The Philosophy of Human Rights

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Contemporary Controversies

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Contents

I. Human Rights: Moral or Political?

II. Rights and Duties

III. Universality

Introduction

Human rights are important. First and foremost they are relevant for those fighting for respect for their own or others' human rights and for the improvement of situations in which fundamental rights are violated. But human rights are also of interest for politicians, political theorists, international lawyers, jurisprudents, NGO activists, civil servants, and, of course, political and moral philosophers. Obviously, the interest in human rights is stirred by quite different reasons: some of them purely practical, some of them purely theoretical, most of them combining practical and theoretical concerns. Yet all those involved with human rights should share one fundamental concern: to know what is the nature of the subject they are talking about and in which way it has normative force. In other words, the clarification of the concept of human rights and the justification of these rights – the two core challenges of the contemporary philosophy of human rights – should matter to all who are interested, in one way or another, in human rights.

In offering such clarification and justification political and moral philosophy has something relevant to contribute to the general discussion of human rights. Being philosophers, we might be criticized for making such a strong claim as to the relevance of philosophy. But forgiveness might be granted in light of our willingness to admit that philosophical insights about human rights are not freestanding, nor do they, in general, enjoy priority. Rather they depend in turn on the political, juridical, etc. dimensions of the idea of human rights, that is, on the use of the concept in practice.

The main function of universal human rights seems to be to set a minimal standard for institutional and individual conduct on a global scale and to guarantee human beings protection from mistreatment through forms of universal legal rights. While an initial agreement about human rights may cover this general claim, it is disputed how to determine exactly the underlying moral idea of basic human rights – and whether it is a moral idea at all that generates the normative force of human rights. There are two primary ways to approach this problem. Some argue that human rights, by their very nature, are held by all human beings either simply because of their common humanity, their human dignity, or because a set of basic needs and interests

of all human beings is sufficiently important that their protection naturally has the status of a fundamental moral right. Others argue that human rights essentially perform a political function. According to these philosophers, the concept of a human right is dependent upon the concept of some political institution or other. In this vein, the violation of human rights is construed, e.g., as *pro tanto* justification for outside interventions on an international level such that the defining function of human rights is to set limits to state sovereignty.

In both cases – the moral and the political view – further questions loom. Some of them are concerned with the nature of human rights as rights. Can human rights be justified? If so, how? And what, if anything, is special about human rights as rights?

Then again, with respect to human rights, it often remains underdetermined what the corresponding duties are. After all, it seems implausible to grant someone a right without offering some idea about how this right can be honored, that is to determine, who exactly shall have which obligation to account for the right in question. On one political conception human rights only obligate official agents such as governments or institutions. Others argue, however, that not only official agents but also individual agents can be said to be holders of human rights-corresponding duties. Following the debate about identifying the holder of rights corresponding duties it becomes important to determine the exact content of these duties.

Human rights are often taken to be essentially universal. But how can there be universal rights in view of the fact that there is such a variety of different, often competing moralities in the world? Is it plausible to assume that many moralities just get it wrong? Obviously, the question of whether or not human rights are universal is not only important from a philosophical point of view. It is also one of the most pressing challenges to the politics of human rights when it comes to promoting human rights as a standard of conduct in regions dominated by different moral standards.

The articles collected in this volume examine in detail these important and much disputed issues in the contemporary philosophical debate about human rights: (I.) the *clarification* of the concept of human rights, (II.) the analysis of human rights as *rights* along with the question of rights-corresponding *duties*, and (III.) the *universality* of human rights.

Moreover, the question of a *justification* of human rights is pertinent to each of these issues.[1]

The *first part* of our volume is mainly concerned with the two conceptions of human rights already mentioned: the moral and the political conception of human rights. Our authors approach this issue from different angles.

In the first paper, "Human rights: questions of aim and approach", *James Griffin* does two things: He argues that to determine its approach in a principled way, every theory of human rights needs to have a clear aim, and he bases his own approach on the aim of giving more determinateness to the concept of human rights as it figures in our ongoing public human rights discourse. The concept of human rights must be better specified, according to Griffin, as a precondition for rational debate about existence conditions of human rights, the content of particular human rights, and potential conflicts of rights. The theory this aim leads to is characterized and defended as piecemeal (as opposed to systematic like Kant's, Mill's or Wellman's approach to human rights), monist (not pluralist) concerning the basic values human rights are grounded in, and evaluative (not functional, as e.g., the approaches of Dworkin, Nozick, Rawls, Raz and Beitz). The basic evaluative concept in Griffin's approach is the concept of normative agency. But since Griffin wants to determine a concept of human rights that meets the practical constraints of uptake (it should actually be used in public discourse) and durability (it should be stable in this use) he also takes these "practicalities" into account.

In "On the nature of human rights" *John Tasioulas* sketches three broad families of answers to the question of what is the essential nature of a human right: (1) the Reductive View, according to which human rights are best understood without essential reference to the notion of a (moral) right, e.g. as universal human interests, (2) the Orthodox View, according to which human rights are universal moral rights possessed by all human beings simply in virtue of their humanity, and (3) the Political View, which makes some political role, or set of roles, an essential aspect of the nature of human rights. Tasioulas argues that a suitably interpreted version of the Orthodox View is preferable to both of its rivals: unlike the Reductive View, it is able to capture the distinctive moral significance of human rights as normative standards, whereas unlike the

1 The following summaries are in many cases based on abstracts provided by the authors.

Political View it does not make the discourse of human rights beholden to extraneous institutional considerations.

In opposition to the moral conception of human rights held by Griffin, Tasioulas and others, different authors argue in favor of what is sometimes called a political conception of human rights. They think that the essence of human rights is determined by their having a specific political function, e. g. to limit the sovereignty of states. This political conception, it is often argued, is closer to the contemporary human rights practice than the traditional view of human rights, and this is seen as a reason to accept it. However, *Peter Schaber* argues in his paper "Human rights without foundations" that the political view of human rights should not be accepted. He attempts to show that this conception does not pass the adequacy test that the political view itself proposes for a satisfactory theory of human rights, nor does this view give us the justification of human rights that is needed. Instead, Schaber provides his own defense of a moral view of human rights in which the concept of human dignity plays a pivotal role.

In "The moral and political conception of human rights – a mixed account" *Erasmus Mayr* also focuses on the dispute between adherents of the political and moral conceptions of human rights, which turns on the question of whether human rights are essentially distinguished as such by their specific political function. Some adherents of the political conception, like Joseph Raz, combine the view that human rights have an essentially political role with the claim that they are a sub-class of moral rights. This, according to Mayr, makes a combination of both approaches appear attractive, where, so it seems, the political conception of human rights answers the conceptual question of what human rights essentially are, while the moral conception offers the most attractive answer to the question of how human rights claims are justified. However, Mayr argues that we cannot expect both conceptions to be capable of the sort of "convergence" that this combination would require. Instead, one should follow a moderate version of the political conception, regarding both the question of what distinguishes human rights from other individual rights and the question how human right-claims can be justified. It turns out, however, that this does not make human rights dependent on the actual existence of states, and that a convincing political account of human rights even requires that human rights are, by and large, universal rights that human beings possess qua human beings – just as the moral conception claims. The resulting account of human rights which Mayr advocates can therefore aptly be called a "mixed" account.

The *second part* of this volume focuses on issues related to the notion of "rights" in the term "human rights". Is it possible to justify rights on a consequentialist basis? What's special about human rights as rights? What are the duties corresponding to human rights and what is their scope?

Utilitarianism and other forms of consequentialism are frequently criticized on grounds that the impersonal pursuit of maximum aggregate goodness fails to provide adequate room for fair distributions and individual rights. In his paper "Problems with some consequentialist arguments for basic rights" *Samuel Freeman* examines three kinds of arguments consequentialists have made for moral, human, or basic individual rights that respond to these criticisms. First, there is the indirect consequentialist framework provided by J.S. Mill; second, there are distribution sensitive accounts of well-being and other goods; and third, there are accounts that directly incorporate rights and other moral concepts into the good that is to be maximized. In response to Mill, even granting he has shown that basic rights and liberties are necessary for individual well-being, Freeman argues that this does not warrant the conclusion that *equal* rights and *equal* freedoms are always or even ever necessary to maximizing the *sum total* of individual well-being. He thinks that similar problems apply to the second position, which incorporates equality of goods (of welfare, autonomy, etc.) or other distribution-sensitive values into the consequentialist maximand (argued for by T.M Scanlon, Larry Temkin, Bill Talbott, and Philip Pettit). According to Freeman, equal distribution of one or more goods does not imply equal rights of the kinds advocated by liberal and social democrats or human rights advocates. Finally, the third position, best represented by Amaryta Sen, argues that equal rights and fair distributions are themselves intrinsic goods to be promoted for their own sake. Freeman contends that this position is not really consequentialist but rather is a pluralist intuitionist conception that requires balancing aggregate goodness against antecedent moral principles of fairness and individual rights.

Rowan Cruft's essay "Human rights as rights" defends the thesis that individualistic justification is one of the hallmarks of human rights. Combining this conception of human rights with standard worries about socioeconomic and other "expensive" rights can tempt one to take the phrase "human rights" to refer to any individualistically justified weighty normative consideration – including considerations that are not rights in Hohfeld's sense. Cruft maintains that abandoning a Hohfeldian conception of rights is problematic in several ways: for in-

stance, it makes it difficult to distinguish rights from their grounding values, and can make it unclear in what sense rights-violations genuinely wrong right-holders. But the essay ends with the suggestion that – due to the nature of individualistic justification – these problems are less worrying for human rights than for other rights.

The aim of *Corinna Mieth*'s paper "On human rights and the strength of corresponding duties" is to determine the strength of individual duties corresponding to human rights. While Onora O'Neill claimed that the existence of social human rights depends on the allocation of corresponding duties, Elizabeth Ashford holds that it is not the existence but the realization of social human rights that depends on their institutionalization. From this she concludes that there are individual duties to institutionalize human rights under non-ideal circumstances. Mieth focuses on the strength of these duties. She suggests a reconstruction of the strength of duties according to three criteria. The first criterion is the significance of the good that is protected by a right and the corresponding duty. This leads to a differentiation of the strength of duties according to the theory of goods that diverges from the differentiation of negative and positive duties found in the theory of action. Furthermore, Mieth defends the idea that reasonable demandingness can be considered a second criterion for the strength of duties. Thirdly, the specificity of the content of the duty has relevance for its strength. If this is correct, then the duties of an average person to institutionalize human rights are only weak. Therefore, Mieth proposes a shift from duties to responsibilities. Even if duties of institutionalization are underdetermined in general and therefore only weak, it may be possible to assign responsibilities to improve human rights standards.

The last contribution to the second part of this volume also addresses the question of the demandingness of rights-corresponding duties but focuses on individuals as duty bearers. In his paper "The moral demandingness of socioeconomic human rights", *Jan-Christoph Heilinger* asks whether excessive demands for moral agents speak against a moral framework such as socioeconomic human rights. In other words, is an account of human rights that embraces welfare rights unsound if it turns out to be extremely burdensome for moral agents? After an analysis of the relationship between human rights and the corresponding, potentially overdemanding duties, Heilinger argues that not only institutions but also individual agents are addressed by these duties. Next, he introduces the "moral demandingness objection" as a meta-theoretical criterion to judge the soundness of a moral theory and shows different

ways in which a moral theory might demand more than agents can do or can be reasonably expected to do, particularly in the context of human rights. His paradigm case is the alleged human right to adequate food and its corresponding duties. Heilinger argues that excessive demands mirror the current circumstances of extreme but in principle preventable world poverty. Hence, extremely burdensome demands should be taken neither as an argument against the moral theory of human welfare rights nor as a pre-emptive exculpation of agents failing to live up to the duties corresponding to these rights. However, obligations corresponding to welfare rights are not the only type of obligations for moral agents; therefore, they should not always and exclusively strive to fulfill these obligations.

Whatever the nature of human rights might be, and whatever their status as rights exactly involves, one feature seems to be essential in any case: Human rights are universal rights. Nevertheless, anyone claiming that human rights are universal is confronted with the fact that there are quite different moralities to be found in the world – present and past. So, are human rights really universal? Is there enough common ground between all moralities for a justification of human rights? Do we even need such a common ground? The papers of the *third part* of this volume try to answer questions like these.

In his paper "Common humanity as a justification for human rights claims" *Simon Hope* argues for two related conclusions. His primary concern is to investigate the standard justification for human rights in the modern human rights culture: That *human rights are held in virtue of our common humanity*. Hope argues that the depth and breadth of moral diversity raises serious questions about whether the features of common humanity standardly appealed to can stand as intelligible moral reasons to the bearers of different forms of life. At the same time, he does not think a retreat to a Rawlsian-inspired "political" conception of human rights is justified. Ordinary moral reasoning does not break down completely when addressed to an unbounded domain of agents. Although necessarily constrained, ordinary moral reasoning about the human condition can justify human rights claims. But that reasoning must appeal to vulnerabilities inherent in the human condition, rather than features of personhood, if intelligible reasons are to be advanced.

On the one hand, the universality of human rights is, as it seems, part of their very nature. On the other hand, when we look at the mor-

alities actually endorsed by different persons/cultures etc., we find a great variety, including quite different views on the nature and importance of human rights. From a philosophical point of view, there seem to be two different options, one as unsatisfactory as the other: Either we must assume that many people/cultures etc. are deeply wrong about fundamental moral matters, or we have to admit that human rights are not universal after all. In his paper "Human rights and moral diversity" *Gerhard Ernst* tries to find a solution to this problem by outlining a morally decent form of moral relativism. He is convinced that there is a deeply contingent element in morality as such which allows for some variation concerning a morally acceptable stance towards human rights.

The present volume presents new philosophical papers, written by leading philosophers in the field, inquiring into crucial aspects of the current philosophical debate about human rights. It includes selected papers from a workshop on the philosophy of human rights held in 2009 at the Venice International University as well as invited papers. The Venice workshop was part of a project on human rights established by the *Junge Akademie* and the *Berlin-Brandenburg Academy of Sciences and Humanities*. First and foremost we thank the authors for their contributions to this volume. We also owe our gratitude for generous financial support to the Udo Keller Stiftung–Forum Humanum. Furthermore, special thanks go to Erich Ammereller for pulling most of the weight in organizing the workshop just mentioned, and to him, Konrad Petrovszky, Tobias Pulver, and Karsten Schoellner for their help in preparing this volume.

Stuttgart and Zurich, August 2011 The editors

I.
Human Rights: Moral or Political?

Human rights: questions of aim and approach

James Griffin

1. The question of aim and approach

I shall step back from the discussion of human rights going on now in philosophy, political theory, and jurisprudence and ask a question about it – the discussion. What are we philosophers, political theorists, and jurisprudents trying to do? One might think that the answer is obvious: we are trying to understand better what human rights are. But that answer is most unclear. 'Human rights' as used in ethics? Or in the law? Or in political life? If in ethics, rights derived from over-arching ethical principles, as Kant derives his account of 'natural rights' from his Doctrine of the Right, or John Stuart Mill derives his account of 'rights' from the Principle of Utility? Or 'rights' as used now in evaluating particular societies? If in the law, the law as it is? Or as it should be? And the law where? If in politics, in its history? Or in an empirical account of political institutions? Or in setting standards? All of these different aims themselves require different approaches.[1]

2. Systematic and piecemeal approaches

One might think that the most rational approach is what I shall call 'systematic'. One starts, ideally, by developing a general theory of value, then one develops a theory of ethics in general, then a theory of rights in general, followed by theories of *legal* rights and *moral* rights, and finally by a theory of *human* rights, either *moral* or *legal*. In our day, Carl Wellman provides a distinguished example of this approach (Wellmann 1985, ch. 1 and 1997, ch. 1).

A different approach is what I shall call 'piecemeal'. One starts with a particular notion of human rights, say, the notion that emerged from the long natural rights/human rights tradition starting in the Late Mid-

1 This paper is a substantially revised version of Griffin 2010.

dle Ages, modified substantially in the seventeenth and eighteenth centuries, and greatly articulated and mobilized in national and international life by the United Nations following the Second World War. This notion of 'human rights' is now used widely – in law and political life and ethics. Then one must further focus one's concern: one is interested, one may decide, in how this notion of human rights figures in the most plausible ethics that one can find. Its role in ethics would make demands on the notion that would lead to the filling out of its sense, in particular to the provision of much needed existence conditions for a human right. This filling out would invariably involve appeal to more abstract ethical considerations, but perhaps nothing as abstract as Wellman's 'general theory of value' or Kant's Doctrine of the Right or Mill's Principle of Utility. One could wait to see how abstract one's explanation has to get. One would start, piecemeal fashion, to make the ethical notion of a 'human right' clearer. An example of this approach would be a book I recently published (Griffin 2008, ch. 2).

Why not adopt the systematic – and apparently much more rational – approach to human rights? For two reasons. First, the few explanations of the term 'rights', on its own, that we have been given so far seem to me failures. The most influential one in the last few decades is that of Joseph Raz, and I have explained in my book why I think it fails (ibid., 54–56; 261–5). In addition to that, there is Wittgenstein's case for the impossibility of a verbal definition of many terms (Wittgenstein 1953, sects. 64 ff). The example he uses is the noun 'game', but the noun 'right' is no more promising a subject for verbal definition than the noun 'game'. I know that a *definition* and an *explanation* are different things (Raz, for example, was not attempting a verbal *definition),* but they are still close enough for Wittgenstein's skepticism about verbal definitions to be a worry about certain attempts at a quite full explanation. And think of the extraordinarily varied ground now covered by the noun 'right': 'the right has triumphed', 'by rights she should have it', 'he upholds the right' (i. e. righteousness), 'put it to rights', 'the rights of customers/patients/depositors' (as announced by a shop/a hospital/a bank), and so on. The lexicography of the English noun 'right', for example as one finds it in the Oxford English Dictionary, leaves one a long way short of identifying the sort of 'right' that we are after.

My second reason for not choosing the systematic approach is that it is not needed. When the Glossators in Bologna in the twelfth or thirteenth centuries first used the noun 'right' ('ius') in our modern sense, it was already understood as a natural right and was later explicitly

called that. And, as we know, the adjective 'natural' later gave way to the adjective 'human'. The Glossators did not first have the notion of the *genus* 'right' and afterwards introduce a *differentia* to produce the species 'natural right'. They *started* with the class 'natural right'. What is faulty with the meaning of the term 'natural right' as they used it? It is true that there were several vaguenesses in it: 'natural laws', which were seen as the grounds of natural rights, were not at all easy to identify. And there was even greater indeterminacy in the sense of the successor term 'human right', after the philosophers of the seventeenth and eighteenth centuries got finished secularizing it – secularizing it because of their enhanced views of the powers of human reason. But what more would we need to make the term 'human right' satisfactorily determinate in sense (merely 'satisfactorily', not 'fully')? Nothing, I should say. So why not be content with the piecemeal approach?

So my two thoughts come down to this: (1) I doubt that we can make a success of the systematic approach, and (2) in any case, I doubt that we need it to understand human rights.

There is also the danger that the systematic approach will carry one off in a direction in which one does not want to go. My aim is to understand the notion of 'human rights' that comes out of the tradition that I sketched a moment ago. It is at the center of an on-going public discourse of human rights now used in ethics, law, and politics. Kant and Mill have theories of value in general and single highest-level moral principles – Kant has his Doctrine of the Right and Mill his Principle of Utility. But in these two philosophers' hands the terms 'natural right' (Kant) and 'right' simpliciter (Mill) come to have markedly larger extensions than the term out of the tradition has – substantially larger in Kant's case and even larger in Mill's. Indeed, the extensions are so much larger that Kant's and Mills' notions of a 'right' turn out to be different from the notion that emerged from the tradition. Kant and Mill have, in effect, changed the subject. What they have done is to commandeer the language of 'rights' and put it to use in spelling out their own accounts of morality. There is nothing wrong with that, though it may cause confusion. But anyone who adopts the systematic approach is at risk of finding that this approach, like Kant's and Mill's, produces a markedly different-sized extension than the extension yielded by the tradition. To which, then, would the systematizer concede greater authority: to the implications of this systematic approach or to the outcome of the tradition? Would the systematizer react by revising this approach or by making major revisions to the extension that emerges from the tradition?

This question, of course, takes us back to that series of questions about the particular aim of an account of human rights. What is the systematizer's *aim?* It is not yet clear.

3. How problems can determine approaches

Nearly everyone who thinks deeply about human rights acknowledges that there is a problem with the notion: we need to understand better what human rights are. We differ about the nature of the problem and about its solution. So let me explain how *I* diagnose the problem.

I believe that the sense of the term 'human right' suffers from a high degree of indeterminateness. It may not be uniquely indeterminate among ethical terms, but it is considerably more indeterminate than most of them. We have too few agreed criteria for determining when the term is used correctly and when incorrectly for the discourse of human rights to be satisfactorily reason-guided. When the term 'natural right' was secularized in stages, the background notion of 'natural law' along with its context in Christian metaphysics was dropped as unnecessary, and nothing was put in its place. The term 'natural law' continued in fairly wide use, but by then it usually meant no more than a moral principle independent of law, custom, or convention. It is not that there were *no* criteria for correct and incorrect use; the idea of a right still had some intension: a human right was a right that we had simply in virtue of being human. And we do not need to have a *fully* determinate sense of the term; practically all terms have some indeterminateness, if only at the edges. What we need is, rather, a sense that will at least give us existence conditions for a 'human right', and will supply grounds for deciding the content of particular 'human rights', and will indicate how in general to go about trying to resolve conflicts of human rights. In short, we need a sense determinate enough to allow us to make these quite basic rational moves with the term – moves that we are unable to make at present.

But the term 'human right' used where? I think that the most important use of the term is that in the on-going public discourse of human rights that emerged from the tradition that I sketched. It is the term 'human right' used today by most philosophers, political theorists, international lawyers, jurisprudents, civil servants, politicians, and human rights activists. In any case, that is the use that I am concerned about. It is a use in which ethics plays a basic role, as it did in the tra-

dition, though nowadays, as I shall come to, that basic role for ethics is sometimes denied by international lawyers. And it is a use of the term in a fairly wide and diverse community, at the heart of which are those especially concerned with human rights, whom I listed a moment ago: philosophers, political theorists, international lawyers, and so on.

My point here is that one's particular *aim* in clarifying the term 'human right' can determine how one is to approach the subject. It can determine the constraints on what one tries to do. Given what *I* want to do, one major constraint clearly is ethical. I want to clarify the idea of a human right that would appear in the most plausible ethics that one can find. So there are the constraints imposed by its having to fit into that demanding context. But the idea that I am interested in also appears in an on-going public discourse used by a certain heterogeneous linguistic community, and that role generates certain *practical* constraints. These practical constraints are less well-known than the ethical constraints that I just mentioned, so let me briefly explain them.

My ultimate aim is to make the sense of the term 'human right' satisfactorily determinate. There have been strong inflationary pressures on the term in the past, and they are still at work. The belief is widespread, but mistaken, that human rights mark what is most important in morality; so whatever any group in society regards as most important, it will be strongly tempted to declare to be a human right. The group will be out to annex the rhetorical force of the term 'human right' for its own keenest concerns. It is now also a common, and not unjustified, belief that getting something widely accepted as a human right is a good first step to getting it made a legal right; so there is a great temptation to assert that anything to which one wants to have a legal guarantee is a human right. And getting something accepted as a human right transforms one's case. One is transformed from beggar ('you ought to help me') to chooser ('it is mine by right'). If one can claim by right, one is not dependent upon the grace or kindness or charity of others. These features of the discourse of human rights are responsible both for great good and great bad, the bad being the ballooning of the discourse itself during the second half of the twentieth century.

My belief is that we have a better chance of improving the discourse of human rights if we stipulate 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 – though we have weighty moral obligations to all of them of a different kind. For the discourse to be improved, the criteria for correct and incorrect use of the

term must be fairly widely agreed upon. They would not have to be anything like universally agreed upon, but there would have to be fairly wide agreement among those central to the discourse: philosophers, international lawyers, etc. If a good number of the members of those groups came to agree on the criteria, the rest of the members would be likely in time to follow, and the general public would themselves to some extent eventually fall in line.

That sequence of events is what we should need for an appreciable improvement in the discourse. What, then, should we need to set off that favorable sequence of events? The start would be the appearance of a substantive account of human rights – some not too complicated, fairly sharp-edged normative intension for the term – which commended itself to a growing number of those central to the discourse. There is no mechanism available that would be likely to lead us to agree to a very few, but not more, exceptions to the proposed new intension. Even if there were, the inflationary pressures are all still with us and all still very strong; there would soon be too many exceptions for the criteria for correct and incorrect use to remain sharp-edged enough to produce the needed improvement.

I should stress that what moves me is not the wish to reverse what is called the 'proliferation' of rights. I have no views about how many human rights there are. Nor, given the different levels of abstraction in their formulation, do I know how to enumerate them. We speak of 'proliferation', in a pejorative sense, only because we suspect that some of the declared rights are not true rights. What moves me is the wish to end the damaging indeterminateness of sense of the term 'human right'.

Once one thus admits elements of stipulation into the grounds of human rights, does one not then abandon a central claim of the natural rights/human rights tradition: namely, that human rights are grounded in human nature? I think not. On the contrary, the decision embodied in the stipulation is the decision to derive human rights solely from certain values constitutive of human nature. That element of stipulation does not make the constituent values of normative agency, namely autonomy and liberty, any less able to be considered 'objective' or 'natural' or even in a sense 'real'. Still, one cannot deny that there are several feasible alternatives to adopting the restriction to normative agency that I recommend. For example, there is the personhood account expanded to include certain potential persons such as infants; there is the basic need account; there is a more pluralist account than mine that includes

other goods in addition to the goods of normative agency; and so on. Any of these competing accounts could be adopted, though, I am claiming, with less benefit. I may not simply insist that human rights *are* derived solely from normative agency; that belief would need a great deal in the way of justification, which I have not given. Although some of the alternative accounts (e.g. the need account) can be faulted for not adequately explaining human rights, others of them (the account that includes certain potential persons or the more pluralist account) cannot be. The objection to them is practical: they do not give us the beneficial determinateness of sense we need. That is why the sort of stipulation I am making is not arbitrary. It has to be justified.

There are different kinds of stipulation. Many, of course, are arbitrary, but some are part of a disciplined project. My project is to make 'human right' – this very widely used term, this term used by many different sorts of people – more determinate in sense. So my aim is, in part, a certain practical outcome: change in a public discourse. One, but only one, of the practical constraints on my project is that my proposed more determinate sense for the term 'human right' have a fighting chance of being adopted by the members of the many groups who make up its central linguistic community. Another constraint is that the proposed more determinate sense have a reasonable chance of enduring, that any proposed more determinate sense not be so complicated that the criteria for correct and incorrect use would in time become muddled and confused and eventually slack and the greater determinateness of sense would thereby be undone.

And that is not a far-fetched fear: the inflationary pressures on the term are all with us still. Call these, respectively, the constraints of uptake and of durability. Not all who write about human rights share my project, so their work may well not be subject to these constraints. But very many writers do share my project.

Suppose a writer who shares exactly my project adopts a much more systematic approach to it than I do. The writer starts, let us say, not with anything quite so abstract as a general theory of value, but with a general account of ethics. The writer, let us say, explains what a human right is by explaining what moral obligations are, especially the categorical moral obligations correlative to rights simpliciter and to moral rights in particular, then by using those resources to explain the special peremptory obligation characteristic of human rights.[2] But this approach

2 For an example, see Tasioulas 2002 and 2010.

would require working out a general account of the nature of moral obligation. That is no small job; it is not even clear that it is possible. What is more, we know that the account that the writer would eventually develop would come nowhere near commanding widespread agreement; the history of philosophy, alas, shows that. The account would be too teleological for some, or too deontological, or would make the virtues too basic in the ethical structure, or not basic enough, and so on. I am not saying that no one particular account of obligation would have more *rational support* than another, or that a person could never decide which account the *most rational* one was. My claim is, rather, that there would not be general *agreement* on what the most rational account is, and that a term with a satisfactorily determinate sense, which is my aim, requires fairly general agreement. The proposed more determinate sense must be graspable by and acceptable to members of the various groups central to the public discourse of human rights: that is, certain national and international civil servants, legislators, international lawyers, human rights activists, as well as philosophers, political theorists, and other academics. To arrive at a satisfactorily determinate sense there must be fairly wide convergence on criteria for correct and incorrect use of the term. The more systematic approach that I just sketched would fail to meet the constraint of *uptake*.

4. Monist and pluralist approaches

Let me quickly give one more example of practical constraints at work. The most promising accounts of human rights ground human rights partly in certain basic human interests. An interest account suggests that we make the sense of the term 'human right' more determinate by spelling out the particular interests that we should see human rights as protecting. Although the theological content of the term 'human rights' was gradually abandoned over the span of the seventeenth and eighteenth centuries, the ethical content was not. From time to time in the course of the human rights tradition one encounters the idea that human rights are protections of our human status and that the human status in question is our rational or, more specifically, normative agency. The two basic human interests grounding human rights, I have proposed in my book, are the two constituents of normative agency: autonomy and liberty. My proposal is not a *derivation* of human rights from normative agency; it is a *suggestion* based on a hunch that this par-

ticular way of remedying the indeterminateness of the term will turn out to suit best its role in ethics and society. I try to bolster this suggestion in my book by looking at how it works out when applied to several important cases.

The most plausible alternative to my account, I should say, incorporates my interest account, but maintains that further, perhaps many further, human interests can ground human rights, not just the two that I propose, and perhaps also moral considerations that are not entirely human interests, namely justice, fairness, and equality. For example, on this view our keen interest in avoiding great pain can ground a human right not to be tortured; the ground for that right does not have to be limited, as I propose, to torture's assault on our autonomy or liberty. And our keen interest in understanding human life and its duties and rewards can ground a human right to basic education; the ground for that right does not have to be limited, as I propose, to education's promotion of autonomy and liberty. And the ground of a human right against certain forms of discrimination may not be human interests at all, but fairness and equality. I shall call these two competing accounts 'monist' and 'pluralist'. The monism and pluralism involved have to do with values. So my account is not, strictly speaking, monist but dualist; human rights, I say, are grounded in *two* distinct values, autonomy and liberty. But since I also use a single term to cover them both, 'normative agency', let me accept the label 'monist'.

How can we assess these two competing accounts? In several different ways, I should say. There are difficulties simply in formulating the pluralist claim. Where do the further grounds for human rights added by pluralists *end?* Why do they end *there?* And if the term 'basic' in the expression 'basic human interests' is brought in to help answer those questions, what would 'basic' mean here? And if a ground that a pluralist adds comes in degrees, then we have to know how much is needed to make it a matter of a human *right. And which* matters of justice, fairness, and equality are integral to human rights, and which are not, and *why?*

But I am interested now in only one kind of assessment: meeting the practical constraints of uptake and durability. If it is the term 'human right' as used in the on-going public discourse that interests us, then those constraints will have to be met. There are forms of pluralism that would clearly fail to meet them. Perhaps even *most* forms of pluralism would fail. I am not going to try to decide this. My point is different: if one's concern is the term 'human right' as used in the public dis-

course, as it probably is for most of us, then the ability to meet these constraints is an important, but ignored, form of assessment. In most present-day philosophical writing about human rights, the *aim* of the work is unspecified. A reader who wants to know what the aim is will no doubt be left in the dark, and the author will probably be in the dark too. The answer cannot be: the *truth* about what human rights are. There is no one truth to arrive at.

5. Evaluative and functional approaches

Many writers approach human rights largely under the influence of the tradition. They see human rights in the context of a theory of what is especially valuable in, and special to, human nature. They see the present intension of the term 'human right' as having been largely settled by the end of the Enlightenment. It is not that they need think that nothing important has happened to the idea since then. After something of a hiatus in the nineteenth century, the discourse of human rights went through a period of astonishing development during the twentieth century – developments, for example, in international law – that helped to settle the extension, and to some extent also influenced the intension, of the term. But the intension remained substantially as the Enlightenment had left it: rights that we have simply in virtue of being human, on an ethical conception of what it is to be 'human'. Call this the 'evaluative' approach.

My own account of human rights, since it bears all the features so far mentioned, is an 'evaluative' account. It proposes that we take the word *'human'* in the term 'human right' to refer to our valuable status as human persons – that is, as normative agents.

But an account of human rights cannot stop there. On its own, the consideration of normative agency is often not up to fixing anything approaching a determinate enough line for practice. We have also to take into account practical considerations: to be effective, the line has to be clear and so not take too many complicated bends; given our proneness to stretch a point, we should probably have to leave a generous safety margin. So to make the content of, say, the right to security of person determinate enough in sense to be an effective guide to behaviour, we need a further ground – call it 'practicalities'. So in my account I propose two grounds for human rights: normative agency and practicalities. The existence conditions for a human right would, on this account, be

these. One establishes the existence of such a right by showing, first, that it protects an essential feature of normative agency and, second, that its determinate content results from the sorts of practical considerations that I just roughly sketched.

There is, in contrast to this 'evaluative' approach, what I shall call the 'functional' approach. Those who adopt the functional approach attach great importance to what, in modern times, we have come to *do* with the language of human rights. Indeed, in recent times in the anglophone world this has been the most common approach. Ronald Dworkin has explained legal rights in terms of their function as *trumps* over appeals to the general good. Robert Nozick explained human rights in terms of their function as *side-constraints* on other justifications of action. John Rawls explained human rights as grounds for the rules of war and for intervention in the internal affairs of another country.[3] All of these are functional accounts of rights.

Writers who adopt the functional approach concentrate on how the developments of the twentieth century, especially in international law, have shaped the idea of a 'human right'. They say that there is a *modern* conception of human rights, mainly the creature of the United Nations, the function of which is to do a certain kind of work in global politics. If one looks at the real world of legal and political practice, they claim, one finds that the term 'human rights' either relies on their legal recognition as limiting state sovereignty or constitutes a claim that they should be so recognized. Two recent advocates of the 'functional' approach, much influenced by Rawls but modifying him, are Joseph Raz and Charles Beitz.[4]

This sharp contrast between 'evaluative' and 'functional' approaches, if it were defensible, would be of great importance. But the claim that the function, even merely the predominant function, of human rights nowadays is to limit sovereignty is a factual claim and, I should think, surely false. These days human rights discourse is still commonly used in our national as well as our international life: for example, in the European Union's fairly recent bill of rights and its more recent incorporation in the legal systems of several member states, in current campaigns against violations of liberty (for example, in Guantánamo), and in similar campaigns against torture.

3 See Dworkin 1977, xi–xv; 188–191; Nozick 1974, 28–33; Rawls 1999.
4 See Raz 2010; Beitz 2009.

This contrast between 'modern' and 'traditional' is much too sharp. If one looks closely at how the United Nations conceives of human rights, one finds both *new* features and *old*. The new feature is that they are now mobilized to serve in the regulation of the global order. But it is also the case that the Commission on Human Rights, which drafted the Universal Declaration of Human Rights, started from a compendium of all examples of human rights taken from historical documents. They started their deliberation with the historical *extension* of the term. And, like all sensible law-makers or standard-setters, they did not want to go too deeply into matters of *justification* because there is generally more ready agreement on examples than on their rationale. Despite this, they *did* commit themselves to one ethical claim: that human rights were to be seen as deriving from 'the inherent dignity of the human person'. This phrase, which appears in the Preambles of the foundational human rights instruments, namely the two Covenants of 1966, would inevitably call to the mind of a lawyer or jurisprudent or a political thinker Pico della Mirandola's classic tract *The Dignity of Man*. And the phrase 'the dignity of the human person' refers to a value, not spelt out by the United Nations but, none the less, a value that the drafters installed as the foundation of human rights. It is true that the United Nations put the term 'human right' to new uses, but they did not just *amputate* its history. They combined new elements with old, both of which must be kept in mind in order to properly understand current thought about human rights.

In any case, a particularly salient feature of our present notion of a 'human right' is its indeterminateness of sense. What are we to do about that? This question manifests itself whenever we need to know the *existence conditions* of human rights, or when we need to settle the *content* of a particular human right, or when we must resolve *conflicts* of rights. And we need to do all of these things sometimes; adopting the functional approach does not save us from that. It is at these times, I say, that substantive ethical input is necessary – not sufficient (the law must play a role too) but necessary. We have a human right to *health*. But what is that a right *to?* The United Nations answers: it is a right to the highest attainable standard of physical and mental health. But even some officials in the World Health Organization reject that as too lavish. How are we to tell if it is? And a judge on an international bench cannot resolve conflicts involving human rights by fiat. The resolution must be reasoned. But what will count as good reasons? And if ethical input is necessary, what is it to be?