Structuring Human Rights: Lessons for Central and Eastern Europe

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Abstract *The article deals with a large spectrum of issues concerning human rights in the Central and Eastern Europe, including post-Soviet republics. Firstly, the author depicts the historical background of nowadays human rights' defense, including the most important international bodies and conventions. Secondly, the scholar identifies the basic types of human rights and then their tensions and restructuring.*

Key-words*: human rights, minorities, indigenous peoples, recognition, protection gap*

Human rights are norms that help to protect all people everywhere from severe political, legal, and social abuses. Examples of human rights are the right to freedom of religion, the right to a fair trial when charged with a crime, the right not to be tortured, and the right to engage in political activity. These rights exist in morality and in law at the national and international levels. (Nickel, Human Rights 2014)

Despite a proliferation of NGOs as well as numerous international and regional treaties, conventions, conferences, and bodies dedicated to protecting universal human rights and promoting development, a full half of the human family lives in poverty and human rights abuses continue in every country in the world. Minority groups are all too often the focus of such abuse. When they are not directly targeted, grinding poverty and social and political marginalization contribute to a standard of living that is frequently well below that of majority populations living in the same areas. There are of course normative reasons to care about the treatment and well-being of minorities—human rights, development, democracy and human agency come to mind—but there are pragmatic policy concerns as well. Many of the Central and Eastern European countries that were part of the two most recent waves of European Union accession, as well as neighboring non-EU hopefuls, are members of a variety of international institutions, programs, and organizations through which they have committed themselves to protecting and integrating their minority individuals and groups. To whatever extent these countries would like to be recognized as making a sincere effort toward achieving these goals (and, given the reliance of many of them on varying degrees of foreign aid, that desire is not insignificant), these states have a reason to enact and try to enforce the relevant laws. Translating key international treaties into domestic law and policy, however, is not always straightforward.

Over the course of the last century, the countries of Europe have—mostly through the Council of Europe (CoE)—blazed a trail toward clarifying, codifying, and attempting to enforce human rights norms and laws, many of which have a strong "development" component. As part of this system, the CoE boasts the longest running and most powerful regional human rights court in the world—the European Court

of Human Rights—and its caseload is rapidly expanding. More recently, as the European Union has expanded into the former communist states of Central and Eastern Europe (CEE), its basic standards for accession to the regional body have become salient political goals domestically. These include, among other things, democratization, the protection of minorities, and plans of action to fight poverty (issues that frequently go hand-in-hand). The European Framework Convention for the Protection of National Minorities, promulgated by the Council of Europe and ratified by all of its members including the non-EU CEE states, has been a milestone in the advancement of minority protections throughout Europe. For CEE member states that have not yet joined the European Union but hope to, many of its provisions are also critical concerns for accession to the EU.

The application of this and similar international laws in a domestic context, however, has been uneven, with countries such as Spain and Belgium integrating strong minority and group rights laws into their legislative docket and even into their constitution, while other countries, such as France, remain strongly opposed to ethnocultural "fractionalization" of the law, as opponents of multiculturalism often call it. The trend toward application of such policies has been strong in Western Europe and in countries of immigration such as the US and Canada, but far weaker in Central and Eastern Europe and nearly non-existent beyond (Kymlicka 2007), although with the recent wave of successes of far-right political parties in the wake of Europe's refugee and migration crisis, even the multiculturalist stalwarts such as Germany have begun to waver in their commitment to minority protections. These events open the doors for manipulation of the provisions in the treaties, making a clear understanding of what each requires all the more important.

Such clarity is especially important for determining, at the most basic level, which groups or peoples are actually the targets of certain minority protection treaties. The term „national minority," for example, is not defined anywhere in the Framework Convention but rather is left up to states to determine. While there are some good reasons for this vagueness, it also leaves groups at the mercy of their government to decide whether certain laws will protect them. Groups that fall through the cracks fall into what I refer to as a „recognition gap." This gap is particularly salient for Europe's Roma people, a group that does not fit neatly into some of the existing minority rights protection regimes, such as the European Framework Convention for the Protection of National Minorities, but whose members nevertheless share many of the same vulnerabilities, and face many of the same threats, as those who are formally recognized as national minorities. Meanwhile, these vulnerabilities are both acute and widespread.[1]

Structuring Human Rights.

This paper takes for granted that human rights are embodiments of certain principles, and then examines human rights as they are structured in international law. Such rights are, fundamentally, rules, not principles. They are *grounded* in principles, for example the „harm principle" (Mill 2002 (original:

[1] I canvass this problem in some detail elsewhere, for example Kosko 2016, and it continues to motivate and inform much of the thinking here.

1859)), 'justice as fairness' (Rawls 1971), or freedom of opportunity (Sen 1999), and can be understood as moral guarantees (Nickel, Making Sense of Human Rights 2007), but they are not themselves principles. International human rights treaties – the collections of covenants, conventions, and other binding agreements – and declarations are comprised of *lists of rules*. These rules tend to be very specific and are meant to address a set of very specific problems and experiences of injustice. This can be seen in the many preambles, going back to the *Magna Carta*, that open with a list of grievances or wrongs. This specificity can be both good and bad for the purposes of ensuring that human rights are genuinely universal; in some ways it promotes that goal, while undermining it in others. Specific, narrowly drawn rights are harder for states or other duty bearers to wriggle out of upholding. But although broad principles of justice can (in principle) speak to everyone (again, think John Stuart Mill, John Rawls, or Amartya Sen), a list cannot truly hope to do that. Their specificity inevitably makes them inapplicable to, or causes them to miss covering, certain persons or groups. This is a general feature of rules as opposed to principles and is largely unavoidable.

But how have we arrived at these lists? Most human rights, and especially the early human rights treaties such as the International Covenants on Economic, Social, and Cultural Rights (ICESCR) (United Nations 1966), and on Civil and Political Rights (ICCPR) (United Nations 1966), were designed to respond to very general threats, what Henry Shue has called „standard threats" (Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy 1996). Standard threats, according to Shue, are „the targets of the social guarantees for the enjoyment of the substance of a right" (Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy 1996, 29). These are meant to be threats that all human beings potentially face. These are broad, general, severe, remediable, and universal.[2]

Now, what if I, as a minority individual in need of a particular set of protections, have not been identified as such yet? Perhaps my needs are not especially visible, or not well understood. Or perhaps there is political resistance to recognizing them officially, to establishing legal norms to address them and ginning up the necessary appetite to enforce new laws. This reality generates a type of human rights protection gap sometimes called a normative gap. However, this situation also generates a second kind of gap which I refer to as a „recognition gap" in human rights protection (Kosko, 2016). The recognition gap, at least with respect to minority groups, arises in part from the current system of categorizing different „types" of minorities, formally *recognizing* certain groups as falling within the specified category (sometimes irrespective of what the group members themselves might think), and applying different protections accordingly.

[2] In the paper "Standard Threats," currently under development, I will argue that universality was never meant to be a defining feature of the standard threat and undermines its usefulness in helping identify rights necessary to protect individual human beings. However, until now interpreters of Shue have often argued that it is so.

Typologies of Rights

While Will Kymlicka and others have helped to clarify the international typology of minorities—those categories into which various ethnocultural groups fall—James Nickel does something similar for the various types of human rights that provide protections to minorities. His 'typology of rights' provides a useful framework for understanding human rights as they are applied to minorities, distinguishing three types of relevant rights: something he calls „Universal Rights Applied to Minorities" („URAMs" for short), as well as Minority Rights and Group Rights (for which he uses capital letters to clarify that he is referring to a specific term for a specific type of right).[3] Getting a grip on how individual and group rights, in their different forms, serve to protect minorities will be crucial in helping to determine whether group rights are, in fact, necessary (and, if they are, in what sense), and then to formulate a justification for that position. Crucially, unlike the trends in liberal multiculturalism and the typology of minorities that I describe elsewhere (Kosko 2013), Nickel makes the persuasive argument that *specific* rights—be they held by individuals or groups—have arisen from an historical demonstration of genuine need. Specific rights, he argues, are answers to specific kinds of vulnerability.

„Universal Rights Applied to Minorities" are „ordinary human rights of all people in one of their roles, namely protecting minority persons. URAMs do not name types of minorities or mention specific problems of minorities" (Nickel 2007, 154). The right to practice one's own religion—as enshrined in the Civil and Political Covenant or the American Bill of Rights, for example—is one example of this type of right, since it is a right that all people enjoy. Nickel describes URAMs as functioning like "reminders" that minorities have the same rights that the rest of us have.

True Minority Rights are designed with the purpose of protecting vulnerable minorities and addressing specific problems they face. These are „group differentiated" in the sense that they refer to particular minorities or types of minorities and are „rights of some not all" (Nickel 2007, 155). To be clear, „Minority Rights are individual rather than group rights. But they are rights of minority individuals, not rights of all persons" (Nickel 2007, 161). Nickel, following Kymlicka, gives an example from the Civil and Political Covenant that says that „in those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right… to use their own language" (United Nations 1966, Article 27). Though of course majorities cannot be denied this right either, in this case, these rights are articulated as belonging to minorities because international treaties do not accord these rights to all. This is because rights are formulated to meet threats, not simply recognize the elements or conditions of a decent life.[4] Nevertheless, though Minority Rights are group-differentiated, they are still held and enjoyed by individuals.

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3 Will Kymlicka uses the term 'group-differentiated rights,' but also 'status-differentiated rights.' See Baisley (2012) for a discussion of the distinction between the two, drawing on the work of both Will Kymlicka and Peter Jones.

4 Nickel, taking up an idea of Henry Shue in Basic Rights, argues that „experienced dangers and injustices play a large role in the formulation of human rights" and thus invokes a „substantial and recurrent threats" test (like Shue's „ordinary and serious" threats test) to justify the formulation of a true human right (Nickel 2007, 70). Majorities do not generally experience „substantial and recurrent threats" to their linguistic freedom and it is thus not necessary to assign a human right to protect that freedom. This is not true of minorities. Shue, in addition to requiring

Group Rights are also group differentiated—they are rights of some, not all—but they are held by a group as whole, not by individuals within that group. The *group* is actually the „right holder," a very uncommon phenomenon in the very individual-oriented world of human rights. Nickel gives the helpful examples of rights against genocide or ethnic cleansing or forced assimilation, rights that are not infringed upon when an individual's right to personal security is violated, but rather when the security—even survival—of the entire group is violated. Of course, in any such case, violations of group rights go hand in hand with violations of individual rights and the protection against the latter may even require protection against the former (and vice-versa). Violations of group rights compound violations of individual rights by recognizing the presence of a special kind of threat. Nickel's list of Group Rights, which he says are very often applied in the context of some form of political autonomy, includes:

…rights against genocide, forced assimilation, and ethnic cleansing, to semi-autonomous status, territory, control over resources, recognition as distinctive and/or oppressed; recognition of a group's language as one of the official languages of the country; subsidies to help keep a culture alive; expanded educational and economic opportunities; political participation as groups; self-determination; and secession (Nickel 1997).[5] The items on this list are extremely varied. Which Group Rights, if any, are appropriate to a particular minority group depends greatly on the group's nature and circumstances. (Nickel 2007, 155)

Recognition of minority rights in international treaties and conventions has moved from the early „URAMs" (like rights against discrimination) to broader, group differentiated Minority and Group Rights. This move, particularly toward Group Rights such as autonomy, remains controversial.

„URAM" was the approach taken in the Universal Declaration of Human Rights (Nickel 2007, 156). The treaties of the 1950s and '60s followed and extended this approach by specifying certain types of minorities—ethnic, linguistic, and religious (Minority Rights)—as well as by recognizing certain rights of "peoples" (Group Rights). The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was the first treaty specifically dedicated to the protection of Minority Rights. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) followed suit, blending the URAM approach that emphasized that women were due the same protections as men with the Minority Rights approach that emphasized the specific problems and vulnerabilities that women—a social if not numerical "minority"—face.

The first treaty fully to embrace the idea of protecting „peoples"—the Group Rights approach—is the United Nations Declaration on the Rights of Indigenous Peoples, which after a long and contentious history was finally passed on September 13, 2007 in a vote of 143-4 (with 11 abstaining).[6] The

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that the threat be ordinary and serious, argues that for the human right to exist it should also be remediable (Shue 1996). Threats such as those discussed by Nickel generally pass this test as long as lack of political will is not accepted as a legitimate failure of the „remediable" test

[5] Citation is Nickel's and part of the original text.

[6] Australia, Canada, New Zealand, and The United States voted against adopting the declaration. All four have significant indigenous populations. In April 2009, Australia reversed its position and endorsed the Declaration, followed by New Zealand a year later.In November 2010, Canada formally endorsed the Declaration. Less than a month later, the United States also joined the Declaration's supporters. US President Barak Obama, in a December 2010, speech announcing the U.S. Government's intention to reverse its stance and lend the Declaration its support, said of native-nonnative health gaps, "Closing these gaps is not just a question of policy, it's a question of our values" (Bohan 2010).

Declaration „sets out the individual and collective rights of the world's 370 million native peoples, calls for the maintenance and strengthening of their cultural identities, and emphasizes their right to pursue development in keeping with their own needs and aspirations" (United Nations 2007). The Declaration is not legally binding, but it does recognize that indigenous populations ought to be protected from discrimination and that „States must promote their full and effective participation in all matters that concern them" (United Nations 2007).

Are these varieties of rights really all that different, though, and if not, is there still a compelling reason to articulate and enforce them? Nickel advances this discussion by examining the distinctions between URAMs, Minority Rights and Group Rights more closely. He makes the strong point that many Minority Rights (including women's rights) are in fact derivable from universal human rights. They are only superficially group-differentiated and are in fact simply URAM's that are specially formulated to address special gaps in protection arising from minority status. Thus, the right to speak your own language really is enjoyed or, at least, enjoyable by all and the right to pre-natal care is derived from the right to health care. That members of linguistic majorities typically need not invoke protection under the former right and men need not (cannot!) request pre-natal care is merely an expression of the fact that human rights are needbased. You can only claim that a state ought to take some action to protect your right if you *need*—and are not getting—whatever benefit the right confers (Nickel 2007, 162-3). There must be some serious and recurrent threat.

This point echoes the equal-treatment-for-equal-needs principle advocated by Barry: minorities are not getting „special rights" as many opponents of Traveller rights in the UK argue, for example, but rather are getting their equal need to—in this example—a decent home met by the equal treatment of provision (Barry 2001). Contrary to Barry, however, this does not mean that the category of Minority Rights is not useful. While URAMs serve as *reminders* that universal human rights apply to all, a Minority Right serves the important function of *addressing the special problems* faced by minorities in the application of universal human rights (that is, their particular need), and *prescribing a special remedy* to ensure that that right is in fact protected (a remedy that has been proven necessary by countless historical examples, a fact Barry should take into account).

Nickel also fleshes out his discussion of Group Rights, distinguishing three kinds: group security rights, representation rights, and autonomy rights. Security rights are the least disputed of the three. These can be understood as those that „protect the existence and safety of minority groups as groups. The right against genocide is an example of a group security right, as are rights against ethnocide, deprivation of group property, and forced relocation" (Nickel 2007, 164).

Tensions in the System

This typology of rights arises from efforts to ensure that our human rights laws, our treaties and conventions, respond to the many common, severe, and remediable threats that human beings face, but not just all human beings. The evolution of the system as it is today recognizing also that there are specific threats that particular peoples, or groups or 'kinds' of people, face. As our international law-

making bodies, such as the United Nations, the African Union, the Organization of American States, the Council of Europe, and other international and multilateral organizations chose to move beyond the reliance on individual, 'universal' human rights, they did so – perhaps quite naturally – by focusing their instruments of protection of particular groups of people: minorities of varying kinds, indigenous peoples, the very young and the very old, women, migrant workers, persons with disabilities, and so on. That is, the international community has in many cases tried to close human rights protection gaps by identifying more kinds of minorities with more specific vulnerabilities and writing up more declarations and treaties.[7] The result has been a proliferation of what Nickel would call Minority Rights, with some number of Group Rights as well. And yet, acute vulnerabilities remain as these regimes, while group-differentiated and sometimes narrowly targeted, still do not fully account for the particular disadvantages of certain groups. To make the problem worse, as I have pointed out elsewhere, for a person to claim these specialized protections, she must be *recognized* by her government's authorities as the 'type' of minority that is the target of the right, or rights regime, in question (Kosko 2016). Otherwise, the rules will not apply to her.

There is a tension here. On the one hand, there is a clear need to protect human beings as much as possible from standard threats to our security, subsistence, and freedom (including those threats which are common only to sub-groups of the population), as well as other serious vulnerabilities that do not generate what Shue would deem 'basic rights' but are nevertheless severe, while on the other hand not allowing the human rights system to become overly fragmented and unwieldy. Unchecked proliferation, generating unmanageably long lists of rights, does not really seem to be the answer. Already, many argue that '[p]erhaps lists of human rights have gotten too long' (Nickel 2007, 96). Even those theorists who do not advocate for an ultra-minimalist handful of legal rights stop well short of calling for open-ended treaty proliferation, for a variety of reasons (logistics, time, financial cost, and uncertainty of success, among others).[8] Furthermore, as I have argued:

„[W]hile more nimbly targeted, fine-grained international human rights instruments offer the promise of pulling many groups from the normative gap, they also come with the risk of widening the recognition gap. The more narrowly-drawn the target population, the easier it is for authorities to pick and choose who will be recognized as rights-holders under the new treaty". (Kosko 2016, 187)

As badly as (many of us would argue) we seem to need various group-differentiated rights, rights that will continue to evolve and change as our human vulnerabilities evolve and change,[9] a fundamental question remains: how do we reach a balance between the universality to which the human rights system aspires and the specificity that it requires? Is there a 'sweet spot' in which a working typology of

[7] See the Office of the High Commissioner for Human Rights 2010, Section III, for an exhaustive list of minority rights protection mechanisms in international human rights law. See also Nickel 2007, Chapter 10, Minority Rights

[8] See Kymlicka 2011 for a helpful discussion with respect to the indigenous-minority divide; see Nickel 2007, Chapter 6, for a broader treatment of 'The List Question;' see also International Council on Human Rights Policy 2006 for a discussion of pros and cons of resolving protection gaps through hard law (ie, norm proliferation) versus other, soft law mechanisms. See Rawls 1999 for an example of an ultra-minimalist view (and list) of human rights.

[9] See Henry Shue's recent work on human rights in the Anthropocene (forthcoming in *Encyclopedia of the Anthropocene*, Elsevier, December 15, 2017) for a discussion and some examples of the role of climate change in this process.

minority groups is no longer grossly inadequate and increasingly unstable? Is such a typology necessary, or even desirable, for human rights law and policy to function properly? Can revising or abolishing it help address the politics of recognition that have generated such a legal typology in the first place?

Restructuring Human Rights

Perhaps part of the answer is to begin to think of treaties and conventions not as the end-all, be-all of all human rights, the final word on the rights that groups actually enjoy, but rather as further applications of broader human rights principles. This is not too far off from Shue's proposal to focus on a few cores, "basic" rights from which other, more specific rights might spring (Shue 1996). Of course, many philosophers of human rights have long argued that the lists of rights that we find in international treaties and declarations are not themselves *the rights* but are expressions and legal codifications of certain rights that (more or less) all people hold at (more or less) all times and in (more or less) all places irrespective of whether they have been enshrined in international law or supported by domestic legislation. I am suggesting something a little different. I am not taking up here the question of whether my right to be educated in my own language is a right that I *have* irrespective of whether it has been *recognized* in law (this is dealt with comprehensively by many others elsewhere).[10] Rather, I am suggesting that we look to the space outside of positive law not for timeless and universal but otherwise very specific rights, but rather for the abstract principles that underlie those rights. Let me offer a very rough sketch of one possible way that we might restructure the way we think about, and thus use, human rights in policy making. I offer this sketch as nothing more than the start of a long conversation, not as a new theory of rights!

I propose that we might think of human rights as having three levels of abstraction.[11] In the middle is the familiar, generally stated, universal human right that responds to a standard threat. We can work up from this universal human right to the abstract underlying principle. We can also work down to the narrower minority rights, those that respond to less standard threats. Figure 1 below demonstrates both the general idea, and two specific examples of how we might move between an underlying principle, a universal (broadly stated) human right, and a more specific right. Here I use the term „minority" to mean any group of people whose particular vulnerabilities might not be shared by the wider population, or whose needs are not adequately met by the (often presumably universal) protections against standard threats. In fact, the structure I am laying out here can accommodate many different kinds of narrowly-drawn rights, possibly, but not necessarily, including ones that are group-differentiated. (Anexe)

This structure recognizes that, at the lowest level of abstraction we sometimes *do* (and need to) generate more specific rules from the general, universal human rights: the Convention on the Elimination of All Forms of Discrimination Against Women, for example. But if we can also extrapolate, work backward, to

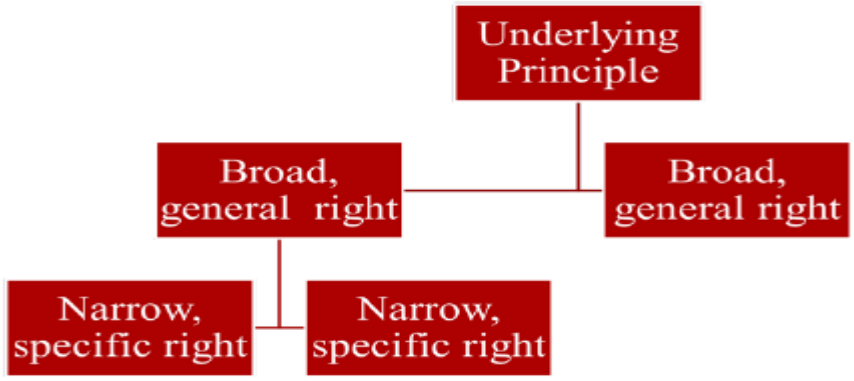
[10] See Nickel 2014, Section II, for an overview and suggestions for further reading.

[11] James Griffin, in *On Human Rights* (2011), makes a similar, although not identical, move in proposing that rights operate on three levels.

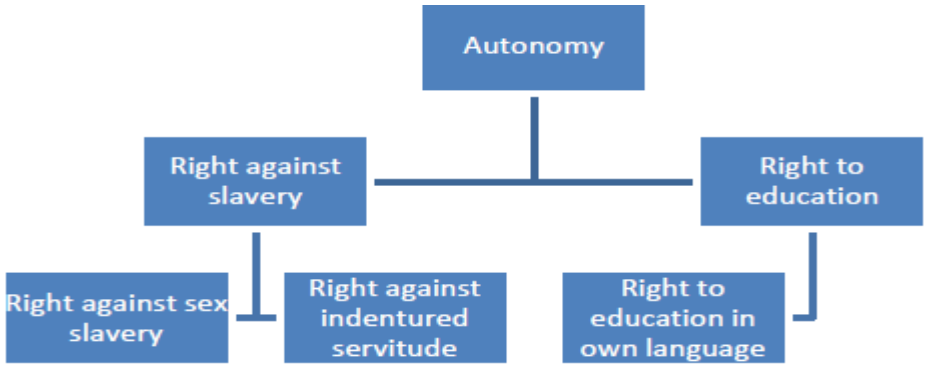
find the principles that underpin these, then we can use these principles to guide domestic or even local or international policy formation, or we can employ them at the point where existing policies are applied (in how law is interpreted on the ground). This conception allows us to ask: What is the broad *principle* that this *rule* seeks to forward? From here we can do two things. We can ask: How can this principle be applied to this group that is not currently covered by any human rights treaties or declarations? That is, how can we close a particular normative gap? Or we can ask: How can this principle be applied to this group that *ought* to be covered by existing treaties but is labeled in such a way that those treaties do not apply to them? That is, how can we close a particular recognition gap?

Working up from the narrowly defined (minority) right, to the broad, underlying principle can give us the grounds to bring the excluded group under the umbrella of that particular list of rules, even if there is disagreement about whether the label quite fits. Germany, FRY-Macedonia, Slovenia, and Sweden have all done precisely this with respect to the Roma under the European Framework Convention for the Protection of National Minorities. Sweden and FRY-Macedonia explicitly recognize the Roma as a national minority, while Germany and Slovenia define the Roma as an ethnic group, not a national minority, but say explicitly that the Convention will apply to them. Nicaraguan courts employed this principle in declaring that certain indigenous rights extend to Nicaraguans of African descent. In many respects, it can be easier to pressure states to do this than to draw up or buy into a whole new treaty. It is politically easier to say „Hey, Luxembourg, the Framework Convention applies to the Roma", than „Hey, Luxembourg, how about we write up a Convention on the Rights of the Roma?" Similarly, in Nicaragua, it proved easier to say „Hey, ILO 169 on indigenous peoples applies to the Afro-Nicaraguans," than „Hey, how about we write up a Convention on the Rights of Afro-Nicaraguans?" (Nevertheless, advocates on both continents have been, and continue to be, actively seeking conventions on the rights of Romani people and Afro-Latinos, respectively. While it may be that a significant normative gap remains for both groups—a situation that seems to justify making new lists—working in the meantime to bring these groups under existing treaties seems to many like an expedient middle ground.

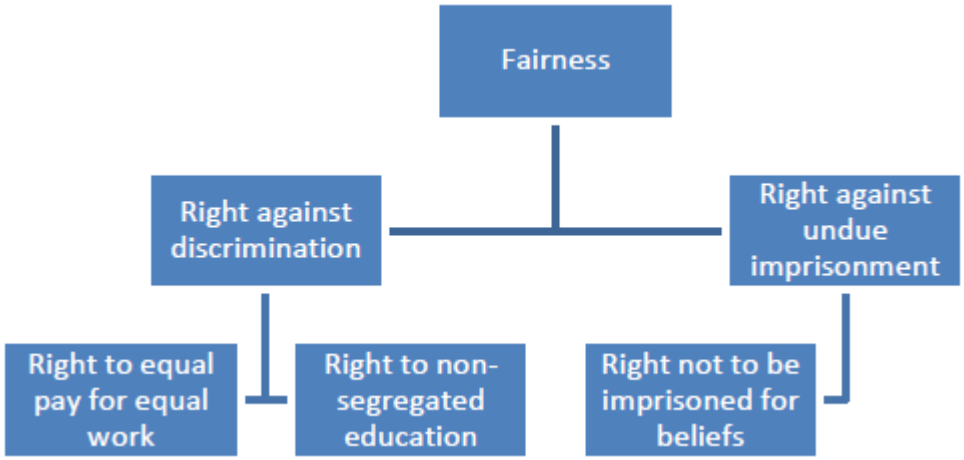
figure 1: Levels of Rights Abstraction



Example 1: Autonomy



Example 2: fairness



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