneself and duties to others; and third, into perfect and imperfect duties. Now, the Kantian *duties of right*, the duties towards *others*, and the *perfect* duties are of great importance here, given that socioeconomic rights –including the right of children to freedom from extreme poverty– are grounded in them. To the above triple Kantian division of duties, I add a fourth division, namely the division between *universal* and *specific* duties; that is to say, between duties which require actions or omissions by *all*, and duties requiring actions or omissions by *specific* duty bearers, respectively.

Clearly, this division has not been on Kant's focus. However, it is important in view of the distinction between human and socioeconomic rights which is suggested in the present section. That is to say, contrary to human rights, I see socioeconomic rights, including the right of children to be free from extreme poverty, as not owed to someone by *all* others; rather, they are owed to someone by *specific* others: individuals, or/and states, or/and institutions, or/and organizations. The reasons why

⁷⁵² Gregor (1996), p. 395

the relevant right is, and should be seen, as a socioeconomic right, are thoroughly explained below. Here the fundamental question arises as to *how* from specific duties towards children, the socioeconomic right of children to be free from severe poverty is eventually developed or justified in *Kantian* or *deontological* terms.

Initially, I argue that there is an ‘external, moral, specific, perfect duty of right to protect children from extreme poverty’. This duty is derived from the ethical lawgiving function of morality. That is to say, the fulfilment of the aforementioned duty is, to speak in Kantian terms, the result of the positive response of rational human beings, to the categorical ‘voice’ of reason, or the common to all rational human beings’ genetic basis, or intrinsic capacity, for moral agency (rationality). This ‘voice’ of reason ‘commands’ compliance with the moral law, according to which children must be protected from severe poverty because this is a moral duty, or for the sake of moral law alone, independently of any other concerns.

Incidentally, the pure practical reason ‘commanding’ compliance with the moral law is not an absolute ruler, or despot. If reason was a tyrant, then there wouldn’t be millions of people who do not respect it. For example, there wouldn’t be children living in cramped, polluted, and diseased conditions in Old Fadama, an informal settlement in Accra.⁷⁵³ Hence, the pure practical reason is better understood in Aristotelian terms as the ‘right reason’ (*orthos logos*), or rational inner ‘voice’, which can only be ‘listened to’ by those whose opposite ‘voices’ of natural inclinations, personal interests, wishes, desires, and so forth, are not ‘screaming’ (yet they do exist).

Further, I claim that the aforementioned duty, namely our ‘external, moral, specific, perfect duty of right to protect children from extreme poverty’, is divided into our duties to: 1) *abstain* from any action that prohibits children’s freedom from extreme poverty, and 2) secure through intentional *act(s)* children’s right to freedom from extreme poverty. From these two (negative and positive, respectively) duties, through Kant’s thesis in 6:239 in the *Metaphysics of Morals*, the socioeconomic right

⁷⁵³ United Nations Human Rights, Office of the Higher Commissioner 2018

of children to be free from extreme poverty is afterwards *generated* or *developed* (*entwickelt*). More specifically, in 6:239 in the *Metaphysics of Morals*, Kant argues:

‘But why is the doctrine of morals usually called (especially by Cicero) a doctrine of *duties* and not also a doctrine of *rights*, even though rights have reference to duties? – The reason is that we know our own freedom (from which all moral laws, and so all rights as well as duties proceed) only through the *moral imperative*, which is, the proposition commanding duty, from which the capacity for putting others under obligation, that is, the concept of right can afterwards be [explicated]’.⁷⁵⁴

What Kant argues here is in effect that we experience our freedom through a moral imperative which commands the fulfilment of our duties. Specifically, we experience our freedom as *autonomous or good* persons when we *freely* self-legislate. In the same passage, Kant claims that moral duties and rights *proceed* from, or are *grounded in* the ethical lawgiving which is freely conducted by the autonomous person. However, this derivation of duties and rights from the ethical lawgiving does take place in a particular order. Kant argues that rights, namely the capacity one has to put others under obligations, do not have just *reference to duties*, but they are straightforwardly *generated* (*entwickelt*) from them. In other words, Kant seems to argue that our moral duties, as well as those rights, which are further generated or developed from them, are grounded in the ‘ethical lawgiving’ function of morality which is freely conducted by the autonomous person. Therefore, rights do not simply *correspond* to duties, but their relation to duties is much stronger, in the sense that they are *generated*, or *developed*, or *originate* (*entwickelt*) from duties. That is to say, without duties, Kant implies that there can be no rights, or that rights do *not exist*. Overall, duties have (foundational) priority over rights.

⁷⁵⁴ Gregor (1996), p. 395. What must be pointed out here is that Mary Gregor’s translation of the German word ‘entwickelt’, in the original text, as ‘explicated’ is not correct (Kant 2013: 346). ‘Entwickelt’ means ‘generated’ or ‘developed’, that is, ‘grounded’, and not just ‘explicated’.

Consequently, our awareness of the right of children to freedom from extreme poverty, either in the form of 1) children's right to claim the *absence* of any action that restricts their freedom from extreme poverty, or in the form of 2) children's right to claim the *protection* of their freedom from extreme poverty, does not actually exist without the moral imperative commanding us to protect children from extreme poverty ('specific perfect duty of right to protect children'). We may represent the proposed *duty-based* justification of children's right to be free from extreme poverty in the following list:

Specific perfect duties of right to protect children from extreme poverty:

- Specific perfect duty of right to abstain from any action that prohibits children's freedom from extreme poverty → The right of children to claim the absence of any action that restricts their freedom from extreme poverty
- Specific perfect duty of right to secure children's right to freedom from extreme poverty → The right of children to claim the protection of their freedom from extreme poverty

Overall, the (socioeconomic) right of children to freedom from extreme poverty:

- is grounded in the 'external, moral, specific perfect duty of right to protect children from extreme poverty' (grounds),
- consists of the right to claim the omission of any action that restricts children's freedom from extreme poverty (negatively); as well as the right to claim the performing of intentional act(s) that guarantees children's freedom from extreme poverty (positively) [content]; and
- is based on a duty which is not of all others, but of specific others, e.g. the relatives or/and the friends of the child, the local authorities, states, and organizations (duty-bearers).

In what follows, I respond to possible objections against the new Duty-Based Approach. Within this context, I first show the moral priority of duties over rights; second, I explain why the socioeconomic right of children to be free from extreme poverty is not a human right; and third, I explain the reasons why Kant is not a moral constructivist.

A possible objection against the proposed justificatory account in the present section might be that, through the priority given to the notion of 'duty' over the notion of 'right', the notion of 'right' is degraded. Also, it could be asked why duties are more fundamental than rights, or why duties must be seen as more basic than rights in the case of the right of children to be free from extreme poverty. In this section, I respond to these claims.

Initially, contrary to the prevailing twentieth century ethical approach, according to which rights have priority over duties, and similarly to some prominent Kant scholars, such as O'Neill, I argue that it is a mistake to emphasize rights without integrating them with duties or obligations.⁷⁵⁵ Incidentally, although the term 'obligation' is more often associated with law, while the term 'duty' is typically related to morality, here the terms 'duty' and 'obligation' are used interchangeably as approximate synonyms. Hence, I use both the words 'duty' and 'obligation' to denote the 'ought', that is, something that *has* to be done by someone.

Now, simply to argue that duties are more basic or fundamental than rights does not automatically render the latter less morally important than the former. Only within the Kantian duty-based ethics a moral priority of duties over rights is *justified*; specifically, through the passage 6:239 in the *Metaphysics of Morals*. Based on the aforementioned passage, my claim concerning the relation between duties and rights is stronger than the claim that rights have *correlative* obligations.⁷⁵⁶ Through the justification of the right of children to freedom from extreme poverty, is clearly shown that what is effectively meant by the statement that 'duties are more

⁷⁵⁵ O'Neill (2016)

⁷⁵⁶ O'Neill (1996)

fundamental than rights' is that in the absence of the former, the latter alone *do not exist*.

Further, a duty-based justificatory approach, such as the one suggested in the present chapter, is absolutely necessary especially in the case of children, given that, by reason of their physical and mental immaturity, they *depend* on others. That is to say, their incapacities, in particular their lack of reason and agency, make it extremely difficult for them to claim a right. Schweiger and Graf argue that the particular condition of children as developing beings imposes relevant duties to protect them and ensure that they are not harmed.⁷⁵⁷ Thus, in my view, the language of 'duties of others towards children' is more essential than the language of 'rights of children'.

Consequently, I suggest changing our way of dealing with children's right to freedom from extreme poverty. Instead of focusing on the right itself, I think we should focus on individuals', states', institutions', and organizations' obligations to protect children from a state of extreme poverty either by *preventing* it, or by *suppressing* it. I am convinced that a duty-based approach, such as the one suggested above, does ensure better than a rights-based approach the relevant objective, that is, the protection of children from extreme poverty. What also must be stressed is that the UNCRC is actually a duty-based treaty rather than a rights-based one. It is true that most of its articles are framed in the form of duties that the State or guardians have towards children, rather than as rights that children have themselves. However, the problem of the UNCRC is that it does not explicitly mention the right in question, that is, children's right to be free from extreme poverty.

Of course, my approach does not mean or imply that we should ignore the *right* of children to be free from severe poverty. I only suggest that, because of the particular condition of children, as incapable enforcers of rights, we should put their right to be free from severe poverty aside for a while, in order to see the issue of their protection from extreme poverty today from another angle, that is, from

⁷⁵⁷ Schweiger, G. and Graf, G. (2015): 9

duties' point of view; from which (duties) the relevant right is afterwards generated, or developed, in Kantian or in broad deontological terms. Eventually, the objection according to which, through the priority given to the notion of 'duty' over the notion of 'right', the proposed justification degrades the popular concept of rights is not correct. Under the new justificatory account, rights are not rejected or degraded. Rather, they are put aside for a while, in order to strengthen the old category of duties, so that eventually both rights and duties could be seen as equal parts in a contemporary account of international justice.

Another possible objection against my account is that the right of children to be free from extreme poverty is mistakenly considered as a *socioeconomic* right. Rather, it might be argued that the aforementioned right is actually a *human* right. In what follows I explain the distinction between these two categories of rights.

Initially, my own view is that human rights, for example the right to life, are moral rights (with political connotations, further protected by law) owed to human beings by *all* others: individuals, states, institutions, organizations, and corporations. Contrary to human rights, I understand socioeconomic rights, for example the right to work, as rights which generally provide the conditions necessary for our prosperity and wellbeing. Similar to human rights, socioeconomic rights are moral rights, with political connotations potentially protected by law. Also, as human rights, socioeconomic rights cannot strictly be seen as *natural* rights, namely as entitlements independent of the existence of other's duties. Further, socioeconomic rights are understood and treated as rights which derive from the duties of individuals, states, and institutions. Incidentally, these duties of others derive from their moral and rational reason, which 'commands' them to act or not act in a certain way.

Nevertheless, contrary to human rights, I do not see socioeconomic rights as *human* rights in the above sense. This is a strong claim that must further be explained. Initially, even though, as moral rights, socioeconomic rights exist prior to any political recognition, and codification and ratification by law, they still cannot be considered as human rights, because they are not owed generically to people by *all*

others. Instead, they are owed to people by *specific* duty-bearers, either individuals, or states and institutions, which are responsible for their fulfilment and enforcement.⁷⁵⁸ Thus, I am not responsible for feeding each hungry child in the world. Understanding socioeconomic rights as rights owed to people by *specific* duty-bearers, I think, would render their protection more effective.

For example, the right to health care of a child in a poor country can better be protected if it is understood or declared as a right owed by specific others rather than a right owed by all others. In the last case, the Government, or any other *specific* Organization responsible for the protection of the right to children's healthcare in that country, could easily refuse their duties on the pretext of the *universality* of the relevant duty, and ascribe their *own* responsibilities to *all others* in the world who can actually do nothing in praxis to protect the health of children in that particular country. Consequently, because of the *nature* of the so-called socioeconomic rights, as rights presupposing social and economic support that in principle cannot be given by everyone, we cannot speak of universal duties in this case. What must also be stressed is the fact that even in the case of civil and political rights, in which the first-order obligations to *respect* them are universal, the second-order obligations, that is, the obligations to *ensure* that the first-order obligations are respected, still have to be allocated.⁷⁵⁹ In what follows, I focus on children's right to freedom from extreme poverty in particular.

To begin with, contrary to the claim that children's right to freedom from extreme poverty is a *human* right, I regard it, or I suggest we should treat it, as a *socioeconomic* right. Surely, children are human beings with human rights, e.g. the right not to be tortured. However, children's right to be free from severe poverty is not a typical *human* right, but a right specifically belonging to *socioeconomic* justice. One reason why the right of children to be free from extreme poverty is a socioeconomic right is that the relevant duties, from which this right is effectively

⁷⁵⁸ In the same vein, Onora O'Neill claims that 'welfare rights must have necessarily specific duty-bearers; see, for instance, O'Neill (1996), pp. 130, 131, 134

⁷⁵⁹ O'Neill (2005): 427-439

derived, are not owed to children by *all others*, as in the case of human rights.⁷⁶⁰ Instead, following an agent-centered approach, I see children's right to freedom from extreme poverty as a right derived from *specific* –and not universal– duties of *specific* actors-duty-bearers, either individuals, or states, institutions, and organizations, which are responsible, either to action or omission. It would be implausible, non-feasible, and non-practical *all others*, individuals, states, institutions, and organizations to have the duty to protect (action), or being accused of abstaining from the protection of each child in the world from extreme poverty (omission). Instead, the allocation of duties to *specific others* leads eventually to more effective protection of children. Therefore, as a UK resident, I do not typically have the duty either to feed each child living in extreme poverty in Ghana (praxis), or abstain from any act (omission), e.g. enjoying all my meal, in order to offer half of it to that child in Ghana.⁷⁶¹ That may sound a bit harsh. Yet, I am convinced that the allocation of duties (positive, negative) to *specific others*, either individuals, or states and institutions, in the case of the socioeconomic right to children's freedom from extreme poverty, leads eventually to more effective protection of children.⁷⁶²

Moreover, I am afraid that the non-identification of specific duty-bearers, the non-determination of their duties, and the non-specification of the content of these duties as well as the consequences of their non-fulfilment, would render the right of children to freedom from extreme poverty itself an indeterminate 'manifesto' right, for which no one would actually take the responsibility of its infringement in certain circumstances. But this apparently must be avoided –especially in the case of

⁷⁶⁰ O'Neill (2005) 427-439

⁷⁶¹ However, I still have the duty not to act against the fulfilment of the relevant right in some way, e.g. to prevent those who are willing to provide food to the children in Ghana from doing so.

⁷⁶² Incidentally, this might also apply to *some* human rights which typically straddle the division between 'civil and political' and 'socioeconomic' rights, e.g. the right for freedom of association. For example, as a UK resident, I do not have a duty (negative, positive) to provide, or abstain from providing the Ghanaian with the resources required for freedom of association, e.g. by providing (or not providing) a public arena, or organising meetings for them. However, I still have the duty not to restrict a Ghanaian's freedom of association.

children who are not able to fully protect themselves. It could also be argued here that the lack of precise determination of duty-bearers in the case of *human* rights too is one of the reasons why these rights are poorly observed.

Furthermore, what must be stressed is that the characterization of some rights, including children's right to freedom from extreme poverty, as *socioeconomic rights*, does not render them less important than *human* rights. It is only in the respect of the allocation of specific duties to specified duty-bearers, that is, the requirement which is a condition sine qua non for a more effective protection of children from extreme poverty that this right differs from typical children's human rights, e.g. the right of children not to be tortured by *all* others.

Further, it could be counterargued that my approach is not purely Kantian in the sense that 'effectiveness arguments', such as the one developed in this chapter, do not seem Kantian. That is true. Kant and effectiveness do not typically go together. Hence, from the very beginning, I have stressed the fact that it was *my* decision, and not Kant's, to add to the Kantian triple division of duties a fourth division between *universal* and *specific* duties. The question here arises as to whether my decision renders the whole argument less Kantian. Apparently, the decision to add the fourth division renders my argument less *Kantian*. However, it does not render my argument for children less *deontological*; hence, the title of the section is not a 'Kantian Approach to Children's Right to Freedom from Extreme Poverty'. Although the proposed justification is inspired by the Kantian opus, it cannot be seen as a purely Kantian justification. Instead, it is clearly a deontological justification. Why? Because I think a deviation from a strictly Kantian approach and an inclination to a broader deontological approach inspired by the Kantian opus is preferable in the case of children, towards which we have the duty to offer more pragmatic and effective rather than idealistic and non-effective solutions.

Moreover, in the following analysis, I focus on and respond to another possible objection against my account. It could be argued that Kant, from whom the aforementioned justification is inspired, is not actually a foundationalist, but a constructivist, who would oppose my idea of a *foundation* for rights, including the

rights of children to freedom from extreme poverty. There are indeed some significant Kant scholars who argue in favour of *constructivism*. In their view, a Kantian foundation of rights cannot plausibly be supported and proposed.⁷⁶³ My aim here is to show that Kant is not actually a moral constructivist, but there is room in his opus for legitimately arguing that he is a foundationalist.

To begin with, a prominent constructivist Kant scholar is Onora O'Neill. O'Neill has worked a lot on duties and rights from a Kantian point of view. Generally, I agree with her approach regarding the issue of human rights in general, namely her thesis that the fulfilment of duties or obligations is more basic than the fulfilment of rights; and that any rights' claim is no more than rhetoric, unless the counterpart duties or obligations are justified and allocated accordingly to individuals and institutions.⁷⁶⁴ That is to say, we cannot actually know what a right amounts to until we know: 1) who is the duty-bearer, 2) what exactly is the content of his or her obligation, and 3) to whom (right-holder) the fulfilment of the relevant obligation is owed. As O'Neill argues, if we take rights seriously, we must take the counterpart duties or obligations even more seriously; otherwise, rights remain only aspiration claims with high cost. That is to say, when rights are violated, there is no way one to see who has infringed the relevant right, and who owes redress.⁷⁶⁵ However, although I generally agree with O'Neill's claim that duties have priority over rights, I disagree with her constructivist reading of Kant.

More specifically, one of the weighty claims of O'Neill is that, recognizing that a plurality of agents may lack antecedent principles of coordination, Kant eventually *builds* an account of reason, ethics, politics, and justice on this basis.⁷⁶⁶ Hence, in her view, Kant introduces the Formula of Universal Law, according to which there is a categorical imperative, namely to '*act only in accordance with that maxim through which you can at the same time will that it become a universal law*'.⁷⁶⁷ That is to say,

⁷⁶³ See for instance, O'Neill, O. (2015b); also, Flikschuh (2015)

⁷⁶⁴ O'Neill (2016), p. 35

⁷⁶⁵ O'Neill (2016), pp. 196-197

⁷⁶⁶ O'Neill (2015), pp. 77, 84

⁷⁶⁷ Gregor (1996), p. 73

given the plurality of agents, and the need of an agreement of all with some principles, O'Neill claims that Kant introduces, or *constructs*, or *builds* the Formula of Universal Law through which he eventually aims the principles adopted not be ones that could not be willed by all agents. Eventually, O'Neill characterizes the Formula of Universal Law as 'the best-known version of Kant's procedure of construction', and Kant's accounts on reason, ethics, politics, and justice as pure constructivist accounts without foundations.⁷⁶⁸

Yet, even if the Kantian Formula of Universal Law is a construction, still a construction needs foundation. A foundation or base is the most crucial element of an architectural structure that connects it to the ground. There are either shallow or deep foundations, but, in any case, the crucial point is that *all* building structures should not lack a specific foundation. This is a pragmatic claim that directly opposes O'Neill's moral constructivist thesis that there can be constructions without foundations.⁷⁶⁹ Consequently, even if it is indeed a Kantian construction, the Formula of Universal Law needs a deeper foundation. I see the foundation of the Formula of Universal Law to be the following: As a formulation of the Categorical Imperative (CI), the Formula of Universal Law (FUL) is grounded in the Moral Law (in singular) commanded further by Pure Practical Reason.⁷⁷⁰

Moreover, throughout his opus, Kant does not essentially show anything about the *construction* of reason, ethics, politics, and justice. Rather he directly points to *foundationalism*. We could focus on passages such as the passage 4:439, in the *Groundwork of the Metaphysics of Morals*, in light of which Kant does not seem to be a constructivist or antirealist. Kant writes: 'The essence of things is not changed by their external relations; and that which, without taking account of such relations, alone constitutes the worth of a human being is that in terms of which he must also be appraised by whoever does it, even by the supreme being'.⁷⁷¹ Also, one must consider the notorious passage in the *Groundwork of the Metaphysics of Morals*, in

⁷⁶⁸ O'Neill (2015), pp. 23-24, 77, 84

⁷⁶⁹ O'Neill (2015), p. 24

⁷⁷⁰ Gregor (1996), pp. 164-165

⁷⁷¹ Gregor (1996), p. 88

which Kant describes the moral concept of human dignity. Kant writes in 4:434-5 in the *Groundwork of the Metaphysics of Morals*: ‘that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*’.⁷⁷² He then argues in 4:436 that ‘*Autonomy* is therefore the ground of the dignity of human nature and of every rational nature’.⁷⁷³ Apparently, here the role of the fundamental moral principle of autonomy as the *foundation* of the dignity of human beings does not allow for attributing to Kant the characterization of the constructivist, or non-foundationalist, philosopher. Finally, one must also take into consideration the 5:47 passage in the *Critique of Practical Reason*, in which Kant argues that ‘... the moral law is given, as it were, as a **fact** of pure reason of which we are a priori conscious and which is apodictically certain, though it be granted that no example of exact observance of it can be found in experience’ [emphasis added].⁷⁷⁴ Here again, Kant expresses his foundationalism or moral realism. Consequently, because of these passages, and many other ones in his opus, I cannot see Kant, as O’Neill does, namely as a constructivist or antirealist philosopher.

To conclude, in this section, I have applied the new DBA to the case of children living in extreme poverty. Within this context, I have philosophically examined 1) the grounds of the right of children to be free from extreme poverty, 2) the content of the aforementioned right, and 3) who the duty-bearers are. More specifically, I have argued that the socioeconomic right of children to freedom from severe poverty:

- is grounded in the specific perfect moral duty of right to protect children from extreme poverty (grounds);
- consists of the right to claim the omission of any act that prohibits children’s freedom from extreme poverty (negatively); as well as the right to claim the performing of acts that guarantee children’s freedom from extreme poverty (positively) [content]; and

⁷⁷² Gregor (1996), pp. 84-85

⁷⁷³ Gregor (1996), pp. 84-85

⁷⁷⁴ Gregor (1996), p. 177

- is based on a duty which is not of *all* others, but of *specific* others, e.g. the relatives or/and the friends of the child, the local authorities, states, and organizations (duty-bearers).

In addition, I have responded to possible objections against the proposed philosophical foundation. Within this context, I have emphasized the moral priority of duties over rights; I have explained why the socioeconomic right of children to be free from extreme poverty is not a typical human right, but a socioeconomic right; and, finally, I have explained the reasons why Kant is not a moral constructivist; hence the foundation of rights, as we understand them today, in a broad Kantian or deontological mode is feasible.

4. Towards a future account of international justice

On the 50th anniversary of the Universal Declaration of Human Rights (UDHR), in 1998 in the city of Valencia, a Universal Declaration of Human Duties and Responsibilities (DHDR) was written, of which aim was to reinforce the implementation of human rights under the auspices of the United Nations.⁷⁷⁵ In the same vein, in 2009, the Government in the United Kingdom issued a Green Paper entitled ‘Rights and responsibilities: developing our constitutional framework’, in which the authors Jack Straw and Michael Wills strongly disapproved of the fact that ‘... responsibilities have not been given the same prominence as rights in our constitutional architecture.’⁷⁷⁶

Unfortunately, in spite of the drafting of the Universal Declaration of Human Duties and Responsibilities in 1998, no efforts have been made since then in order to reinforce the idea of duties in international and regional legal order. Also, regarding

⁷⁷⁵ Available from <http://globalization.icaap.org/content/v2.2/declare.html> [accessed 7 February 2018].

⁷⁷⁶ See online

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238435/7860.pdf [accessed 7 February 2018]; see also Waldron (2010a), pp. 216-235

the aforementioned Green Paper in the UK, even though in the debate following the publication of it there was indeed considerable support for the idea of a legal charter of responsibilities, unfortunately no further steps were taken. The main reasons why these efforts have not been successful are: 1) the fear that a focus on duties would diminish the importance of rights, 2) the unclear or poor understanding of the idea of duties within a legal context, 3) the concern about whether duties can be enforced by law, and 4) the worry that the legislation would become even more prolix and complex. To all these concerns, an answer is provided through the development of the new duty-based justification of human and socioeconomic rights.

First, as has already been explained in chapter 4, it cannot legitimately be claimed that a focus on duties today would diminish the importance of rights. On the contrary, a duty-based perspective on international, regional, and domestic justice would strengthen human rights even more by showing that duties actually function as *indispensable* complements to rights. **Second**, through the new Duty-Based Approach, the idea of duties –at least the duties from which our human and socioeconomic rights derive– has been made clear. That is to say, our human and socioeconomic rights are generated from our external moral duties arising from the lawgiving function of morality. **Third**, it is true that ethical duties cannot be externally enforced, that is, to be enforced by law, given that they are moral duties of which enforcement by means of social coercion is unacceptable because it is considered as a wrongful violation of our autonomy of the will. However, this does not mean that duties lack their own, ‘*sui generis*’, normativity, deriving from the moral law itself and the moral commitment of individuals, states, and institutions to it. **Fourth**, it is *human rights* legislation today that has become hyper-complex and prolix, so that it could be argued that the enhancement of the human rights agenda would be a superfluous task. But this is not the case of the ‘duties agenda’, of which development still remains premature. Incidentally, who would deny the formulation of a future duty-based account aiming at a more effective protection of children living in extreme poverty?

Consequently, efforts should be made towards the drafting of a new Bill of *duties* in international level, for example a new (non-legally binding) Universal Declaration of Human Duties (UDHD), aiming at the reinforcement of the implementation of human rights stated in the Universal Declaration of Human Rights (UDHR). Incidentally, I insist on the term 'duties' (or obligations), instead of the term 'responsibilities.' The reason is that, contrary to the notion of responsibility, which is simply the *state* of one being responsible, the idea of duty entails an obligation on one to *act*. Within this context, my proposal refers to the formulation of a new UDHD equivalent and complementary to, yet independent from, the UDHR.

For example, according to article 10 of the UDHR 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'⁷⁷⁷ What I propose, in effect, is the formulation of another article, part of a new UDHD, which would *directly* impose the relevant duties, e.g. independence and impartiality, to individual judges and the judiciary as a whole. This would be extremely important in the case of international tribunals, e.g. the international criminal tribunals. Contrary to states, which have a long tradition of judicial independence and impartiality, both typically ensured in national constitutions, in the case of international criminal tribunals these two significant principles are only ensured in the statutes of the courts and tribunals. But even though this is essential, it is not a sufficient to guarantee the relevant principles in international justice.⁷⁷⁸

Overall, a new UDHD would not only render duties equal to rights, but it would also enable the discussion of both in parallel. Surely the prerequisite of the formulation of any future duty-based account of international justice would be the clarification within its corpus, e.g. in the Preamble of it, of the grounding basis of the relevant duties. One of the main goals of the present thesis was to provide such a philosophical foundation for our external moral duties, from which our human and socioeconomic rights are afterwards generated or developed. To conclude, I hope

⁷⁷⁷ See <http://www.un.org/en/universal-declaration-human-rights/> [accessed 7 February 2018].

⁷⁷⁸ See also Meron (2005), pp.359-369.

this goal is provided, and, along with all other results of my research, as they are epigrammatically referred below, to be taken seriously into consideration in a theoretical discussion of justice, as well as in legal and judicial practice.

5. Conclusions

In this last section, I epigrammatically state some of the main conclusions of the thesis:

1. Because human and socioeconomic rights derive from moral duties which are grounded in the ethical lawgiving exercised by autonomous or good persons, that is to say, by persons who respect the moral law, these rights are effectively moral rights. Yet, this does not mean that, because they are moral, human and socioeconomic rights cannot further be secured through specific international, regional, and domestic legislation; or that they do not have significant political connotations and role within the international politics.

2. Human and socioeconomic rights do have their own, *sui generis*, normativity, independently of their arrangement into a law (codification/ratification). Their normativity derives from the moral law itself and the (moral) commitment of individuals, states, and institutions to it.

3. Only human –not socioeconomic– rights are universal rights, because they derive from universal perfect duties of right to others.

4. Some rights are indeed genuine human or socioeconomic rights; while some other rights, such as the right to paid holidays, are not genuine moral rights.

5. Within the context of a duty-based perspective, all human beings, including embryos, children, the mentally disabled, coma patients, criminals, and so forth are protected, not because *they* have normative agency, e.g. in Griffin's sense, but as a result of the fact that there are *others* (*duty-bearers*), from whose dutiful judgments and actions, their human and socioeconomic rights originate.

6. Kant's soft paternalism is clearly shown in 6:454 in the *Metaphysics of Morals*, in which he writes: 'I cannot do good to anyone in accordance with *my* concepts of happiness (except to young children and the insane), thinking to benefit him by forcing a gift upon him; rather, I can benefit him only in accordance with *his* concepts of happiness.'⁷⁷⁹

7. Contrary to goods/interests-based accounts for the justification of rights, the Duty-Based Approach does not simply presuppose that duties are connected with rights, or that duties and rights correspond to each other, or that those who have rights have also duties and vice versa, but that our (human and socioeconomic) rights are *generated* or *developed* from moral duties.

8. Contrary to the 'basic needs' accounts, the Duty-Based Approach gives special attention to civil and political rights, for which it is specifically claimed that they derive from our universal perfect duties of right to others.

9. Contrary to Rawls's liberal account for the justification of human rights, the Duty-Based Approach is broader as it originates from our common human reason, so that by definition it refers to *all* human beings. Only in the case of socioeconomic rights the burden falls under *specific* duty-bearers.

10. Contrary to Beitz's account, the Duty-Based Approach allows for the fulfilment of duties, hence the protection of the relevant rights not only in *modern* societies, but in every society, even in the most isolated societies on earth.

11. Through the new duty-based justification not only states, as Beitz argues, but *all others*, individuals, institutions, GOs, NGOs, and MNEs are responsible for the fulfilment of duties, from which rights are afterwards generated.

12. The new Duty-Based Approach may be more successful than other rights-based justificatory approaches, including the 'official' dignitarian rights-based justification, given that, contrary to the idea of rights, which is mostly recognized within the

⁷⁷⁹ Gregor (1996), p. 573.

western societies, the old category of 'duty' is recognized all over the world as it is an idea deeply rooted in the core of human nature.

13. The moral concept of human dignity is not, as it is popularly argued, a value possessed by the right-holders, but a value (and a feeling) acquired by the duty-bearers after the fulfillment of their (external) moral duties; hence it cannot be the basis of human rights of right-holders as it is popularly argued today.

14. The Kantian dignity is an *inner*, not an *intrinsic* or *inherent* value, e.g. in the Catholic sense.

15. Dignity belongs to the internal domain of morality, while human and socioeconomic rights typically belong to the external domain of law.

16. Human beings are respected not because *they* (right-holders) have dignity, but because *others* (duty-bearers), by showing respect on them, have dignity.

17. Dignity (internally) and duties (externally) –from which rights are afterwards developed– are *coordinate* ideas.

18. According to the correct interpretation of human dignity, slavery or torture, or any other paradigmatic case of offence against human dignity, is not wrong because it is incompatible with the idea that slaves or the tortured woman, and so on, have dignity. Rather they are wrong because they are irrational acts performed by non-dignified persons (duty-bearers), who actually fail to do their duties towards others (right-holders).

19. According to the interpretation of dignity, in the present thesis, the embryo, young children, the mentally disabled, patients in coma, those who wish to or commit an assisted suicide, animals, plants, and so forth, are fully respected because *other* persons (duty-bearers), who show (externally) respect on them, by fulfilling their external moral duties to them, have dignity.

20. The powerful moral conception of the autonomy of the will lies not only at the heart of Kant's moral philosophy, but also at the centre of his legal and political theory. In particular, what allows for the Kantian autonomy of the will to be involved

in the external domain of law is the notion of the 'ethical lawgiving' which applies not only to *internal* but also to *external* duties.

21. *Autonomy*, and not *freedom*, as Ripstein argues, is the genuine basis of our human and socioeconomic rights –even though they typically inhabit the external domain of law.

22. Kant's legal and political philosophy is consistent with his ethics. Also it could plausibly be argued that the former is grounded in the latter –at least in the case of human and socioeconomic rights.

23. Contrary to most of recent Kantian work on human rights of liberal orientation focusing on freedom, without any other moral considerations, it is claimed that Kant's practical philosophy is in effect a *philosophy of autonomy*, and not a *philosophy of freedom*.⁷⁸⁰

24. Through the new Duty-Based Approach, it is shown that a kind of 'de-transcendentalization' of the Kantian moral and legal/political theory is feasible; yet a kind of 'de-transcendentalization deeply respecting the transcendental character of Kant's opus in general.

25. The new Duty-Based Approach is an approach through which *all* human beings, including immigrants, refugees, the 'apatrides', those who live in countries which have not the characteristics of a democracy, those who live in non-democratic countries, those who still live in isolated jungle tribes in the world, and so on, are protected.

26. Through the new Duty-Based Approach, both our civil/political (*human*) and our *socioeconomic* rights are protected.

27. Through the Duty-Based Approach a substantive positive body of laws can be developed afterwards.

28. Contrary to metaphysical accounts, e.g. Flikschuh's justificatory account, which can hardly be applied to human rights practice, the justification of rights under the

⁷⁸⁰ For the opposite claim, see Varden (2015), pp. 213-237

new Duty-Based Approach is a justification which, although it originates from a transcendental concept (*autonomy*), yet, it eventually finds its way, through the notion of the ‘ethical lawgiving’, to the practical domain of law and justice (*rights*).

29. There is an *analogy*, yet not absolute identity, between the moral concept of autonomy and the aesthetic notion of the sublime.

30. We must not downplay the significance of Kant’s third *Critique* within the Kantian opus; also, we must not ignore the contribution of the world of the ‘sublime art’ to morality in general.

31. The present thesis shows the *consilience*⁷⁸¹ between four independent disciplines and domains of *activity*: morality, law, politics, and aesthetics; which further indicate or express the unity of the Kantian ‘reason’, as well as the unity of moral, legal, political, and aesthetic value judgments.⁷⁸²

32. Kant’s aesthetic philosophy is valuable in order one to understand other Kantian abstract and vague concepts originating from his moral, legal, and political theory (e.g. autonomy, dignity).

33. Kant’s aesthetic notion of the sublime in the third *Critique* is the key-notion in understanding Kant’s obscure concept of the autonomy of the will.

34. The full definition of the Kantian autonomy of the will is the following: *It is the judgment and feeling of autonomous moral agents who, although they feel humiliated by the omnipotence of the moral law, they abandon ‘volition’, that is, their inclinations, ideologies, wishes and so forth, and, freely self-legislating –yet requiring the same legislation from all others– respect the moral ideas of reason, such as the fulfillment of their moral duties, realizing their higher self as autonomous moral agents (self-approbation),⁷⁸³ while feeling (and being considered by others), at the same time, that they are persons with dignity.*

⁷⁸¹ See Wilson (1999)

⁷⁸² Neiman (1994); also, Dworkin, R. (2013)

⁷⁸³ See 5:81, in the *Critique of Practical Reason*, in: Gregor (1996), p. 205

- 35.** The ‘bottom-up’ understanding of the autonomy of the will, inspired by the sublime, has great implications both in politics and law.
- 36.** The disinterestedness which characterizes the moral concept of autonomy applies to practical matters including legal and political matters.
- 37.** The Kantian ‘subjective universal communicability’ is significant in politics and law.
- 38.** Under its new understanding in the present thesis, autonomy is disconnected from the Enlightenment and the (neo) liberal thought, according to which it is identified with one’s sheer independence or freedom from coercion. Now, autonomy denotes one’s capacity to fulfill her moral, political, and legal duties realizing her higher self. This new interpretation of the concept of autonomy destigmatizes it in both areas of politics and law.
- 39.** For Kant, *duty* is the fundamental concept in beneficent actions. Incidentally, this does not mean that a feeling of *love* is excluded for those who are benefited.
- 40.** The Kantian reason is not our absolute ruler, or despot. It is, to speak in Aristotelian terms, the ‘right reason’ (*orthos logos*) inside us.
- 41.** The Kantian ‘autonomous will’ is not a steely or *holy* will, but an ordinary rational will consisting not only of the strength/capacity/potential to accomplish a rational task, such as the fulfillment of our (moral, legal, political) duties, but also of desires, inclinations, fears, and wishes which contradict rationality.
- 42.** Kant is not the typical Enlightenment philosopher such as Descartes.
- 43.** Duties or obligations are more fundamental than rights.
- 44.** The emphasis on a theory of duties or obligations helps us regarding the two main problems of human rights today, namely the problem of their interpretation, and the problem of their universal validity.
- 45.** Socioeconomic rights are not *human* rights.

46. By 'good will' Kant actually means the 'autonomy of the will' as it is analyzed via the aesthetic category of the sublime.

47. Kant is not a constructivist as it is often argued by Kantian scholars, e.g. Onora O'Neill and Katrin Flikschuh.

48. In the case of human and socioeconomic rights –not other rights with strictly legal character– the Kantian principle of morality and the Kantian principle of right are not contradicting each other, but are complementing each other. The notion of the 'ethical lawgiving' is, in effect, the interface between Kant's moral and legal/political philosophy.

49. Human and socioeconomic rights derive from the moral universal perfect duties of right to others, and the moral specific perfect duties of right to others, respectively.

50. Not our membership in a specific biological species (*humanity*), but a specific characteristic, namely our *rationality*, as it is expressed in the autonomous agency, renders us capable of doing our moral duties.

51. The Duty-Based Approach is not constrained only to *human* beings, but it is extended to all *rational* beings.

52. The Duty-Based Approach may positively contribute to the clarification of existing duties, such as the duty of relatives, friends, and the legal authorities to bury or cremate one's dead body.

53. The Duty-Based Approach may positively contribute to the determination of the nature and the grounds of indeterminate and unstated, yet extremely important, rights, such as the right of children to freedom from extreme poverty.

54. The Duty-Based Approach may be the starting point as well as an important tool in the formulation of a future duty-based account of international justice aiming at the reinforcement of the implementation of human rights that are stated in non-legally binding documents, such as the Universal Declaration of Human Rights (UDHR) or in the European Convention on Human Rights (ECHR).

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