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Facing the Future: Conceiving Legal Obligations Towards Future Generations

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Abstract

Conceiving legal obligations towards future generations is challenging—especially from a positivist stance and if obligations and claims are understood as being correlative in nature. Legal obligations towards future generations are often rejected from the outset if (and insofar as) there is no explicit acknowledgement or established doctrine. This neglects the power of sound legal interpretation. I argue that obligations towards future people and generations are grounded in the relational character of human rights and that their positivity is not a problem in a legal order containing norm texts that can reasonably be interpreted as acknowledging human rights; no additional enactment is necessary for these obligations to be part of the positive law. This claim is based on a (novel) concept of fundamental rights which is compatible with legal positivism.

Keywords

constitutional law; future generations; human rights; intergenerational justice; legal positivism; legal theory

1. Introduction

The debate on obligations towards future generations is multi-faceted and complex. It is deeply intertwined with fundamental debates and controversies, for example, about justice, the relationship between law and morality, the impact of epistemic limitations on normative claims (or how normative systems deal with uncertainty), and—insofar as the question of such obligations pertains to constitutional law—interpretation. The entanglement fuels the rejection of legal obligations towards future generations, sometimes even by those who acknowledge the responsibility of those alive today for “the profound destruction wrought by anthropogenic climate change” and our duty to address this destruction (Humphreys, 2022). In this article, I address the question of whether obligations towards future generations are conceivable as legal obligations from a positivist stance and some of the challenges that this question faces (Section 2). Legal

obligations towards future generations are often rejected from the outset if (and insofar as) no explicit acknowledgement or established doctrine exists. Thus far, any legal obligation towards future generations is primarily understood to be self-imposed: Obligations towards future generations are framed as a guiding principle or as a state task which comes with enormous discretion (and very little orientation). A rights-based approach would remedy that. The German Federal Constitutional Court tried to do just that (Bundesverfassungsgericht, 2021). However, even though the decision is a remarkable step forward (U. Becker, 2023; Jahn, 2023; Kersten, 2022; Kotzé, 2021; Krämer-Hoppe, 2021; Lawrence, 2023; Theil, 2023), the doctrinal approach is not altogether convincing—inter alia because it was not fully developed and glosses over questions that it cannot leave unanswered.

In this article, I argue that legal obligations towards future generations are grounded in the relational character of human rights (Section 3), which is acknowledged by many scholars and can be explained from different conceptual angles, such as (egalitarian) liberal accounts (e.g., John Rawls), or by drawing on concepts of the relational self (e.g., Held, 2006; Herring, 2020; Nedelsky, 2011; Wallace, 2019), and/or relational autonomy (Lee, 2023). I do not refer to any such account but to the meta-theoretical relational account and model of fundamental rights that I developed (Behrendt, 2023b). Even though it shows some similarities to the concepts of relational autonomy and relational self, the conceptual angle is very different. The approach I am taking only draws on the claim of an interpreter according to which the posited legal order acknowledges fundamental rights and does not rely on concepts of relational autonomy (or the relational self), nor does it draw on theses about the human nature, e.g., caring for others as part of human nature (Groves, 2014; Randall, 2019), just parenting as a fundamental interest of human beings (Gheaus, 2016), or the interest of being part of a project bigger than ourselves—one that continues even without us (Scheffler, 2018).

This article does not aim to develop arguments on why we should acknowledge legal obligations towards future people and future generations (in the sense that we should opt for their acknowledgement). Instead, I argue that legal obligations towards future people arise due to the acknowledgement of fundamental rights—there is no (additional) decision to be made. However, state and non-state agents should be aware of those obligations because that promotes sound judgements. Conceiving obligations towards future people and future generations is primarily about understanding the complexity of the interconnectedness of the past, present, and future (e.g., Shue, 2021, pp. 3–4, 14); seeing the bigger picture; and enabling a more rational discourse. We need to correct our conceptual (societal, ethical, and legal) design because it is at least partially blind to matters of the future (Gardiner, 2022; Lawrence, 2023; Shue, 2021). Activities and the manifestation of costs and benefits have a temporal dimension. Some costs and benefits might manifest almost imminently, others may take time. Insofar as the decisions of state and non-state agents suffer from a presentist bias (e.g., Boston, 2016, pp. 4–6; Jacobs, 2016; MacKenzie, 2016) there is a need to address it. By conceiving obligations towards future generations, we can address this flaw and enable ourselves to develop sound models of governance on a global, international, and national level (e.g., Boston, 2016; Caney, 2022). In addition, the presentist bias should be addressed because it is at least partially incompatible with fundamental rights. This can be read as a moral claim by arguing that we are morally obliged to positively acknowledge fundamental rights in our legal order(s) and to acknowledge legal obligations towards future generations. I am not denying this. However, from a positivist perspective, it is more important that addressing the presentist bias is something that the positive law calls for, once fundamental rights are acknowledged (inter alia because it can impact climate litigation and the legal obligations of state and non-state agents without any additional legislation)—this argument is the point of this article.

2. Background: Complications in the Debate on Legal Obligations Towards Future Generations

2.1. Law and Morality

Those who argue in favour of conceiving obligations towards future generations seem to be motivated by the thesis that short-termism and the focus on the present are ill-advised regarding the future of our own offspring and humankind in general (e.g., Caney, 2022; Gheaus, 2016; Groves, 2014; Jonas, 1984, p. 22; Randall, 2019), maybe even ourselves. This is dramatically obvious when it comes to climate change (see, e.g., Brooks, 2020; Caney, 2022; Shue, 2021, pp. 2–10, 22–27). Some go as far as saying that the focus on the present is inherently morally unjust (Gardiner, 2022; Kumar, 2018) or in conflict with intergenerational equity (Weiss, 1989, pp. 23–26). If the presently living are engaging in enterprises that benefit them but will cause (substantial) harm to future generations that is only avoidable at great expenses—if at all—it is certainly plausible that such behaviour violates moral obligations (Gardiner, 2022; Shue, 2021, pp. 22–23). Even though it seems plausible that moral obligations towards future generations are justifiable, conceiving a viable conceptual basis proves challenging—but not impossible (Heath, 2013; Kumar, 2018; Mulgan, 2006).

It cannot come as a surprise that the conceptual challenges of moral obligations do not advance the argument for legal obligations: Even if there is a moral obligation to do X, it does not mean that there is a legal obligation to do X. If it is doubtful whether there is even a moral obligation to do X, it seems even harder to argue that there is a legal obligation if such an obligation is not expressly articulated in norm texts.

The ethical charge of the debate obfuscates the conceivability of obligations towards future generations as legal obligations from a positivist stance. The field of (moral) philosophy is very present in the debate, which provokes (or might provoke) scepticism on the part of legal scholars who endorse legal positivism. From a positivist point of view, it does not matter whether or not it is possible to justify moral obligations towards future generations, whether philosophers argue for relationships between generations and whether, for example, there are good reasons for why we need to achieve climate neutrality as soon as possible—an obligation towards future generations would need to be positively acknowledged in the legal order. Otherwise, it would only be a moral paradigm that has no bearing in the realm of the law. From a positivist legal stance, obligations towards future generations only impact the legal system if and insofar as the posited law gives rise to them. As a result, whether and to what extent obligations towards future generations are a matter of the law depends on the legal order in question.

2.2. Law and Justice

The question of whether legal obligations towards future generations are conceivable based on human rights should be separated conceptually from questions of justice. However, the question of justice can pertain to two different issues: (a) we can differentiate between moral obligations to acknowledge legal obligations towards an agent and (b) moral obligations to balance that agent's interests fairly with those of other agents. This article concerns the question of whether legal obligations towards members of future generations are conceivable as such—i.e., it focuses on issue (a). This equals the matter of whether future people can be fathomed as bearers of human rights. Issue (b) is beyond the scope of this article because it

involves weight attribution and decisional elements: Whether concrete decisions and measurements (legislative acts, governmental measurements, or relevant court decisions) reflect a “just” balance of the interests at stake, depends on whether all relevant rightholders and their interests were taken into account and whether the attribution of weight is considered correct. Different agents might have different notions about what needs to be taken into consideration, for example, due to different levels of insight into factual circumstances and the development of a situation. Evaluating the fairness of a decision or a measurement involves a decisional element concerning selection and weight attribution. Claiming that a result is “just” does not mean much if it is unclear whose interests and what interests have been taken into account. This problem is intensified in light of the necessary weight attribution and the problem of whether it is even possible to ascribe the “right” weight to an interest.

2.3. Law and Interpretation

Unavoidable subjectivity is not only a problem for the previously presented issue (b). Accounts of legal positivism tend to facilitate an understanding of the law that neglects the unavoidable subjectivity of legal interpretation. For example, the aesthetic allure of a pure theory of law might indulge the assumption that the law would not be sullied by the shortcomings of an individual interpreter. The idea is that in easy cases an interpreter only applies the law—but they are not creating the law unless they are empowered to do so and engage in the authoritative setting of concrete norms. However, both Kelsen (1967, pp. 349–356) and Hart (2012, pp. 124–136) acknowledge that the (existing) positive law runs out and needs to be set authoritatively whenever the concrete application of the law is indeterminate. This suggests that normative construction only takes place within the boundaries established by law, which would mean that determining the framework would only be an issue of uncovering normative content. It is certainly true that legal interpretation is experienced as an attempt to recreate a meaning or to find out what the law is telling us regarding the concrete question (and/or to determine the boundaries set by the positive law for engaging in normative construction). Nevertheless, it is a misleading description of what is actually happening. Due to the unavoidable hermeneutical character of interpretation (e.g., Feldmann, 1996, pp. 168, 174–177; Fish, 1982, p. 700; Gadamer, 1960, pp. 291–292; Poscher, 2015), normative content is only created by the interpreter themselves—even in easy cases (e.g., Fish, 1982, p. 700 about the creation of meaning in general; Behrendt, 2020). This does not mean that this creation would not be highly influenced *inter alia* by socialization (or history/tradition; see Gadamer, 1960, p. 289–295) and discourse about these norm texts (C. Becker, 2014, p. 67, 103; Christensen & Kudlich, 2001, pp. 183–184), but it remains a creation of the interpreter. This means that the classic democratic narrative of setting and applying norms is wrong—an ought cannot be substantially set by one agent and simply be applied by a different agent. It follows from this account that an interpretation cannot be measured against an objective ought but instead only against the creation of one’s own interpretation or against those of others—even though this is, once more, a hermeneutical endeavour (e.g., Behrendt, 2020). As a result, the law is a complex social endeavour that works because an interpretation of an agent is compared to those of other agents—especially those of professional interpreters of the law—which pressures agents to approach their interpretations of the legal texts by engaging with what others (e.g., judges) say about the relevant issues of the law and perceiving this activity as uncovering/tracing what the law tells you to do.

The classic approach constitutes a problem concerning matters of the law that have not yet been established and, thus, affecting legal obligations towards future generations, should they be conceivable as a matter of

foundational rights. Established interpretations are not perceived as needing justification, even though no interpretation is better than another by default. No interpretation, and, therefore, no application and no concretisation, can truly be justified by referring to the process of enactment. What is enacted is only the norm text, not the (substantiated) norm (i.e., the normative content) itself. This means that the social event constituting positive acknowledgement cannot solely be attributed to the legislative act. Meaning and, therefore, normative content, is only created by the interpreter. It can neither be set by an authoritative act nor by an intersubjective consensus. It means that interpreters cannot be bound by concrete normative content (even though the legal system employs this claim in a partly legitimate way for reasons of pragmatic necessity and recipient-oriented complexity reduction). Thus, the positivity of law—i.e., the answer to the question under what circumstances an ought is part of the realm of positive law (see, e.g., Shapiro, 2011, pp. 269–273, 279–280)—needs to be explainable in a way that is compatible with this constructivist discourse-theoretical account of law (Behrendt, 2020).

The reconceptualization of what is meant by a positive acknowledgement requires a certain dynamic, openness, and complexity because an interpretation cannot be measured against the “real” legal ought. The fact that a legal order usually determines some sort of conflict-solving mechanism that involves someone having the “final say” does not challenge this view. Non-contestability does not imply that the respective authoritative decision is grounded on the “right” or “best” interpretation (Hart, 2012, pp. 141–147). The unavoidable subjectivity of legal interpretation creates the necessity to end conflicts somehow, and this problem is solved by deciding whose interpretation needs to be accepted to establish some sort of peace and stability. That does not mean the authoritative agent who has “the last say” would be a spokesperson for the “right” interpretation. Just because someone has the power to ultimately decide and people will abide by their decision, does not mean that the decision is anything more than a decision. The legal context does not change this. The decision does not implore normative truth which would then mean that a case that equals the referenced case in all relevant criteria would have to be decided similarly. Even though a certain degree of foreseeability (i.e., legal certainty) is not only useful but necessary for a functioning stable legal system, the law is not set in stone. For hermeneutical reasons, law cannot fossilize and that is not necessarily a bad thing either.

Roughly stated, the notion of legal positivity is used to distinguish legal content from non-legal content. This suggests that the line would not be drawn by the interpreter but by the social facts that determine legal content. According to Hart (2012, pp. 94–95), recognising legal content (i.e., primary rules of obligation) requires a secondary rule: the rule of recognition. Even if such a rule of recognition were to exist (I am not in agreement, but this is not the place to argue this issue), it would not provide an escape for interpreter-relativism; what the law dictates remains a matter of perspective and interpretation. Interpreters with different preconceptions about what the enacted legal texts entail draw the lines differently—even if they are conceiving the law on the same notion of legal positivism, e.g., the notion that the validity of legal content does not depend on its compatibility with moral standards and that the content is not influenced by those standards. Therefore, distinguishing legal content from non-legal content is interpreter-relative. The understanding of the “positive law” needs to take the interpreter-relativism into account. So, the notion of legal positivity is compatible with the constructivist discourse-theoretical account of law after all as the term can be understood to refer descriptively to what can be soundly reasoned in light of the valid norm texts of a specific legal community and professional legal methodology.

What does this mean for the conceivability of legal obligations towards future generations concerning a positivist stance? If we use the notion of the positivity of law in the descriptive sense as portrayed above, then there needs to be enacted norm texts and it needs to be possible to argue soundly for the conceivability of legal obligations towards future generations in light of these norm texts. The remainder of this article is largely used to argue that legal obligations towards future people and future generations are grounded in human rights, conveying that a legal order that positively acknowledges human rights also acknowledges legal obligations towards future generations.

3. Relational Concept of Fundamental Rights

The concept of fundamental rights that I am arguing for here, and elsewhere (Behrendt, 2022, 2023b, pp. 259–365), anchors on the question of what is implicitly asserted when the thesis is put forth that a fundamental right is guaranteed in relation to positive law. The answer to this question is simple, at least at the outset: Such an assertion states that every bearer is entitled to this right. This is the essence of a fundamental right. The whole concept anchors in this and develops from here. It follows that the concept is not founded on some kind of moral reasoning; neither the content of fundamental rights nor their acknowledgement hinges on moral reasoning.

The concept of fundamental rights can be understood as a purely theoretical model because it hinges on this essence of a fundamental right; its relevance for positive law is contingent on the aforementioned claim of an interpreter. Thus, the relational concept of fundamental rights is connected to the constructivist discourse-theoretical account of law. If an interpreter claims that the positive law acknowledges a fundamental right (as described in the previous section), then the model can be used to understand and unfold fundamental rights.

If the law acknowledges human rights, meaning fundamental rights that are bestowed on human beings, every human being is a bearer of human rights (e.g., Besson, 2020; Tasioulas, 2012). Since there is more than one, horizontal legal relationships arise because every bearer of human rights can claim that another bearer of human rights is obligated to respect their right and vice versa. The criterion of rightholdership is dually coded. For example, an agent either qualifies as a human being or does not, but no agent can be more human than the other. Thus, the legal relationship is characterized by equality in rank; there is no hierarchical structure. This leads to the conceivability of the most abstract claim: to be respected as an equal (Behrendt, 2023b, pp. 263–265).

Even though the model does not relieve the interpreter from the burden of arguing which interests are protected by positively acknowledged fundamental rights, there are certain limitations to what an interpreter can argue. For example, according to the relational concept of fundamental rights, there can be no fundamental right of one rightholder to the death of another rightholder because such a right would amount to an inherent violation of equality in rank (see Behrendt, 2023b, pp. 313–315). The question of whether there are legal obligations towards future generations at all is also not up to the interpreter because it is part of the relational structure itself. Once a fundamental right is acknowledged and there is more than one rightholder, legal obligations to future rightholders are conceivable. The only question that needs to be argued is what interests are protected by fundamental rights and, thus, which interests give rise to such legal obligations. If an interpreter claims that positively acknowledged fundamental rights protect bodily integrity and health, for example, then those interests of future people give rise to legal obligations.

To address the question of how and why legal obligations towards future people are conceivable based on this account, the concept needs to be explained regarding claims and obligations and the relevance of interests. Let us begin with the simple observation that agents have interests (e.g., playing tennis or staying alive). The realisation or upkeep of these interests hinges on the factual circumstances of the status quo, including its dynamic developments and the behaviour of other agents. Because the upkeep or realization of an interest is inherently connected to reality, it matters how reality is shaped and how agents behave. If an action or the omission of an action is detrimental to the interest of a rightholder, this is conceivable as an infringement on the claim to be respected as an equal because the other member of the legal relationship puts their interests above those of the rightholder. However, since the “perpetrator” is also a member of the legal relationship and enjoys the same status of equality in rank, they can, in turn, demand that the other party accept that they are acting in pursuit of their own interests. No rightholder’s interests are more important than those of another because of the claim to be respected as an equal.

It follows that the described situation poses a normative conflict. No one’s interests are axiomatically superior to those of another party; both parties have conflicting claims against one another. If we were to try to solve this by measuring whose interests are more important or by arguing that the other party has no claim at all, we would introduce foreign elements into the concept. We would immerse matters of contingent interpretation into a concept that is supposed to be free of colouring by interpretation, decisional elements, and subjective weight attribution. The discourse on foundational rights and the principle of proportionality has shown that there are usually no clear answers and, for legal-theoretical reasons, it is inadvisable to introduce a (de facto decisional) element into the concept, even if consensus were to be reached on how best to solve the problem.

This means that the relational model distinguishes between two levels: the prima facie level and the definite level. Alexy (2002) introduced these terms in his theory of constitutional rights. Even though I am not endorsing Alexy’s account (Behrendt, 2023b, p. 179), I believe that the distinction as such is helpful and viable if it is perceived from a different conceptual stance. Based on this relational account of fundamental rights, a rightholder has prima facie claims against other members to undertake the action necessary to facilitate the realization/upkeep of an interest and to omit an action that would be detrimental. In either case, non-compliance would constitute an infringement on the claim to be respected as an equal. Whether prima facie claims ultimately prevail depends on whether they conflict with other prima facie claims and, if they do, how this conflict is solved. Insofar as it pertains to the positive law, this is not answerable within the meta-concept because it involves answering the question of what interests and what claims are positively acknowledged as part of the law. That requires interpretation which is why the concept of fundamental rights connects to the constructivist discourse theory of law.

The protection of interests does not differ regarding the question of whether or not it requires an action or an omission on the part of the obligated party—there is no structural asymmetry in the level of protection. To exemplify this, let us assume that, in one case, surviving moment X depends on omitting a harmful act and, in another, it requires a beneficial act (such as receiving a vaccination or a respirator). Being in breach of the behavioural obligation is equally detrimental to the interest of surviving moment X. This means that being in breach of an obligation to omit something is not axiomatically more wrong/more harmful than being in breach of an obligation to perform a certain action. The concept of freedom that is connected to this model needs to reflect this symmetric level of protection. This cannot be a libertarian concept because a libertarian concept builds on (or is at least strongly connected to) the concept of negative liberty, which focuses on protecting

against the detrimental behaviour of the addressee (e.g., Berlin, 2002; Carter, 2022). Such a concept neglects the fact that the realization and upkeep of an interest is not always about protecting against harmful behaviour; it can also require others to behave in a certain way or to provide a certain setting in which the interest can be realized. The libertarian view is blind towards the presuppositions required to even get to a situation in which it only needs to be about protecting interests against outside intrusion (see e.g., Berlin, 2002, pp. 172–173; Carter, 2022). Insofar as human rights are read through the lens of libertarianism, human rights protect the status quo and the power asymmetries that go along with it.

The concept of human rights I am arguing for focuses on interests and does not endorse a structural asymmetry in the level of protection (Behrendt, 2023b, pp. 124–125, 265, 306). Rather, the concept facilitates perceiving the complexity of a status quo and the injustice that might have produced it. This is particularly relevant regarding the international dimension of combatting climate change and the discourse on intergenerational justice. It seems to be a reliable assumption that the goal of (human-friendly) climate stability requires a global perspective and, thus, international cooperation. We will not be able to solve this problem on a national level, which does not mean that we do not need to do as much as we can on a domestic level.

If we wish to address the necessity of international cooperation (and of integration of agents beyond states; Weiss, 2020, p. 121), we need to have an answer to the question of allocating costs, and this discussion will have to involve matters of justice (Caney, 2018; Shue, 2021, pp. 28–57), insofar as some nations have contributed far more to anthropogenic climate change than others. Cooperation on the issue of climate stability is (and will remain) influenced by development on the issue of global justice. However, this should be separated from the question of what needs to be done to achieve (human-friendly) climate stability. Both problems are massive and complex and need to be addressed. They are connected but they should also be separated on an operative level to deal with them efficiently. If they are only addressed jointly, we will never get anywhere.

The relational concept of human rights can understand any interest of a human being to be protected by human rights as long as it does not imply a hierarchical element. Therefore, it is not restricted to interests that are fundamental for human beings despite misleading terminology (basic rights or fundamental rights). A right is materially connected to (concrete) claims against obligated parties. Based on the relational concept of human rights, the conceivability of rights hinges on the conceivability of claims that give rise to a right as a form of abstraction (Behrendt, 2023b, p. 303–305). In doctrinal practice, it is the other way around. A claim can only be acknowledged if there is a subjective right that gives rise to it.

Claims and obligations are correlative in nature, meaning that every claim has a corresponding obligation (e.g., Kelsen, 1967, pp. 125–130). Claims and obligations are also inherently connected to reality. The relational concept is a theoretical layer that references the real interests and decisions of agents and provides conceptual frameworks for the complex mechanisms of the system of law (insofar as the law is supposed to be based on fundamental rights). Due to this connection to reality, claims (and therefore obligations) only manifest if there is an interest of an agent who fulfils the criterion of rightholdership and if there is a behavioural option that contributes to or obstructs the realization (or upkeep) of said interest (Behrendt, 2023b, p. 306).

This correlative nature is problematic with regard to conceiving obligations concerning future generations. If there is no agent, they can have no claim and, thus, there can be no obligation. The problem goes even

deeper because it also pertains to what it means to actually have an interest. If you are not playing tennis, for example, then it does not affect your interests if legislation bans tennis as a sport (apart from the anxiety that might arise if this legislative act were to be perceived as erratic). If there is no interest, there is no claim, and, therefore, no obligation. This is conceptually challenging concerning the future interests of those presently living. We do not know what interests we will have in the future because our interests are largely influenced by living circumstances—future interests are not necessarily present interests.

4. Bridging the Gap: Present Legal Obligations in Light of Future Interests

With regard to conceiving present obligations in light of future interests based on a correlative understanding of claims and obligations, two scenarios need to be addressed separately: (a) the rightholder is living and we are asking about present obligations concerning their future interests; (b) there is not even an agent yet and, therefore, no rightholder (Behrendt, 2022).

4.1. *Present Obligations Without Present Concrete Interests*

An obligation to undertake or omit action X is contingent on a corresponding claim, and that claim is contingent on action X having an impact on the interest of the rightholder. Therefore, everything hinges upon there being an interest. But what exactly does it mean to have an interest? What is the ontological phenomenon the term is referring to? Human rights protect several interests, some of which we never really decide on, they simply “exist” (e.g., staying alive and healthy), while others are only brought about by decisions (e.g., eating that apple or playing tennis). At least in some cases, a decision is necessary for a claim to arise—without a choice and a decision that concretizes interests, there would be conflicting interests and, thus, claims and obligations to undertake as well as to omit action X. This points to the need to have a model of all perceivable interests and a way to determine under which circumstances an agent holds which interest. If we combine this model with the relational concept, we can distinguish between different modes of claims: claims that are activated because of a (legally relevant) decision and claims that are only “palely sketched.”

Some interests, like the interest to stay alive, usually do not require a decision; it is simply there and we expect others to omit any action that would end our life (or put our survival at risk) and to undertake actions that facilitate our survival (especially in the face of a threat). These interests do not require a decision, be it a conscious or an unconscious one, to ground an activated claim and, thus, corresponding obligations.

Protecting interests can also be about “keeping your options open” (i.e., about the interest in concretizing the interest later): If people have already created a situation in which a certain option is no longer truly present (because circumstances have changed substantially), concretizing one’s interests becomes meaningless. For example, if someone has offered you an item and gives it away because you were unable to make up your mind, it is somewhat futile if you now decide that you want to have it after all. They are no longer in a position to give you the item without tremendous trouble and effort on their part, which might be too much to ask. This suggests that there can be (activated) claims and corresponding obligations to keep and/or establish circumstances that allow for these future decisions. In my opinion, the notion of intertemporal protection of freedom, which the German Federal Constitutional Court argued for in its 2021 decision on climate change, aimed at exactly this issue. Human rights protect not only against “current” infringements on protected interests but also protect against a “lack of options.” Contrary to the reasoning in

the decision, this is not a harbinger of future violations of human rights. Infringements on human rights that would currently be considered disproportionate and, thus, unconstitutional, can be considered proportional if the relevant circumstances are substantially different. For logical reasons, the notion that human rights protect against the erosion of freedom cannot be thought of as a pre-effect of otherwise necessary future violations of human rights (Behrendt, 2023c).

As a result, some claims and obligations are conceivable even though the rightholder has not made a decision by which they concretize their interests. This means that present claims and obligations exist even though the impact of the behaviour will only occur in the distant future. Whether or not it will be avoided due to some intervening action on the part of a third party (for example) is another matter. As long as it occurs within the lifespan of a rightholder, human rights protect against this. If you undertake an action that can lead to an event that should not occur, you are in breach of an obligation. Legislation that shapes society as well as the behaviour of state and non-state agents in a way that neglects this violates human rights.

4.2. Present Obligations Towards Future People or Obligations Towards Non-Existent Agents

The (meta-conceptual) legal relationship between human beings can be conceived to exist between every (living) human being at any respective point in time. To qualify as a member of the human-rights-relationship model, it suffices that the agent meets the criteria of “being human” in the biological sense. This means that, even at this moment in time, people at the end of their lives are in a legal relationship with a newborn, even if they never meet. Because the concrete present moment is ever-fleeting, already belonging to the past once it has occurred (Shue, 2021), the relationships between human beings are constantly dynamically evolving (insofar similar, Barry, 1977; Gheaus, 2016, p. 499). One person dies and another is born, circumstances change, decisions are made, interests are formed or abandoned, and all of these events affect the legal relationships, the member stock of the social group, and the claims and obligations members have against (or towards) each other. Someone who is now 30 years old will constantly be faced with obligations towards “new” rightholders up until the day they die. This means that a pre-effect of future obligations becomes conceivable simply because people continue to procreate (see Figure 1). This chain of overlapping generations also generates prima facie duties on the part of the presently living agent X that benefit (future) rightholders with whom agent X will never be in a legal relationship. They arise as a pre-effect of the obligations of a future person—agent Y (with whom agent X will enter into a legal relationship at some point throughout his life span)—towards a future person from a generation even further down the chain of generations.

Whether people will be born in the future remains an epistemic issue. Humankind could cease to exist. If we cause this by our behaviour, the behaviour would not constitute a violation of an obligation towards those who never get to be conceived if we evaluate the issue solely based on the relational concept of human rights. They simply never come into existence, so there is never going to be a rightholder. Based on a determinist worldview (that includes a determinist understanding of human decision-making processes), the non-identity problem brought forward by Parfit (1984, pp. 351–378) does not challenge the concept. If you decide against conceiving a child at a certain point in time, you do not violate any obligation against the child which would have been conceived if you had chosen differently. It is simply never being conceived and it was never going to be. There is no rightholder—not presently and not in the future. If a person will not be born in the future, then there is no obligation towards that person in the future. It follows that there is no present obligation as a pre-effect.

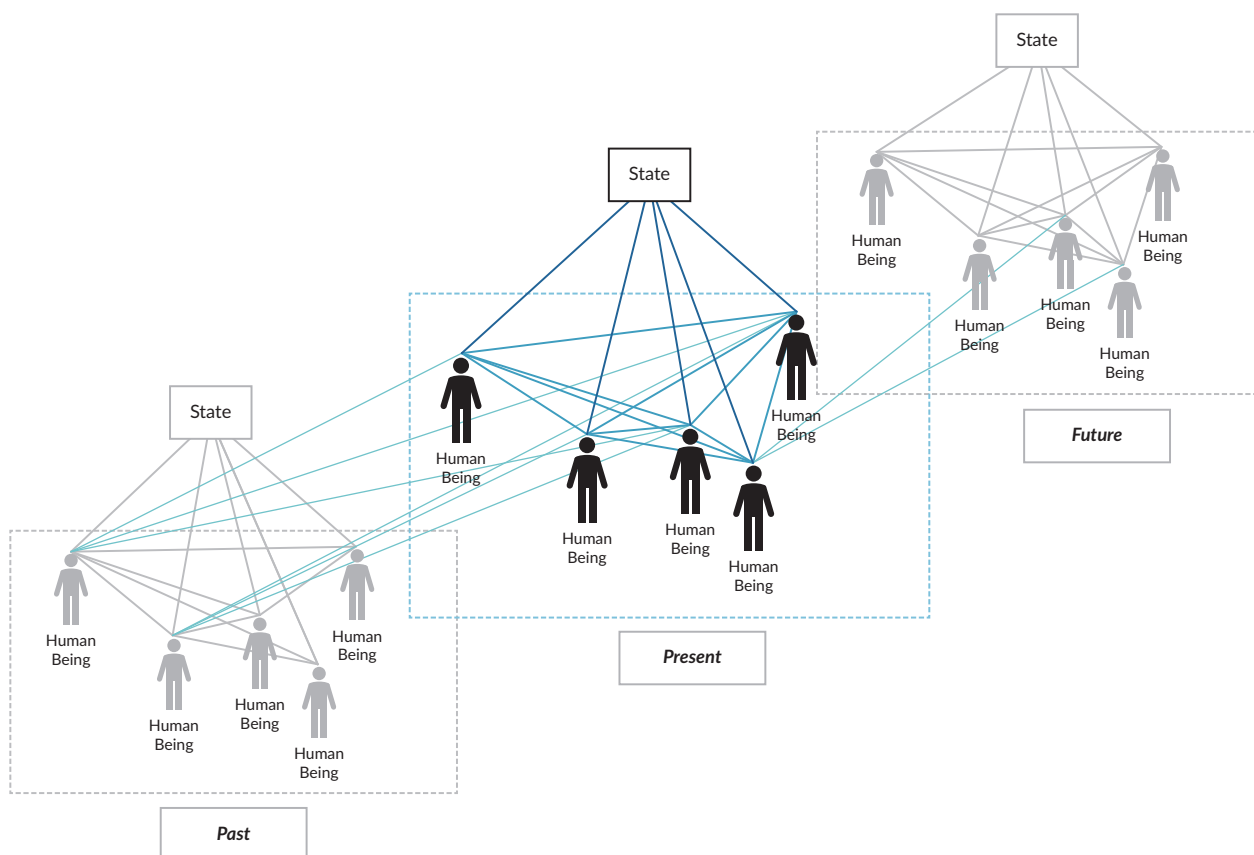


Figure 1. Dynamic model of the relational concept of human rights.

This does not solve the epistemic issue. No normative concept can do that. However, uncertainty cannot be used to refute the thesis that obligations are conceivable as a pre-effect on a normative level or else obligations could not be grounded on consequentialism (consequentialism, however, is a more convincing approach than the deontic model). A consequentialist approach to conduct norms grounds the thesis that the obligation to undertake or omit an action is justifiable only because the action will have certain harmful effects. An action or the omission of an action is required to avoid the occurrence of an event. The event that has that certain harmful effect (event X) always takes place in the future, otherwise, the event would not justify the (consequentialist) conduct norm. In most cases, the question of whether event X will take place raises epistemic issues. Even if we know that event Y has taken place and this will lead to event X (because we know the relevant laws of causality), there might be other chains of events in motion that will disrupt the chain of events leading up to event X and we might not know about all of those other chains of events. Obligations cannot only be conceivable if we have absolute knowledge about every issue that impacts a situation because then we would rarely be able to postulate an obligation.

Nevertheless, epistemic limitations play a role in establishing legal obligations (this dimension of the law needs to be distinguished from the normative dimension I have laid out so far, even though they are connected). One of the central functions of the law is to establish and stabilize behavioural expectations to protect certain interests of members of the legal community. Law has a prescriptive nature; it aims at influencing people's behaviour, telling them how they should behave. Any agent's behaviour can thus be mirrored against the law if and insofar as it is based on a legally relevant decision which enables the members of the legal community

to ascribe a claim to correctness to that behaviour. If and insofar as that behaviour would not be following the law according to an observer or another agent, this might call for a reply. However, any agent can only decide on their knowledge base. This means that legal claims and obligations are established despite epistemic limitations. An agent can only be culpable for an event if they had known or should have known about the relevant factors that qualify their behaviour as setting a chain of events in motion that will lead to the harmful event. If superior insight can be gained later (by the same agent or by other interpreters) and it shows that the behaviour did not create a risk at all, undertaking the action could still constitute an infringement on a legal obligation—because an agent can only decide on their knowledge base. If they thought they would cause a harmful event, it boils down to the question of whether the interests pursued with that action outweigh the interests they thought they would harm. Therefore, epistemic issues do not hinder the conceivability of obligations. With regard to this dimension of law, obligations are conceivable in cases in which reality does not give rise to them (Behrendt, 2023a).

5. No Easy Way Out: Problems of the Established Approach to Human Rights

The concept presented in the previous section does not mirror the established doctrine and approach to fundamental rights when it comes to legal obligations towards future generations. This is partly because the established doctrine does not offer the analytical tools to ask the right questions. At least in German constitutional law, it currently operates under the assumption that fundamental rights will remain the same over time (as long as a relevant constitutional reform does not take place), but this view neglects the link to the interests that give rise to fundamental rights (including human rights) in the first place. In a way, the established perspective is due to the abstraction and deductive reasoning that accompany an enactment-oriented concept of legal positivism and the codification of fundamental rights that are bestowed on human beings. As a result of the historic development of human rights and fundamental rights by liberalism, they are “classically” envisioned to bind only the state; a binding effect on non-state agents is only a collateral effect. Bhatia (2023, p. 4) calls this “default verticality.” Fundamental rights can still be called relational because their application requires acknowledging vertical relations (between the rightholder and the state)—however, it should be noted that this is not the *horizontal* relationality described previously (the horizontal relationality applies only to the relationships among rightholders). Furthermore, as norms, they are also perceivable in the abstract, without being tied to a concrete rightholder. This approach facilitates a different grasp on fundamental rights (one that regards fundamental rights primarily as abstract norms) than the one I am arguing for, especially, if it is combined with the above-mentioned classical approach that holds on to the narrative of legislation setting out not only the norm texts but also the norm. Fundamental rights would be whatever is thus enacted. The concretisation and application, and hence the connection to rightholders and reality, is only the second step. This does not mean that doctrinal work does not refer to reality (scholars are generally determining the contents of the abstract norm with regard to reality) but the connection remains in the abstract and is somewhat non-tangible. The relational character presents itself only with this second step.

If fundamental rights are understood based on the relational concept I have argued for, their codification would merely be a textual anchor; what their acknowledgement would substantially refer to are the real interests, chances, and risks for those interests of the rightholders that are (or would be) generated by the respective behaviour of the state or non-state agent. Thus, the connection between fundamental rights and reality presents itself clearly. The epistemic problem is easily discernible as such; it is not veiled by normative

abstraction and cannot be mistaken as a normative problem. The relational meta-theoretical model of fundamental rights pertains to the purely normative realm; claims and obligations do not suffer from the epistemic problem, as they pertain to a different dimension or level of the law—the one in which obligations and claims need to be established in the application of the law. This level is connected to the purely normative realm, but it also needs to process epistemic limitations.

The established doctrinal approach is unable to differentiate the epistemic problem from the question of whether obligations are conceivable on a “purely” normative level. This seems to make things easier, but simplicity comes at the cost of accuracy and conceptual clarity because the intertemporal dimension of the legal relationships brought about by fundamental rights cannot even be conceived as such. This dimension is beyond the scope of the established doctrinal approach because, as abstract norms, fundamental rights are somewhat “timeless.” As a result, the conceptual approach to protecting future interests needs to be argued differently. A currently living rightholder enjoys the right to life and a general right of personality and, if these interests continue to be positively acknowledged, then the state will be bound in the future. This seems to allow the established doctrinal approach to assume intertemporal protection of freedom by anticipating that rightholders have an interest in enjoying the same or a somewhat similar “amount of freedom” in the future. This is, of course, reasonable. If a person has their hands full with staying alive, circumstances will not allow them to develop their personality in the way we take for granted as members of the upper/middle-class today (especially in comparatively rich nations). This would then lead to the notion of an intertemporally equal “distribution of freedom” (or an intertemporally equal distribution of opportunities for self-determination). The German Federal Constitutional Court expressed something akin to this in its decision of 24 March 2021 on the 2019 Climate Change Act, but it remains unclear whether it actually aimed at this notion. It held that, under certain conditions, the basic law would impose “an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations” (Bundesverfassungsgericht, 2021). The decision suggests that these certain conditions refer to the constitutional acknowledgement of finite resources, but the rationale was not articulated in detail. It is clear, however, that the principle of proportionality was used to state that the German Climate Change Act of 2019 is partly incompatible with constitutional law because it allows for too much in emissions short-term, leaving future decision-makers to take drastic measures to reduce emissions. These future drastic measures will certainly curtail behavioural options and impact the upkeep and realization of protected interests. It is therefore convincing that human rights process this issue somehow. However, the reasoning of the court does not offer a sound doctrinal explanation (e.g., Callies, 2021; Grosche, 2022; Kersten, 2022; Lenz, 2022; Theil, 2023). Its reasoning can be read in several ways but none of them are viable conceptually. In the end, every road leads towards the necessity of forging legal obligations in light of the future interests of rightholders—those who are already alive or who will still be born (Behrendt, 2023c). The abstract-level approach only clouds the core problem of conceiving these obligations; in my opinion, it is therefore preferable to turn to the conceptual approach laid out in this article.

6. Conclusion

Legal obligations towards future generations are conceivable based on human rights, even from a positivist stance, insofar as the interests concern a person who is born during the lifespan of a person alive today. A legal order that entails norm texts on fundamental rights and that proclaims human beings to be rightholders already contains the necessary feature by which to argue that such a legal obligation exists.

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Conflict of Interests

The author declares no conflict of interests.

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