1. Preliminary questions

I. WHAT DOES THE TERM “HUMAN RIGHT” MEAN?

Let us begin with the contested term “human right,” a term that, as philosopher James Griffin noted, “is nearly criterionless. There are unusually few criteria for determining when the term is used correctly and when incorrectly—and not just among politicians, but among philosophers, political theorists, and jurisprudents as well.”

The rights with which I am principally concerned and on which I focus in this book are the rights listed in the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations on December 10, 1948, and/or in one or more of the several UN-sponsored human rights treaties that have entered into force in the period since the adoption of the Universal Declaration. The relevant question here, then, is this: What is a “human right”—what does the term “human right” mean—in the context of discourse about rights of the sort referenced in the preceding sentence?

When we read the Universal Declaration and the several international human rights treaties that have entered into force, we see that the documents state rules of conduct. More precisely, the documents state rules of conduct mainly for government, both rules that direct government not to do something to human beings and rules that direct government to do something for human beings. And today the principal terminology in which such rules are conventionally articulated and discussed is the terminology—the language—of

---

3 For a comprehensive compilation of the treaties, a compilation that includes, for each treaty, the date the treaty entered into force and a list of the countries that have ratified the treaty, see https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en (accessed January 11, 2023).
“human rights.” Moreover, the language of human rights entails the language of “duties.” To say that A has a right that B not do X to A is to say that B has a duty not to do X to A; to say that A has a right that B do X for A is to say that B has a duty to do X for A. Although it is not necessary to articulate the foregoing rules of conduct in the language of “rights” and “duties,” that language, which is now the moral—specifically, the political-moral—lingua franca, is a nonetheless very useful one for articulating the rules, as I, following John Finnis, explain later in this chapter.

As the international human rights documents illustrate:

- The rights (rules) listed in documents directly regulate government actors; in that sense, the duty-bearers are government actors. However, some rights require government actors to regulate nongovernment actors and thereby indirectly regulate nongovernment actors. For example, Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women requires state parties “to take all appropriate measures to eliminate discrimination by any person, organization, or enterprise.”

---

4 See Nicola Perugini and Neve Gordon, *The Human Right to Dominate* 22 (2015): [H]uman rights have become the global lingua franca of global moral speak … Human Rights, as Costas Douzinas has cogently observed, “have become the new morality of international relations, a way of conducting politics according to a moral norm and rules … human rights are now the canonical text for the moral disposition of world affairs.” (Quoting Costas Douzinas, “Humanity, Military Humanism and the New Moral Order,” *Economy and Society* 159 (2003).) See also Jürgen Habermas, *Religion and Rationality: Essays on Reason, God, and Modernity* 153–54 (Eduardo Mendieta, ed., 2002):

Notwithstanding their European origins, … [i]n Asia, Africa, and South America, [human rights now] constitute the only language in which the opponents and victims of murderous regimes and civil wars can raise their voices against violence, repression, and persecution, against injuries to their human dignity.

• Although according to most of the rights listed in the documents, the rights-holders are all human beings (i.e., all born human beings\(^6\)), according to some of the listed rights, the rights-holders are not all human beings but only some.

Article 37 of the Convention on the Rights of the Child, which is the most widely ratified international human rights treaty,\(^7\) is an example of an international human right according to which the rights-holders are not all human beings but only some: Article 37 requires government to “ensure that: (a) … Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age …” Article 38 of the Convention is another example: Article 38 requires government to “refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.”

As Articles 37 and 38 of the Convention reflect, that government may justifiably do something to some human beings does not entail that government may justifiably do the same thing to all human beings; that government may justifiably recruit adults into the military, for example, does not entail that it may justifiably recruit children. Similarly, that government may justifiably decline to do something for some human beings—for example, able-bodied persons—does not entail that it may justifiably decline to do the same thing for human beings who are disabled. One of the most recent international human rights treaties to enter into force (2008) is the Convention on the Rights of Persons with Disabilities.\(^8\) Another example: Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women,\(^9\) which provides, in relevant part, that “States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period,

\(^6\) The Universal Declaration states, in Article 1, that “[a]ll human beings are born free and equal in dignity and rights … and should act towards one another in a spirit of brotherhood.” In chapter 6, I discuss the human rights controversy concerning abortion.


\(^9\) As of October 2022, there are 189 state parties to the Convention on the Elimination of All Forms of Discrimination against Women. The United States, however, is not one of them. See Lisa Baldez, Defying Convention: U.S. Resistance to the U.N. Treaty on Women’s Rights (2014).
granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”

Philosopher John Tasioulas has claimed that the term “human rights” has an “orthodox” meaning, which Tasioulas endorses: “rights possessed by all human beings simply in virtue of their humanity.” However, in the context of discourse about international human rights—which is the principal contemporary discourse about human rights—the “orthodox” meaning is mistaken: In that context, some human rights, as I have just explained, are rights possessed not by all human beings but only by some: e.g., children, the disabled, (some) women. In what sense is such a right truly a human right?

The Universal Declaration states, in Article 1, that “[a]ll human beings … should act towards one another in a spirit of brotherhood.” As the term “human right” is understood both in the Universal Declaration and in the several international human rights treaties that have followed in the Universal Declaration’s wake, a right is a human right, even if according to the right the rights-holders are not all but only some human beings, if the fundamental rationale for establishing and protecting the right—for example, as a treaty-based right—is that conduct that violates the right violates the Article 1 norm: “act towards all human beings in a spirit of brotherhood.” The fundamental rationale for Articles 37 and 38 of the Convention on the Rights of the Child, for example, is that to engage in conduct that violates either article is to fail to act “in a spirit of brotherhood” toward some human beings: children.

II. WHAT IS THE CONTENT OF THE MORALITY OF HUMAN RIGHTS?

As I explained in the Introduction to this book, by “the morality of human rights,” I mean the particular morality embodied in the Universal Declaration of Human Rights and/or in one or more of the several international human rights treaties that have followed in its wake. That morality is a not just a political morality. As Alexandre Lefebvre has emphasized, “contrary to the widespread impression that nation-states are the primary addressees of human rights documents, [the Universal Declaration] explicitly name[s] another subject. … [T]he principal addressee … is not government or a people; it is, instead, each and every individual person.” (Again, Article 1 of the Universal

---


Declaration states that “all human beings … should act towards one another in a spirit of brotherhood.”) But, although not just a political morality, the morality of human rights is mainly a political morality, by which I mean a set of norms about how government—whether a particular government or group of governments, a particular kind of government, or every government—should act toward the human beings over whom it (or they) exercises power. The morality of human rights is mainly a political morality in the sense that the Universal Declaration and the treaties state rules of conduct mainly for government—every government.12

So, what are the rules? A preliminary, general account of the content of the morality of human rights is in order: What does the morality of human rights require of government?

In drafting Article 1 of the Universal Declaration as he did, René Cassin, the French delegate to the United Nations commission charged with drafting what would become the Universal Declaration, had wanted to stress:

the fundamental principle of the unity of the human race because Hitler had “started by asserting the inequality of men before attacking their liberties.” Later on, Cassin reiterated the point that “the authors of that Article had wished to indicate the unity of the human race regardless of frontiers, as opposed to theories like those of Hitler.” When someone … observed that these principles were too well known and did not need to be stated again, Cassin quickly responded that the argument “was invalid in light of recent events. Within the preceding years,” he said, “millions of men had lost their lives, precisely because those principles had been ruthlessly

in Danielle Celermajer and Alexandre Lefebvre, eds, *The Subject of Human Rights* 193 (2020). Eleanor Roosevelt, who was a member of the United Nations commission charged with drafting what would become the Universal Declaration, said in a speech in 1958:

Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.


12 Cf. Lefebvre, *Human Rights as a Way of Life*, n. 11, at xv–xvi:

[Henri] Bergson uses human rights as a kind of perspective from which to evaluate all other institutions, types of political organization, and what we might generally call political phenomena. … [For Bergson, human rights] are the means by which to judge the sense, value, and orientation of all other political forms.
flouted.” He thought it “was essential that the UN should again proclaim to mankind those principles which had come so close to extinction and should refute the abominable doctrine of fascism.”

The morality of human rights consists both of a general requirement and of specific requirements. The general requirement, as Cassin’s comments indicate, is that (in the words of Article 1) “all human beings . . . should act towards one another in a spirit of brotherhood”; neither any government actor nor anyone else should act towards any human being in a demeaning or dehumanizing way; to do so would be to violate the morality of human rights. The most common bases for selecting human beings towards whom to act in a demeaning or dehumanizing way, as Article 2 of the Universal Declaration indicates, include “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The specific requirements of the morality of human rights are the several rights set forth in the Universal Declaration and/or in one or more of the treaties. Those rights are specifications, for particular contexts, of the general requirement. (For example, Article 5 of the Universal Declaration is, in part, a specification for the context of criminal punishment: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”)

In that sense, the general requirement grounds the specific requirements: For government to violate one or more of those rights is for government to fail to act “in a spirit of brotherhood” toward some human beings, thereby violating

---

13 Morsink, n. 2, at 38–39. See also Stuurman, n. 2, at 498: “According … Cassin, the declaration had to be based on the ‘great fundamental principle of the unity of all the races of mankind.’” Stuurman adds: “… Cassin belonged to a Jewish family . . . [and] had lost twenty-nine relatives in the Holocaust . . . ” Id. On Cassin, see Glendon, n. 2, 61–64; Jay Winter and Antoine Prost, René Cassin and Human Rights: From the Great War to the Universal Declaration (2013). Cf. id. at 68 (quoting Eleanor Roosevelt’s comments on the use of the word “men”): “[W]hen we say ‘all men are brothers,’ we mean that all human beings are brothers, and we are not differentiating between men and women. … I have always considered myself a feminist but I really would have no objection to the use of the word as the Committee sees it.”


15 The appendix to this book contains the Universal Declaration and excerpts from the two most comprehensive international human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Those three documents are known collectively as the International Bill of Human Rights.
the morality of human rights. Later in this book, we will consider two of the specific requirements: in Chapter 3, the human right to moral equality; in Chapter 4, the human right to moral freedom.

III. ARE HUMAN RIGHTS MORAL RIGHTS? ARE THEY LEGAL RIGHTS?

Recall that as the term “human right” is understood in the Universal Declaration and in every international human rights treaty, a right is a human right if the fundamental rationale for establishing and protecting the right is that conduct that violates the right violates the “act towards all human beings in a spirit of brotherhood” imperative. Given that understanding of “human right,” and assuming that the category “moral rights” includes, whatever else it includes,16 rights the violation of which violates the “act towards all human beings in a spirit of brotherhood” imperative or an equivalent norm, some human rights—namely, those the violation of which truly does violate the “act towards all human beings in a spirit of brotherhood” imperative or an equivalent norm—are moral rights. If we call such human rights “true” human rights, we may say that all true human rights are moral rights.

Some have insisted, however, that “moral” rights are not really rights, that the only genuine rights are legal rights, that so-called “moral” rights are phony (counterfeit, faux, pseudo-) rights. Consider, in that regard, Jeremy Bentham’s famous dismissal of the language of the “natural” rights:

[1.] Of a natural right who has any idea? I, for my part, have none: a natural right is a round square, —an incorporeal body. What a legal right is I know. I know how it was made. I know what it means when made. To me a right and a legal right are the same thing … Right and law are correlative terms: as much so as son and father. Right is with me the child of law: from different operations of the law result different sorts of rights.17

---

16 There is no consensus about the meaning of the concept “morality.” See, e.g., Jean Porter, “Christian Ethics and the Concept of Morality: An Historical Inquiry,” 26 J. Society of Christian Ethics 3 (2006); Paul Bloomfield, ed., Morality and Self-Interest (2008); Joel J. Kupperman, “Why Ethical Philosophy Needs to be Comparative,” 85 Philosophy 185 (2010). Cf. Michael Smith, The Moral Problem 3 (1994): “[I]f one thing becomes clear by reading what philosophers in meta-ethics have to say, it is surely that enormous gulfs exist between them, gulfs so wide that we must wonder whether they are talking about a common subject matter.”

[2.] Right, the substantive right, is the child of law: from real laws come real rights, but from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons come imaginary rights, a bastard brood of monsters, “gorgons and chimeras dire.”

[3.] Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts.

According to Amartya Sen:

[Bentham’s] suspicion remains very alive today, and despite the persistent use of the idea of human rights in practical affairs, there are many who see the idea of human rights [understood as moral rights] as no more than ‘bawling upon paper,’ to use another of Bentham’s barbed portrayals of natural rights claims.

The fundamental difference between legal rights and moral rights concerns the enforceability of the rights. Legal rights are, as such, enforceable. Social rights, too—rights that, although they do not have the status of law in a particular community, are nonetheless widely regarded by members of the community as authoritative for the community—are, as such, enforceable; members of the community enforce them by shaming those who violate the rights, or by shunning them. In what way, if any, are moral rights—that is, moral rights as such, and not as social or as legal rights—enforceable?

For one who believes that God enforces moral rights by punishing or otherwise holding accountable those who violate the rights, moral rights too are enforceable. But for one who is not a theist—or for a theist who does not believe that God is in the business of holding accountable those who violate moral rights—moral rights are not, as such, enforceable. And for some for whom moral rights are not, as such, enforceable, moral rights are not really “rights” at all. Listen to Raymond Geuss: “[E]ssential to the existence of a set of ‘rights’ [is] that there be some specifiable and more or less effective mechanism for enforcing them.”

Listen, too, to Alasdair MacIntyre:

[W]henever [there is] good reason for describing transactions in [the language of rights], it is always in virtue of the existence … of some particular set of institu-

---

19 Id. at 53.
tional arrangements requiring description in those terms, and the rights in question therefore will always be institutionally conferred, institutionally recognized and institutionally enforced rights ...

Given what Bentham, Geuss, MacIntrye, and others have emphasized, why not just abandon the arguably misleading language of “moral” rights? What, if anything, is gained by using that language?

[T]he ancients and the medievals did not have the notion of a right—was their moral life stunted in some way as a result? Did they lack the tools for dealing with certain aspects of the moral enterprise? Among them moral questions were dealt with in terms of what is [moral] right and wrong, what is in accordance with or required by the natural law, what people ought to do or are obliged to do, but not in terms of what someone has a right to, or has a right to do.

Again, what if anything is gained by using the language of “moral” (as distinct from “legal”) rights? Here is John Finnis’s answer, in his book *Natural Law and Natural Rights*:

[T]he modern vocabulary and grammar of [moral] rights is [an] instrument for reporting and asserting the requirements or other implications of a relationship of justice from the point of view of the person(s) who benefit(s) from that relationship. It provides a way of talking about “what is just” from a special angle: the viewpoint of the “other(s)” to whom something (including, inter alia, freedom of choice) is owed or due, and who would be wronged if denied that something. … The modern language of rights provides a supple and potentially precise instrument for sorting out and expressing the demands of justice.

---

23 Theodore M. Benditt, *Rights* 3 (1982). John Finnis and James Griffin make much the same point:
[I]t is salutary to bear in mind that the modern emphasis on the power of the right-holder, and the consequent systematic bifurcation between “right” (including ‘liberty’) and “duty”, is something that sophisticated lawyers were able to do without for the whole life of classical Roman law.
24 Finnis, n. 23, at 210. Immediately after emphasizing the usefulness of moral-rights talk, John Finnis cautions that such talk “is often, though not inevitably or irremediably, a hindrance to clear thought when the question is: What are the demands of justice?” Id. For a critique of rights talk that hinders “clear thought” about “the demands of justice,” see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991). Professor Glendon’s critique of some rights talk is not a critique of all rights talk; for Glendon’s embrace of talk about international human rights, see Glendon n 2.
James Griffin makes a similar but more focused point, in his book *On Human Rights*; he writes about the usefulness, not of moral-rights talk generally, but of a particular kind of moral-rights talk, namely, human-rights talk:

[The discourse [of human rights] has distinct merits. It focuses and gives prominence to obligations that arise, not from social status or special talents and skills, but from the dignity of human status itself. The dignity of human status itself is not the only, or the most, important moral status that human beings have. The case for singling it out is largely practical. Ring-fencing this particular status gives it prominence, ease of transmission, enhanced effectiveness in our social life, and indeed in our moral life, and so on.\(^{25}\)

For better or worse, the language of rights—especially the language of human rights—is now a common feature of moral discourse throughout the world, and is likely to remain so. Indeed, the language of human rights has become the moral lingua franca.\(^{26}\) It is difficult to see that there is anything of consequence to be gained by refusing to make peace with that state of affairs.

Having just addressed the question whether human rights are *moral* rights, I now want to say a few words in response to the further question whether human rights are *legal* rights—just a few words, because, as I emphasized in the Introduction, I am concerned in this book with the morality of human rights, not with the law of human rights.\(^{27}\)

First, that a particular right is listed in the Universal Declaration of Human Rights does not mean that the right is a legal right in any particular legal system, because that a right is listed in the Universal Declaration does not mean that the right is recognized or, if recognized, enforceable in any particular legal system. As Eleanor Roosevelt stated, immediately preceding the UN General Assembly’s adoption of the Universal Declaration in 1948:

> In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by a formal vote of its members, and to serve as a common standard of achievement for all nations.\(^{28}\)

It is noteworthy that, to an impressive extent, Eleanor Roosevelt’s hopes have been fulfilled: The Universal Declaration “has served as a model for constitu-

\(^{25}\) Griffin, n. 1, at 94.
\(^{26}\) See n. 4.
\(^{27}\) See Introduction, n. 6.
tion makers. Countless constitutions written since 1948 contain guarantees that either mirror or draw upon the Declaration."

Second, although obviously no human right is a legal right in every legal system, some human rights are legal rights in some legal systems. A particular right, including a particular human right, is a legal right in a particular legal system, in a meaningfully practical sense of “legal,” if and only if the right is not only recognized but also generally enforceable in that legal system. The human right to freedom of religion, for example, is a legal right in, because it is both recognized and enforceable in, Canada’s legal system, but the right is not a legal right in, because it is not recognized, much less enforceable, in Saudi Arabia’s legal system.

Much more could be said about human rights as legal rights: in particular, about different sorts of legal systems—national, subnational, transnational, and international; about the extent to which a particular right, if recognized in a particular legal system, is enforceable in that system; and about the efficacy of the penalty or penalties typically imposed, in a particular legal system, for violating a particular right. With respect to a particular human right and a particular legal system, the question may be less whether the right is a legal right in that system than to what extent it is.

But, again, my overarching concern in this book is with the morality, not the law, of human rights.

Having addressed, in this chapter, several preliminary questions concerning the morality of human rights, we are ready to address, in the next chapter, the most fundamental question one can ask about the morality of human rights.


30 [Are there some human rights—one or more—that are not legal rights in any legal system?]

31 I discuss the human right to religious freedom in chapter 4, in the course of elaborating the human right to moral freedom.