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## DISCREPANCIES BETWEEN THE BEST PHILOSOPHICAL ACCOUNT OF HUMAN RIGHTS AND THE INTERNATIONAL LAW OF HUMAN RIGHTS\*

*I\*\*-The Presidential Address*

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### ABSTRACT

The last philosophical explanation about human rights, consider them as protection of the values that we adjudicate to the human agency. The international law of human rights is enclosed in a great number of declarations, conventions, letters and juridical decisions. There are many discrepancies among the lists of human rights that emerge from these authorised sources. This paper explores the meaning of these discrepancies.

**Keywords:** *juridical decisions, protection of the values, human rights.*

### RESUMEN

La mejor explicación filosófica de los derechos humanos los considera como protección de los valores que adjudicamos a la agencia humana. La ley internacional de los derechos humanos está incluida en un gran número de declaraciones, convenciones, convenios, cartas y decisiones jurídicas. Existen muchas discrepancias entre las listas de derechos humanos que emergen de estas fuentes autorizadas. Esta conferencia explora el significado de estas discrepancias.

**Palabras Clave:** *decisión jurídica, protección  
de los valores, derechos humanos*

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## I

*Bringing philosophical theory and legal practice together.* We should be neither surprised nor troubled by some discrepancy between the list of human rights emerges from a theorist's account and the lists that are enshrined in law. If the discrepancy were very great, it is true, we might start doubting either the theory or the law. If it were less great, we should still want to explain it, still want to decide whether the theory or the law is in better order whether, perhaps because of their different functions, both are in perfectly good order.

In this lecture, I want to reflect on discrepancies between two particular lists of human rights—the one from the best philosophical account and the other from the most authoritative declarations in international law. To set the scene, let me quickly sketch the best philosophical account. I shall not make a case for its being the best, because that would take at least another lecture. But the account I shall give is not at all eccentric, and its attractions are easy to see.

A human right is one that a person has, not in virtue of any special status or relation to others, but simply in virtue of being human. That much is agreed. But to apply the term “human right” we have to be able to tell what rights we have simply in virtue of being human, and there is little agreement about the relevant sense of “human”. There are very many cases in which we do not even have agreed criteria for whether the term “human right” is being correctly or incorrectly used. That is why supposed human rights have proliferated so uncontrollably. Of course, “human rights” is what philosophers have called an “essentially contestable concept”,<sup>1</sup> but that a concept is essentially contestable does not relieve it of the need to be tolerably determinate. We today have the job of completing the Enlightenment project by making the term “human right” considerably more determinate than the Enlightenment left it.

There are two parts to this job. The sense of the term will be determined partly by the criteria, inadequate as they are, already attaching to it. So the first part of the job is to consult the long tradition from which the notion comes. But that is not enough; the tradition is underdeveloped. The second part of the job is to complete the work begun in the seventeenth and eighteenth centuries, which requires, among other things, a measure of stipulation. Stipulation gives us freedom, but freedom under sizeable constraints. There is the constraint of the tradition. And there are the constraints of meeting practical needs and of fitting well with the rest of our ethical ideas.

1 An idea introduced by W. B. Gallie, in his “Essentially Contested Concepts”, *Proceedings of the Aristotelian Society*, 56 (1955-56).

A term with our modern sense of a “right” emerged in late medieval or early modern times, perhaps with the later Glossators in Bologna, whose characteristic literary products were glosses on central text of Roman law<sup>2</sup>. In any case, sometime between the thirteenth and seventeenth centuries, between Thomas Aquinas and Francisco Suárez, The word *ius* shifted from meaning a law defining what is fair to roughly our modern sense of a “right”, that is, a power that a person possesses to control or claim something. The historian of ideas, Richard Dagger, speculates that the concept of rights did not emerge, in explicit form, during the classical or early medieval periods, because in those periods it was status concepts that dominated political thought<sup>3</sup>. If one said that a person was a “citizen” or a “lord”, that person’s powers and privileges were thereby specified. In a society dominated by social rank, one did not need the general term “rights”. For that term to become useful, status terms had to decline in importance. And so they did, once egalitarian ideas gained ground. The belief that we are all basically alike had to replace the belief that there are natural differences between us that justify our different positions. The idea of the equality of man had been around for a long while—in both Stoicism and Christianity. But for some reason—perhaps because neither Stoicism nor Christianity attached enough importance to life on earth—the idea of natural equality did not play much part in political thought until the late Middle Ages. As Dagger concludes, “When it did come into prominence, however, the concept of rights came whit it”<sup>4</sup>.

It seems that at the heart of rights lies the notion of *status*. One of the major movements in political thought in the last four centuries has been the shift away from role status—a “citizen”, a “lord”—to concern with human status itself.

But what is so special about human status that it should attract the protection of rights? Pico della Mirandola, an early Renaissance philosopher who studied canon law in Bologna in 1477, gave an influential answer. Humans have a claim “to the highest wonder, as to a prerogative”, because of the position that God had assigned them in creation<sup>5</sup>. God fixed the nature of all other things but left man alone to determine his own nature. Man is free to choose his own place in the order of things, from the lowest

2 Richard Tuck attributes the appearance of roughly our modern sense of a “right” to the Glossators, in particular to their assimilation of *ius* and *dominium*: “Already by the fourteenth century”, he says, “it was possible to argue that to have a right was to be the lord or *dominus* of one’s relevant moral world, to possess a *dominium*, that is to say *property*”. See his *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979).

3 Richard Dagger, “Rights”, in Terrence Ball, James Farr, and Russell L. Hanson (eds.), *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 189), pp. 298–301

4 *op. cit.*, p. 299.

5 Giovanni Pico della Mirandola (1463–94), *On the Dignity of Man*, transl. Charles Glenn Wallis (Indianapolis: Hackett Publishing, 1988), p. 3.

level of the brutes to the highest level of the angels. It is given to man "to have that which he chooses and be that which he wills"<sup>6</sup>. This freedom constitutes, as Pico calls it in the title of his book, "the dignity of man". This link between freedom and dignity, later purged of the religious framework that it still had in Pico's time, became a central theme in the political thought of all subsequent centuries, most notably in the Enlightenment, when it received its most powerful theoretical development at the hands of Rousseau and Kant.

That, briefly, was the first part of the job: to find what content the tradition supplies. Let me turn to the second, more stipulative part of the job. What seems to me the best account of human rights is this. It is centred on the notion of agency. We human beings have the capacity to form pictures of what a good life would be and to try to realise these pictures. We value our status as agents especially highly, often more highly even than our happiness. Human rights can then be seen as protections of our agency—what one might call our personhood. They are protections of that somewhat austere state, the life of an agent and not of a good or happy or perfected or flourishing life. It is not that what human rights protect is the only, or the most, important aspect of our life. But we attach special importance to it, and that is reason enough to mark it off, too, with the language of human rights.

Much more needs to be said about how "agency" is to be understood here. Let me, as an example, enter just one clarification. An obvious objection to a personhood account is that a person can be denied freedom, even be cruelly persecuted, without ceasing to be an agent. For example, Aleksandr Solzhenitsyn, when imprisoned in a gulag, seems to have become a more focused and determined agent than ever. But that is not the picture of agency at the heart of my account of rights. My ampler picture is of a self-determiner (that is, someone autonomous) who, within limits, is not blocked from pursuing his or her conception of a worthwhile life (that is, someone at liberty). Briefly, an agent is someone who chooses goals and is then free to pursue them. Both choosing and pursuing, both autonomy and liberty, are values that we attribute to agency. If either is missing, one's agency, on this fuller interpretation, is deficient. What we need is a normative picture of agency: autonomy and liberty are of special value to us, and thus attract the special protection of rights. Further, it is characteristic of human beings that they do not choose their goals once and for all. People mature; their values change. Liberty is freedom to live this sort of endlessly evolving life.

Personhood is *one* ground of human rights, but it could not be the only one. It leaves rights still too indeterminate. Personhood tells us that each

<sup>6</sup> *op. cit.* p. 5, but see generally pp. 4-9.

of us has a right to *some* political voice. But how much? In what form? It tells us that we have a right to *minimum* material resources. But how much is that? We also have a right to security of person. But what does that exclude? If my blood had some marvellous factor and a few drops painlessly extracted from my finger in a minute's time could save scores of lives, then, on the face of it, my rights do not give me reason, even *prima facie* reason, to refuse. The prick of my finger would hardly destroy my personhood. But what happens if we up the stakes? Does my right to security of person not protect me against, say, the health authority that wants on of my kidneys? After all, the few weeks that it would take me to recover from a kidney extraction would not prevent me from living a recognisably human life either. Where is the line to be drawn? What is clear is that, on its own, the personhood consideration is not up to fixing anything approaching a determinate enough line for practice, and without that we should not be able to say that a right yet exists. That degree of determinateness is part of the existence conditions for rights. To fix a determinate enough line we have also to think about matters such as these: to be effective the line has to be clear and 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 right to security of person determinate enough we need another ground, call it practicalities. We need also to think about human nature, how societies work, and so on, in drawing the line.

Let us now turn to the international law of human rights. It is not that it is entirely innocent of theory. On the contrary, it is deeply influenced by both the natural law tradition and the Enlightenment. But there are only the slightest traces of theory explicit, in the important twentieth century declarations of human rights. The Preambles of the *International Covenant on Economic, Social and Cultural Rights* and of the *International Covenant on Civil and Political Rights*, adopted by the General Assembly of the United Nations in 1966 in order to give legal force to the merely hortatory *Universal Declaration* of 1948, both contain the clause, "Recognising that these rights derive from the inherent dignity of the human person...".<sup>7</sup> So, here too the ground of these rights is said to be personhood, though the exact nature and significance of the idea is not at all

<sup>7</sup> See also the *American Declaration of the Rights and Duties of Man*, 1948: "The American States have on repeated occasions recognised that the essential rights of man... are based upon attributes of his human personality". *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 1988, Preamble: "Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that different categories of rights constitute one indivisible whole based on the recognition of the dignity of the human person..."; *Final Act of the Helsinki Conference*, 1975, Principle VII: "The participating States... will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person..."

spelt out. This clause is, indeed, the only gesture at theory in the two documents. It is a feature of the international declarations in general that they pay little attention to reasons or justifications<sup>8</sup>.

That is not a criticism. It is common in law not to dwell on justification; different groups, particularly different cultures, might agree that there is such a thing as the dignity of the person, and largely agree on the rights that follow from it, but, differ in their understanding of quite what that "dignity of the person, and largely agree on the rights that follow from it, but differ in their understanding of quite what that "dignity" is. So silence on the subject is often simple wisdom, and the personhood account, even if it is indeed the best substantive account, should stay quietly in the background. But that sensible thought is in tension with the sensible driving thought of this lecture: namely, that in order to avoid nearly criterionless claims about human rights, we need to develop, and to be guided by, a fuller substantive account of what they are. These are not contradictory beliefs, but we have to discover how to hold both despite the clear tension between them.

## II

*The list of human rights that emerges from my account.* According to my account, there are two grounds for human rights, personhood and practicalities. Personhood initially generates the rights; practicalities give them, where needed, a sufficiently determinate shape.

The way to understand personhood more fully is to distinguish the various strands of agency. I made a start on this a moment ago. The first stage of agency is our taking our own decisions for ourselves, not being dominated or controlled by someone else (autonomy). To be more than empty tokens, our decisions must be informed; we must have basic education, access to information and to other people's views. And then, having formed a conception of a good life, we must be able to pursue it. So we need enough in the way of material provisions to support ourselves. And if we have all that, then we need others not to stop us (liberty). Whenever the word "basic" appears here, it means the *base* needed not just to keep body and soul together but to live as an agent.

From this picture, or a more developed form of it, we should be able to derive all human rights. We have a right to autonomy. In a private life, this means that, once we are capable of taking major decisions for ourselves, parents, teachers-in general, those in authority-must not make us,

8 Henry J. Steiner and Philip Alston, *International Human Rights in Context* (Oxford: Clarendon Press, 1966), p. 127, make this observation about the two United Nations documents, the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, but it applies generally.

or keep us, submissive to their wills. In public life, this yields a right to some from of equal say in political decisions. Even a *Skilled* benevolent dictator would, if unelected, infringe our autonomy. So there would be a large range of human rights protecting our autonomy, because autonomy is one of the two essential components of agency.

We have a right to life and to some form of security of person. We have a right not to be tortured. There are many objections to torture, an obvious one being simply the suffering it causes. But torture becomes an issue of *rights* because it undermines agency: it does not allow us to decide and stick to our decision. We have rights to education, free expression, peaceful assembly. And we have various rights to basic material provision; these so-called welfare rights are much challenged, but for all my inclination to keep the class of human rights tight, it seems to me impossible to exclude them. So there must be a large range of rights to certain necessary conditions of agency.

Then, we must be free from interference in the pursuit of our major ends. We must be free to worship, to enjoy ourselves, to form the personal relations we want, to try to arrive at certain basic forms of understanding, to create works of art. We must also be free to inform others of what we believe, to display our works of art. Freedom of expression is doubly protected. It is protected because we need it in order effectively to decide our ends in life. But though art may help us in that way, it does not always, and it would be protected even then. It may be a part, not just of deliberating about, but also simply of having, a good life. So there must be a large range of liberty rights, because liberty is the other essential component of agency.

Then, it is hardly surprising that there are rights that cut across these three major categories (that is, autonomy rights, welfare rights, and liberty rights). We have a right to some degree of privacy, because without it we should not be secure or comfortable enough either autonomously to decide our own ends or to pursue some of them. We have a right to asylum, if exile is necessary to protect our lives or our status as agents.

This, of course, is the merest start of a list. There are many more human rights, and even those that I have mentioned need to be brought into sharper focus. But this brief account is enough to give some sense of the range of rights that would appear on my list, and why they would.

### III

*Twentieth century lists: civil and political rights.* So much for my list. The other lists I want to look at are, for the most part, the ones in the three major United Nations documents on human rights, The *Universal Declaration of Human Rights* (1948), the *International Covenant on Civil*



and *Political Rights* (1966), and the *International Covenant on Economic, Social and Cultural Rights* (1966), and the list in the three regional documents, the *European Convention on Human Rights* (1950), the *American Convention on Human Rights* (1969), and the *African Charter on Human People's Rights* (1981). But now and then I shall introduce an example from still other international documents.

Let me first take claims to civil and political rights. There are striking discrepancies between my list and the lists in these documents. Seen through the lens of my account, the majority of items on the other lists are acceptable, but there are many that are unacceptable and several that are at least debatable.

a) *Unacceptable Cases*: The *International Covenant on Civil and Political Rights* asserts: "Any propaganda for war shall be prohibited by law" (Article 20.1). It is not clear that this even has the form of a right. It is the denial of a freedom, namely the freedom to propagandise for war. There seem to be no issues of personhood here to justify the prohibition. And on any account of human rights this is an almost incredible claim. Should one be prohibited from advocating even a just war? The *African Charter* makes a related claim that all people have "the right to national and international peace and security" (Article 23.1)<sup>9</sup>. It is plausible that there should be a collective right to security; such a right can be seen as grounded in individual rights to security of person. But a right to peace? Would a country that decides to defend itself against invasion violate its citizens rights. These scarcely credible claims to rights are a manifestation of a common tendency to lard these international declarations of rights with mere aspirations. Even worthy aspirations such as peace are not, thereby, human rights. They would not be rights on my account, and it is hard to think of any sensible account on which they would be.

*The International Convention on the Elimination of All Forms of Radical Discrimination*, adopted by the United Nations General Assembly in 1965, in the course of rehearsing what are for the most part standard, uncontroversial civil rights, introduces "the right to inherit" (Article 5.D.vi). But this too is scarcely credible. Would a multi-millionaire who knows that his children can look after themselves and leaves his money to charity violate their rights? Even if this right is not interpreted as a claim-right of the potential heirs but as a liberty-right of the testator, it is still highly dubious. Thomas Jefferson once speculated that it would be better not to allow transfer of goods between generations but to have each generation make its own way. Would this, if there were also adequate welfare provisions in

9 See Ian Brownlie, *Principles of Public International Law*, 5<sup>th</sup> ed. (Oxford: Clarendon Press, 1998), pp. 582-583: "Originating in the Algiers Declaration of 1978 a doctrine of the Rights of Peoples has appeared in the literature. A fairly typical prospectus of these rights would include the right to food, the right to a decent environment, the right to develop, and the right to peace."

place, violate anyone's human rights? Not on my account and intuitively not as well. It might be less efficient socially, but that is different. And it would not violate a human right to property, if there is one, but merely restrict one kind of transfer.

The *Universal Declaration* is less lavish in its claims than many of the later documents, but it too has its highly dubious items. It asserts that there is a right to protection against attacks on one's honour and reputation (Article 12), which is repeated in various later documents<sup>10</sup>. But could there be such a broad right? An author cannot have a right not to receive reputation-shaking reviews, and a dishonourable person cannot except protection against exposure. At most there could be a rather different right—a right to redress against libel and slander. But although in most countries there is such a legal right, even that rather different right is doubtfully a *human* right. Its concern is a matter of fairness, not of human rights, and they are not the same. I shall come back to this important difference in a moment.

The *Universal Declaration* also claims that we have freedom of movement and residence within the borders of our own country (Article 13.1)<sup>11</sup>. Is there a freedom of residence? One's personhood would not be threatened if one were required to live in a particular place, so long as the necessary amenities were provided: decent education, adequate material provision, access to art, and so on. Of course, some people prefer living by the sea and others in the mountains, some in cities and others in the country, and where one lives can be an important component of the quality of one's life and so should be restricted only for the strongest of reasons. But many things affect the quality of one's life; that they do hardly in itself makes them a matter of a human right. Imagine a slightly fictionalised Brazil of about fifty years ago. The coastal areas, especially the cities, are heavily populated, but the rich, beautiful interior is largely empty. The Brazilian government decides to open up the interior to settlement, and as a first step creates a new capital city, Brasilia, deep inland. But the citizens on the seaboard are reluctant to move, and the government is reluctant to force them because forced removal would be likely to break up families and friendships, upset settled expectations, and so on. But a boat-load of new citizens, immigrants to the country, arrives in Rio, and they are informed that they must settle in the interior. Brasilia, let us assume, already has all of the amenities that I just desiderated. The immigrants, let us assume, would be able to choose between living in Brasilia itself or the countryside around it. The area has great natural beauty; life would

10 *American Declaration of the Rights and Duties of Man*, 1948, Art. V; *International Covenant on Civil and Political Rights*, Art. 17.1.

11 This is repeated in the *International Covenant on Civil and Political Rights*, Art. 12.1 and the *African Charter*, Art. 12.1.

be comfortable, and a free shuttle to Rio and Sao Paolo, let us add for the sake of the argument, would be laid on. Of course, some of the immigrants may have a general preference for coasts over interiors, and they will not therefore have everything they want. But then life seldom provides everything one wants, and there is certainly no human right to the greatest possible satisfaction of one's preferences.

Would this policy violate a human right? The right that it would be most likely to violate would be liberty. But not every compulsion that stops one from getting what one wants—for example, parking restrictions—violate liberty. Living where one wants is much more central to a worthwhile life, then it is hard to see any case for claiming a violation of a human right.

The Brazil case, as I say, is fiction. But there are real compulsions, economics one, to live in a particular place that may violate, or at least come close to violating, a human right. There have been such cases for thousands of years. But the most interesting examples are ones that are likely to arise in the near future, because they will be the result of deliberate political choice. With the introduction of a common currency in the European Union, and with the harmonisation of various tax rates, the major tool for managing the economy left to individual nations will be levels of unemployment. If welfare rates are fixed so as to force migration of labour, then a Greek worker, say, may have to migrate to Germany. In Germany, because of the change of language and hostile attitudes in the local society, the Greek worker might well have little effective voice in political decisions. The worker will therefore be subject to laws without having an equal voice in making them. This *begins* to make the sort of case—more needs to be said—that would support a claim that a human right had been violated. The case would be very different if the worker had merely to migrate from the Greek countryside to Athens. And it is very different from my fictional case of the immigrants to Brazil having to settle inland rather than on the coast. So this example does not support the right, in all its generality, claimed by the *Universal Declaration*.

b) *Debatable Cases*: Of all the putative civil and political rights in the major international documents, the most challenging to my account are the ones that come under the general heading “equality before the law”<sup>12</sup>. This is how they appear in the *Universal Declaration*:

Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law...

12 See the *American Declaration of the Rights and Duties of Man*, Art. XXIV-XXVI; the *European Convention*, Arts. 6-7; the *International Covenant on Civil and Political Rights*, Arts. 14-16; the *American Convention*, Arts. 3, 8-10; the *African Charter*, Arts. 6-7.

- Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
- Article 9. No one shall be subjected to arbitrary arrest, detention or exile.
- Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal...
- Article 11. 1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty...  
2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence... at the time when it was committed.
- These articles are spelt out in more practical detail in the *International Covenant on Civil and Political Rights*, for example in Article 14:
- 3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
- a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - c) To be tried without undue delay;
  - d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing...;
  - e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - g) Not to be compelled to testify against himself or to confess guilt...
- 6) ... the person who has suffered punishment as a result of such conviction [namely, a miscarriage of justice] shall be compensated.

Many of these are, according to my account, clear human rights, but I am inclined to say that some are not, though the case for saying so is not nearly as simple as in what I earlier labelled "unacceptable" cases.

It is entirely plausible that we have a second-order human right to remedy for violations of our human rights. Human rights are meant to be protections of our personhood, so we should be able to claim not only that others not violate our personhood but also that society in some way help in its protection. It is plausible, too, that we have a human right not to be subjected to arbitrary arrest, detention, or exile; those are extreme violations of our liberty, in the sense of the term that comes out of the personhood account. And everyone has a (human) right to be presumed innocent until proved guilty; if one's guilt were presumed and action appropriate to that presumption then followed, such as serious loss of liberty or property, then one's capacity to live one's chosen life would be seriously impaired. It is true that not all cases of presumption of guilt need result in diminished personhood, but the line between those that do and those that do not would be hard to draw, and the sort of simplicity needed by both moral norms and civil laws is likely to result in a blanket presumption of innocence.

However, there is a general point that should be recalled here. There is no inference from something's being a matter of justice or fairness to its being a matter of rights. This is a major point of conflict between my account and what certain international lawyers say. Some of them write as if the domain of justice and of human rights were identical<sup>13</sup>. But they are clearly not. Human rights do not exhaust the whole domain of justice or fairness. If you free-ride on the bus because you know that no harm will come as the rest of us are paying our fares, you do not violate my rights, though you do, clearly, act unfairly. If when we play our occasional game of penny-ante poker you use a marked deck, you are again acting unfairly, but you are not violating my human rights. That explains why the tradition regards procedural justice as a matter of human rights, but not distributive justice. Procedural justice protects our liberties. Distributive justice, for all its importance does not bear on our personhood- so long, that is, as the human right to minimum provision is respected. In fact, as most people in most societies never attract the attention of police or courts, their interests are likely to be far more affected by matters of distributive justice than of procedural justice. But matters of justice can be highly important in our lives without being matters of human rights.

If, therefore, we want to say that some human rights are grounded in justice, we have to explain which considerations of justice ground human rights and which do not. One possible answer would be mine: the considerations that ground human rights are those of personhood, understood

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13 See e.g. Michael Akehurst, *A Modern Introduction to International Law*, 6<sup>th</sup> edn. (London: Allen and Unwin, 1987), p. 76, who in writing about the growth of the human rights doctrine observes: "It was only after the United Nations Charter was signed in 1945 that any attempt was made to provide comprehensive protection for all individuals against all forms of injustice."

as I have explained it. But not all of the putative rights that I have just quoted can be found a rationale in personhood. For instance, the right to compensation following a miscarriage of justice cannot be. In a society with proper welfare provisions, not to be compensated will not undermine the *personhood* of the victim of a miscarriage of justice. The is, all the same, a different but perfectly strong reason to compensate the victim: the victim deserves it; justice demands it. But the case for it is based in the victim's desert, not in the protection of the victim's personhood.

On the face of it, there might seem to be a similar case for rejecting several other proposed rights to fair procedure: for example, rights to be informed of the charge against one promptly and in detail, to have adequate time to prepare one's defence, not to be compelled to testify against oneself, and so on. There is, of course, a very strong justification for these guarantees—namely, in justice or fairness. It is true that when one is being tried for an offence, one's liberty or some other component of personhood, might be at stake, and then these procedural guarantees could be seen as crucial protections of one's personhood. But not all charges carry the risk of loss of liberty—the worst penalty might sometimes be a fine that fairness would still be very much at stake, so these guarantees would retain their rationale even if no component of personhood were in the slightest jeopardy. Their rationale, this line of thought goes, is justice itself, not the more specific matter of human rights. And accepting that line of thought need not bring with it any loss of expressive power. We do not have to speak in terms of human rights, or even of rights, in order to specify fair legal procedure, and generations of philosophers and jurists have managed to say all that must be said on the subject without them. And there need be no loss in moral power either. The case for these procedures is that they are quite plain matters of justice. What more powerful backing would one want? Human rights have been proliferating at such a suspect rate because we all want to cash in on the power of the language of rights. But why not instead recover and protect the power of the language of justice? It is a great mistake to think that, because we see rights as especially important in morality, we must make everything especially important in morality into a right.

Still, this line of thought only very occasionally succeeds. To my mind, it succeeds in threatening the supposed right to compensation for a miscarriage of justice. But it does not threaten these other rights to fair legal procedures. These other rights were originally introduced as protections of liberty, autonomy, and the material basis of life as an agent. They were seen as defences against the arbitrary behaviour of governments. They were meant as defences against death, imprisonment, and confiscation of property without due process. The right to be informed of the charges against one promptly and to have adequate time to prepare one's defence

are obvious protections against arbitrary denials of liberty. The right not to be compelled to testify against oneself is protection against threats and torture, which undermine autonomy. It does not matter that the penalties for some offences do not involve loss of liberty or damaging confiscation of property. One has to expect a certain simplicity in norms, both legal and moral. The historical motive for the introduction of these rights was to protect personhood<sup>14</sup>. But, to repeat, not all of the rights to fair legal procedures claimed in the Universal Covenant can be defended in this way. The supposed right to compensation for unjust punishment, for example, cannot be.

But there is objection to my conclusion. The drafters of these international covenants might say, as I do, that the considerations of justice that ground rights are those of "personhood". But they might want to employ a rather more generous interpretation of "personhood" than I do. We should concentrate, as most of these documents do, on the notion of the *dignity* of the person. If one is accused of a crime and then subjected to unfair treatment by a court, or even denied compensation after unjust punishment, one's dignity as a person, the drafters might say, is not respected. And thus one's human rights, not just legal rights, are violated. These procedural guarantees, including the right to compensation, are meant to define what it is, in the legal contest, to treat someone with the basic dignity due to a person. For that reason, the drafters might say, they are properly regarded as human rights. Free-riding and cheating at cards are real enough cases of unfairness, but they differ from not getting a fair hearing in court. The latter unfairness is so fundamental to our life that protection against it is part of what it is to accord us our dignity as persons, while protection against trivial free-riding and cheating at cards is not.

The proposal that I attribute here to the drafters is like mine, in that we both ground rights in the dignity of persons. But my account puts its stress on *persons*, whom it understands as agents. The dignity is then to be seen as deriving from the values we attach to our agency. That is why my account is more restrictive: human rights have to be protections of one or other component of agency. The drafters' account—at least as I have just imagined it—puts its stress on *dignity*. It leaves *person* a more intuitive notion: our dignity as a person may encompass more than just the components of agency. But the very elasticity of what I am imagining to be the drafters' interpretation of dignity causes problems. If dignity is not to be understood in my way, how is it to be understood? One promising place to start is with the closely connected notion of respect for persons. On virtually everyone's understanding of it, the moral point of view consists in having equal respect for all persons. This need not be the same as treat-

14 For the history of e.g. the introduction of the Bill of Rights in the United States, see L.W. Levy, *Origins of the Bill of Rights* (New Haven: Yale University Press, 1999), esp. Ch. 1.

ing them all equally, one's own children no differently from a stranger's. It is, rather, giving them all some form, still to be spelled out, of equal weight in our deliberation. One prominent way of spelling out the idea of respect for persons is Kant's: everyone must be treated as an end and never merely as a means. But this whole approach, no matter how it is spelt out, will not help us. It is spelling out a notion of the dignity of persons that underlies morality as a whole. If we adopted this understanding, human rights would expand to fill the whole moral domain, or at least the whole domain of obligation, which is so counterintuitive a consequence that we must avoid it.

Taking a cue from the examples of free-riding and cheating at cards, which we want to keep out of the class of infringements of human rights, we might amend this last proposal. We might introduce the distinction between minor or trivial violations of respect for persons, which these two examples might be taken to represent, and major or serious violations. But, as we have already seen, this does not help either. We should not let human rights expand to fill the whole domain of major or serious affronts to respect for persons either. A husband might have been cold and unpleasant to his wife throughout their marriage, causing her great unhappiness. He might thereby have done her a gross moral wrong, but he would not have infringed her human rights. A plutocracy might perpetuate an unjust distribution of goods, thereby denying a majority of the population of substantial benefits. But if everyone in the population has at least the minimum provision for life as an agent, the government does not infringe anyone's human rights. It is deeply counter-intuitive to regard all serious moral wrongs, even all substantial injustices, as infringements of human rights.

The distinction we need is not between major and minor violations of respect for persons, but something along the line of fundamental and non-fundamental ones. But, apart from my way of spelling out the "fundamental" features of the dignity of persons, what kind of well-motivated workable account is there? And we cannot leave the notion of "dignity" as elastic and intuitive as it is now because, unless we have tolerably clear criteria for whether the term "human rights" is being correctly or incorrectly used, the term will remain as seriously degraded as it is now<sup>15</sup>.

15 Is there another line that the drafters of these international documents might take? An interesting phrase crops up in many of the documents. They speak promoting observance of "human rights and fundamental freedoms". See e.g. the *Universal Declaration*, Preamble, Art. 2; *International Covenant on Civil and Political Rights*, Preamble, Art. 2.3<sup>a</sup>, Art. 5.1; *International Covenant on Economic, Social and Cultural Rights*, Preamble, Art. 5.1; *European Convention*, Preamble (which links the two: "fundamental freedoms" depend upon the observance of "human rights" and so suggests that they are co-extensive); *American Convention*, Art. 1; *African Convention*, Preamble, Art. 1-2. Are "fundamental freedoms" different from "human rights"?



c) *Acceptable Cases*: Despite the unacceptable and the debatable cases, most of the claims to human rights that one finds in the *Universal Declaration* come out on my account, as I have said, as entirely acceptable. That is partly because the *Universal Declaration* is brief, does not go into fine detail, and is relatively restrained it makes to economic, cultural, and collective rights. My own list, which I made a start on earlier, contained only the most obvious rights, and much more needs to be added to it. Many of the items on these international documents I should want to add to my list. I shall mention just one. Article 15.1 of the *Universal Declaration* says: "Everyone has the right to a nationality." There is a powerful case for that. Everyone must live within the boundaries of one country or other. If one cannot vote, one lacks the only form of autonomy that political life within those boundaries allows. And states are the main agents of security of person. And so on. It is true that in some states one can vote and enjoy the protection of police and army without being a citizen, but only citizenship makes possession secure. The case for saying that there is a human right to a nationality is powerful.

#### IV

*Interlude on the aims and status of international law.* The exercise I have just been through-examining discrepancies between my list and the lists in major international documents- might be thought to be in various ways misconceived. Do the drafters of these documents and I not have different aims? I am trying to understand what a human right is; I am trying to make the sense of the term determinate enough for it to be a clear and helpful addition to our moral and political thought. The drafters of these documents were trying, in the aftermath of two devastating world wars, to establish a basic code of conduct for the behaviour of states towards those subject to their power, in the belief that the promotion of human rights contributes to the promotion of peace<sup>16</sup>. There is not the slightest doubt which is the more important, more noble ambition. My small aim is, at best, a contribution to their much larger aim. But then the drafters were not interested in arriving at a narrow list of human rights with impeccable semantic credentials. They were interested in a ampler list, in a way the ampler the better, with some claim to being, or decent prospects of becoming, a standard that crossed cultures, religions, borders,

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There is, so far as I know, no explanation of the distinction between the two. Of course, some fundamental freedoms, such as liberty, are human rights if anything is. But is some "fundamental freedoms" fall outside the class of "human rights", then the drafters may not be using "human rights" as broadly as I think they are. But the most plausible interpretation of what the drafters mean by "fundamental freedoms", it seems to me, is that they are a sub-class of "human rights". This makes the phrase "and fundamental freedoms" outside, but I am inclined to accept that consequence. (An example of a human right that is not also a fundamental freedom would be a right to welfare.)

16 See Preamble, para 1, of the *Universal Declaration*.

and power-blocs. And so they made use, without too much worry, of an obscure, undefined notion of "the dignity of the person"<sup>17</sup>. But in an important way its obscurity does not matter. Their lists have succeeded in crossing at least some borders, and they have been, all things considered, a substantial force for the good. The rights on their lists, even if it turned out that they were not all strictly speaking *human* rights, have become, one embodied in treaties, basic international legal rights. That is a status hardly to be scorned.

What is more, does not international law have its own perfectly coherent conception of a human right? I have said that we badly need criteria for deciding when the term "human right" is used correctly and when incorrectly. But does not international law in a way supply them? It does not supply them as I do, by putting more substance into the notion of personhood. It supplies them, rather, with something more in the nature of a rule of recognition. There are various procedures which, if carried far enough, establish a human right in international law. For instance, and international non-government group, alarmed at the degradation of nature, might declare there to be a fundamental right to live in a healthy environment. Other groups, say regional organisations of nations, sensing the same threats, might include a similar right in their charters or conventions. In this way, a fair measure of consensus may develop. Next a committee of the United Nations—say the United Nations Sub-Commission on Human Rights—might then define the right more fully and embody it in a set of draft principles. If matters had proceeded only so far (as, in fact, as I write, they have), then one might say that a human right to a healthy environment has begun to emerge in international law though is not yet clearly established. It is a matter of judgement and convention when the right is established. If, say, the General Assembly were to adopt in some hortatory form the draft principles from its Sub-Commission, then the case for the existence of the right would be strengthened. If it were to embody the right in a legally binding international convention, which was then widely ratified, the case, one might say, would be conclusive<sup>18</sup>.

Still, my project in this lecture should not be underestimated. These internationally agreed list have crossed borders, but not all borders, and in any case the respect they receive within any borders depends largely upon the attitudes of local governments, and many of these have still to be convinced of the case for human rights. There is cynicism about the

17 See Oscar Schachter, "Human Dignity as a Normative Concept", 77 *American Journal of International Law*, 848, (1983). "We do not find an explicit definition of the expression "dignity of the human person" in international instruments or (as far as I know) in national law. Its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors..."

18 In tracing the emergence of a right to a healthy environment, I follow closely Carl Wellman's discussion in his paper "Solidarity, the Individual and Human Rights", Sect. 3, Ts.

whole discourse, which, being so fatally malleable, is exploited as a weapon in power politics. Some governments maintain that economic and social rights are prior to classic civil and political rights. Some say that the rights of certain groups—a people, a nation, a culture, limit the human rights of individuals. And there are doubts, not always groundless, about how firmly based some of the claims to rights is to make the case for them as intellectually compelling as one can.

It is not that the job can be left to international law. It is not that over the last fifty years the body of treaties and decisions of international courts has grown large enough for those courts now to be able to tell us definitively whether a certain human right exists and what fairly precisely its content is. The most authoritative source for the courts' decisions is the treaties, and we must be able to ask whether the lists of rights in the treaties are themselves correct. And the treaties supply the terms of the argument on that subject: an item on the list is acceptable if, and only, if, it can be derived from the idea of "the dignity of the person." But that is precisely the idea that cries out for clarification. Has the reasoning that has gone on at the various stages in the emergence of a supposed human right been persuasive? Widespread doubts about certain reputed civil rights, objections to the lavishness of some welfare rights, scepticism about the whole class of group rights have a rational force that cannot be countered simply by showing that these rights appear in international treaties.

In any case, treaties are not the only source of international law. The *Statute of the International Court of Justice*, announces (Article 38.1) that, in settling disputes submitted to it, it shall apply (1) treaties, (2) customary law in the international sphere, (3) general principles of law recognised by civilised nations, an as "subsidiary means", (4) judicial decision, and (5) the teaching of the most highly qualified publicists (that is, experts). Some legal scholars go on to add (6) considerations of humanity (for example, especially basic principles that appear in the preambles to conventions, prominent among which would be "the dignity of the person"), (7) *ius cogens* (that is, basic principles that not rest on the consent of nations, a notion reminiscent of "natural law"), and (8) legitimate interest<sup>19</sup>. These sources overlap. Some may even collapse into others; it may be possible, for instance to regard any *ius cogens* as an especially basic customary law<sup>20</sup>. None the less, an international court willing to heed expert opinion or consideration of humanity or *ius cogens* is driven to take seriously basic consideration of justice, the meaning of "the dignity of the person", and how

19 See Michael Akehurst, *A Modern Introduction to International Law*, Ch. 3; Ian Brownlie, *Principles of Public International Law*, Ch. I, Sect. 2; H. J. Steiner and P. Alston, *International Human Rights in Context*, p. 27.

20 This is the view of Michael Akehurst, *A Modern Introduction to International Law*, p. 42.

justice and rights are related. The decisions of international courts are not an alternative to answering my questions; they require it.

They require, crucially, fuller understanding of the notion of "the dignity of the person". I have already said that it would be a mistake to interpret it so broadly—say, as respect for the persons, when that idea is meant to capture the moral point of view itself—that human rights expand to fill the whole moral domain. And if one wants something in between this overly broad account and my narrower account, then one must identify and justify it. Looking for the best understanding of "the dignity of the person" is exactly my project, which is why I say that it should not be underestimated.

## V

*Twentieth century list: economic, social, and cultural rights.* I just remarked in passing that some writers are deeply sceptical about the whole class of welfare rights<sup>21</sup>. They see them as often admirable social goals, but without the peremptory force or universal scope of human rights. Welfare rights are, they think, for each society to decide for itself in light of its resources and own scale of values. None of them is a human right. But that seems to me not so. What seems to me undeniable is that there is a human right to the minimum resources needed to live as agent. That is more than the resources needed simply to keep body and soul together, but it is a good deal less than the lavish provision that many of the international documents have in mind.

So I think that there are acceptable claims to (human) welfare rights in the major international documents. But, on my account, there is also a vast number of unacceptable and debatable claims, many more than in the case of civil and political rights.

*a) Unacceptable Cases:* Some of the claims to welfare rights are hardly credible. Article 7c of the *Additional Protocol to the American Convention* asserts that there is a right of every worker to promotion or upward mobility in his employment<sup>22</sup>. But some perfectly good jobs have no career structure. It was common a few decades ago in Oxford to be appointed to a tutorial fellowship as one's first job, and virtually everyone expected, and was content, to finish up in the same job. There are, perhaps, drawbacks in having no change of duties or responsibilities in the course of a whole

21 See e.g. Maurice Cranston, "Human Rights: Real and Supposed", in D. D. Raphael (ed.), *Political Theory and the Rights of Man* (London: Macmillan, 1967); for a more conceptual doubt about welfare rights, see Carl Wellman, *Welfare Rights* (Totowa, New Jersey: Rowman and Allanheld, 1982), esp. p. 181.

22 See also the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, Art. 7c.

career, but it is incredible of a lawyer whose career is passed in a one-person practise doing much the same work, no of a G. P. in a similar position. Nor would a right be violated if the salary in these jobs never changed over the career. There are many issues of justice or fairness about jobs (unattractive or dangerous jobs should perhaps be shared or highly compensated, promotion should be on merit, and so on), but these issues are not addressed by this proposed right to promotion. It is hard to think of any plausible account of human rights that would justify it.

Take now a more important and more plausible claim. In his State of the Union message in 1944, President F. D. Roosevelt said:

We have come to a clear realisation of the fact true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men"...

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights...

Among these are:

The right to a useful and remunerative job in the industries, or shops, or farms, or mines of the Nation.

The right to earn enough to provide adequate food and clothing and recreation...

The Universal Declaration of 1948 proclaims, in the spirit of Roosevelt's address, a right to work (Article 23.1) and many subsequent international documents have repeated the claim<sup>23</sup>. Yet on my account, there is no right to work. There is certainly a right to the resources needed to live as an agent, but those resources do not have to come from work. If in an advanced technological society there were not enough work for everyone, and those without it were adequately provided for, then, on the face of it, no one's human rights would be violated. Work is valuable to us, it is true, in more than one way. The most obvious way is as a means to an end. What ultimately we need, as Roosevelt puts it, is adequate food and clothing and (even) recreation. We need them, he says, in order to live as "free men". All of this seems to me exactly right. Still, for most people on the face of the earth work is the expected, and sometimes the only, means to that end. Roosevelt and the drafters of the Universal Declaration, and of all the other documents that claim a right to work, reasonably enough wanted to state the right they had in mind in a form relevant to the social reality of their time. What their Post-Depression societies had to do ensure adequate provision was to ensure the availability of jobs<sup>24</sup>. And most societies today have to do so too.

23 See the *American Declaration of the Rights and Duties of Man*, Art. XIV; the *International Covenant on Economic, Social and Cultural Rights*, Art. 6.1; *European Social Charter*, I.1 and II.1; the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, Art. 6.1.

24 See, e.g., the *European Social Charter*, II.1.

All the same, some societies are nearing conditions in which a job will not be, even for a large proportion of the population, the necessary means to the end. But the value of work is more complex than this means-end story makes out. Most people want the dignity of earning their own keep. They want to contribute something to their society. Their enjoyment of life depends upon their having something absorbing, demanding, and useful to do. One of the most important components of the quality of life is one's accomplishing something of substance in the course of it. Idleness is a close cousin of boredom; absorption in projects is a close cousin of enjoyment. So if there are not enough jobs of the old sort to go around (butcher, baker, candlestick maker...), then a community must discover, for those who cannot discover them for themselves, jobs of a new sort (there is still plenty of scope, for example, to improve our present communities). But the advocates of a right to work meant jobs of the old sort, and that seems wrong. Strictly speaking, the right is to adequate material provision—adequate for life as an agent—and to options to live one's life in a productive, interesting, enjoyable way. But I think that the discrepancy between that right, which is what follows from my account, and the right to work, which appears in these international documents, can largely be reconciled. There is no serious discrepancy.

I want to mention only one more dubious welfare right—an example of a particularly lavish right. The *International Covenant on Economic, Social and Cultural Rights*, followed by other documents, claims that we have a right to “the highest attainable standard of physical and mental health”<sup>25</sup>. On my account, there is such a right. The highest attainable standard of physical and mental health is not even a reasonable social aim. Societies could mount crash programmes, on the model of the Manhattan Project, in the case of illnesses for which cures are attainable, but they often do not. They regard themselves as free to decide when they have spent enough on health, even if they are still short of the highest attainable standards, and may devote their inevitably limited resources to education, preservation of the environment, and other important social goods. On my account, we have a right to life, because life is a necessary condition of agency, and to the health care necessary for our functioning effectively as agents. This statement of the right to life and the right to health is still very loose, and work would have to be put into making these two rights determinate enough for political life. But there is nothing in my explanation of the ground of those rights that implies that life must be extended as long as possible or that health must be as good as possible. And that seems right. Health does not always trump other desirable social goals, and not every-

25 Art. 12.1. See also the *African Charter on Human and People's Rights*, Art. 16; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, Art. 10.1.

thing that is desirable is a matter of rights. It is common criticism of the various international documents on economic, social, and cultural rights that they lose sight of the difference between an aspiration and a right. This seems to me true. They also, I think, display insufficient realism in the statement even of their aspirations; they lose sight of the fact that the attainment of one admirable goal often excludes the attainment of other equally admirable ones.

(b) *Debatable Cases*: I have the same doubts about the inference from justice to right in the case of welfare rights that I had before in the case of civil and political rights. Equal pay for equal work is only fair<sup>26</sup>. Just conditions of work are, obviously, a requirement of justice<sup>27</sup>. And promotion on merit is, equally, a matter of simple fairness<sup>28</sup>. But they are not thereby also matters of human rights. I should put all of these claims to rights in the class of the debatable, merely because the relation of justice and rights is not easy to settle. But, as I said before, I think that in the end the argument goes against their being human rights.

## VI

*The future of international lists of human rights.* Suppose that I am right. How should we react to what would then be all the debatable and unacceptable items on the lists in international law?

Some of the items on the lists are so flawed that they should be given, as far as possible, the legal cold shoulder. Many can, and should be seen as aspirations rather than rights (for example, the right to the highest possible standard of physical and mental health, or even the right to freedom of residence within the borders of one's country). Many are so badly drafted that they need interpretation bordering on re-drafting (for example, the right to inherit or the right to protection against attacks on one's honour and reputation).

After those exercises in down-grading and re-defining have been completed, there would still remain what most of us in any case regard as the core of the list. But even in the core there are rights that I earlier labelled "debatable": for example, the right to compensation for a miscarriage of justice. What should we do with those cases?

The sensible answer, I think, is this: accept them as human rights. Their defect, such as it is, is that they cannot be seen as defending personhood.

26 See the Universal Declaration, Art. 23.2; the *International Covenant on Economic, Social and Cultural Rights*, Art. 7<sup>a</sup>.i; the *European Social Charter*, II. 4.3; the *African Charter*, Art. 15.

27 See the *International Covenant on Economic, Social and Cultural Rights*, Art. 7; the *European Social Charter* II.2.

28 See *International Covenant on Economic, Social and Cultural Rights*, Art. 7c; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, Art. 7c.

They cannot be brought under what I am proposing as the canonical heading "protection of a component of human agency". But very few words in our language are governed wholly by a canonical formula; very few can be defined in terms of essential properties. Many geometrical terms, such as "triangle", can be. But the word "game", to take Wittgenstein's example<sup>29</sup>, cannot be. Most words in a natural language cover some of the ground they do for reasons of utility and of historical accident. Their lack of essential properties does not matter; their having a settled use is enough for there to be criteria for determining whether or not they are used correctly.

It is not hard to see how a "right" to compensation for a miscarriage of justice should have come to included in a list spelling out procedural justice in the law. The original impetus for these rights seems indeed to have been the urgent need to protect liberty, autonomy, and property against arbitrary government. But if society decides to entrench these protections in especially solemn from-in, say, a United Nations Covenant-it is understandable that, in compiling the list of protections, it will aim at certain measure of completeness. And if those who compile the list have only a vague sense of a "human right" in mind at the time, one would not expect to find any sharply bounded set of defining properties running through all the items included on the list.

But why then not simply accept all the claims to human rights that appear on these lists in international law, even the ones for which I recommend the cold shoulder? The reason is that the term "human right" is, in other respects, not like the word "game". It does not have nearly as well settled use as "game" has. It is a theorist's term; it was, as words go, relatively recently introduced. It succeeded to the position of the earlier term, "natural right", but the metaphysical background of the successor term was radically different from that of its predecessor, and that mean that new criteria of use were at work. And because philosopher and political theorists introduced it, they have the responsibility, not yet fully discharged, of giving it a satisfactorily determinate sense. And a canonical formula is, for that reason, going to play a large, if not sole, part in the way they do discharge it. It is precisely our further understanding, which a substantive account of human rights will supply, that will carry our use of the term "human right" from unworkable indeterminateness to sufficient determinateness of sense. It may be that what carries members of the Western European Enlightenment tradition to sufficiently determinate sense may be non-trivially different from what carries members of the Hindu or Bushman traditions. It may be that, despite our different routes, we all arrive at more or less the same destination. But there has

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29 Ludwig Wittgenstein, *Philosophical Investigations*, sects. 64 ff.



to be something that carries each of us to it. That is why each of us needs a substantive account of human rights.

Once we have it, should we keep it dark? This brings us back to the thought that a substantive account should be self-effacing. If there really is a non-trivial difference in substantive accounts between members of different cultures, we should hardly insist that our own particular account should be preferred by incorporation in international documents. Those documents at least can remain silent on the subject. But in deliberating about what is and what is not a human right, one cannot do anything but appeal to one's own understanding of human dignity. And we need more, not less, such deliberation. In present conditions, there is likely to be conflict when the drafters of an international document listing a new category of human rights come to deciding what belong on the list. That would not be a bad thing. The conflict would provide a good test of the adequacy of the competing substantive accounts. With time, we might find greater convergence between them.