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The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach*

Rainer Forst

There is a crack in everything—that's how the light gets in.
(LEONARD COHEN, "Anthem" [1992])

I

Human Rights are a complex phenomenon, comprising an array of different aspects. They have a *moral* life, expressing urgent human concerns and claims that must not be violated or ignored, anywhere on the globe; they also have a *legal* life, being enshrined in national constitutions and in lists of basic rights, as well as in international declarations, covenants, and treaties; and they have a *political* life, expressing standards of basic political legitimacy. Hence, they are a perennial topic in the political realm, both nationally and transnationally, raising questions about whether they are fulfilled or violated and how violations could be avoided or sanctioned. Apart from these aspects, human rights also have

* I presented earlier versions of this article at the John F. Kennedy School at Harvard University, Ludwig-Maximilians-University of Munich, Columbia University, the Hessen Peace Research Institute in Frankfurt, the Political Theory Colloquium at Frankfurt University, and the Legal Theory Workshop at University of California, Los Angeles. I am grateful for comments from audiences at these occasions, in particular to James Griffin and John Tasioulas. I am especially indebted to Jürgen Habermas for an exchange on these matters, as well as to Allen Buchanan, the coordinator of this symposium, Henry Richardson, the editor of *Ethics*, and two anonymous referees for very valuable comments. Special thanks also to Ayelet Banai, Seyla Benhabib, Samantha Besson, Eva Buddeberg, Jean Cohen, Christopher Daase, Ronald Dworkin, Stefan Gosepath, Klaus Günther, Mattias Iser, Stefan Kadelbach, Andreas Kalyvas, Regina Kreide, Charles Larmore, Philip Pettit, Martin Saar, Seana Shiffrin, and Jim Tully for helpful questions and remarks. Amy Allen and Ciaran Cronin deserve special thanks for helping me to improve my English and my thoughts.

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a *historical* existence, though it is a matter of dispute as to when the idea materialized for the first time and what that means for us.

For a comprehensive philosophical account of human rights, all of these aspects are essential and need to be integrated in the right way. Yet when doing so one must not overlook the central *social* aspect of human rights, namely, that when and where they have been claimed, it has been because the individuals concerned suffered from and protested against forms of oppression and/or exploitation that they believed disregarded their dignity as human beings. They viewed the acts or institutions that they opposed as violations of the basic respect owed to human beings (and hence, in principle, as a concern for the community of all human beings). Human rights are first and foremost weapons in combating certain evils that human beings inflict upon one another; they emphasize standards of treatment that no human being could justifiably deny to others and that should be secured in a legitimate social order.

My thesis in what follows is that, if it is true that human rights are meant to ensure that no human being is treated in a way that could not be justified to him or her as a person equal to others, then this implies—reflexively speaking—that one claim underlies all human rights, namely, human beings' claim to be respected as autonomous agents who have the right not to be subjected to certain actions or institutional norms that cannot be adequately justified to them. The reflexive argument has three dimensions I will try to unpack in what follows. First, human rights have a common ground in one basic moral right, the *right to justification*. Second, the legal and political function of human rights is to make this right socially effective, both substantively and procedurally. The substantive aspect consists in formulating rights that express adequate forms of mutual respect the violation of which cannot be properly justified between free and equal persons; and the procedural aspect highlights the essential condition that no one should be subjected to a set of rights and duties—to a political-legal rights regime—the determination of which he or she cannot participate in as an autonomous agent of justification. Thus, human rights do not just protect the autonomy and agency of persons, they also express their autonomy politically. Third, the reflexive argument claims that this way of grounding human rights is not open to the charge of ethnocentrism haunting so many justifications of human rights, for that charge itself demands a right to adequate justifications that do not exclude those affected. In sum, the reflexive approach interprets the very notion of justification in a normative way as a basic concept of practical reason and as a practice of moral and political autonomy—as a practice that implies the moral right to justification and that grounds human rights on that basis.

II

In philosophical debates, we encounter a plurality of perspectives on human rights that accord priority to one of the above-mentioned aspects. I present these approaches here in a brief overview and will come back to them subsequently in more detail.

A

A primarily *ethical* justification of human rights focuses on the importance of the human interests they are meant to protect. There are some, like James Griffin in his recent book *On Human Rights*, who argue that core values such as autonomy and liberty are essential to what it means to be a “functioning human agent” and that rights can be derived from the basic interests persons have in realizing these values.¹ There are others, like James Nickel and John Tasioulas, who defend a pluralist conception of such essential human interests.² What these ethical justifications of human rights share, however, is their focus on substantive notions of well-being or the “good life” and their view of human rights as means to guaranteeing essential minimal conditions for such forms of human life. The “human being” here is one who has an interest in leading, and the basic right to lead, a good life, and “rights” are means to make this possible for everyone.

There have been numerous debates over such ethical justifications, over whether their notion of the good life is inextricably context-bound, so that it cannot be universalized, or whether it might be too “thin” rather than too “thick,” and thus lacks sufficient content. In addition, there are worries about the derivation of normative rights claims from basic human interests. There are many such interests in the first place—think of the interest in being loved; but how do we single out those that qualify for grounding human rights? Furthermore, how does a claim of subjective importance translate into a binding general claim to rights? What is the mediating factor which generates that kind of normativity?

B

In recent discussions, a radical alternative to ethical views has been developed that stresses the *political-legal* aspect or function of human rights, though in a very specific sense. According to such accounts, the main role or function of human rights is the one that they play in the area of international law or politics, the basis being, as in Rawls, a

1. James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 35.

2. James Nickel, *Making Sense of Human Rights*, 2nd ed. (Oxford: Blackwell, 2006); see also John Tasioulas, “The Moral Reality of Human Rights,” in *Freedom from Poverty as a Human Right*, ed. Thomas Pogge (Oxford: Oxford University Press, 2007), 75–101, and “Taking Rights out of Human Rights,” *Ethics* 120 (2010): 647–78 (in this issue).

philosophical account of “the law of peoples” or, as in Raz’s or Beitz’s view, international legal and political practice. And that role is, in Rawls’s formulations, “to provide a suitable definition of, and limits on, a government’s internal sovereignty” or “to restrict the justifying reasons for war and its conduct” and to “specify limits to a regime’s internal autonomy.”³ Rawls draws a close connection between the questions of international peace and internal standards for the “decency of domestic political and social institutions,”⁴ such that a conception of human rights can be justified only as “intrinsic” to a conception of the law of peoples acceptable to liberal as well as “decent hierarchical peoples.”⁵ For Rawls, this is based on a reflection on the “reasonable pluralism” of peoples in the international arena. It suggests that there is not a single normative ground for a conception of human rights but that there are liberal grounds for liberal conceptions of human rights and others for other conceptions; since the role of human rights is such that their violation places sovereignty in question and justifies an intervention, the result of that construction is a minimal list of human rights as part of an “ecumenical” account of a law of peoples for an international order of peace.

Others have followed and radicalized this approach, which, as I will explain below, introduced a major shift of perspective in political philosophy. Favoring a “practical” conception of human rights over an “orthodox” one which holds that “human rights have an existence in the moral order that is independent of their expression in international doctrine,”⁶ Charles Beitz’s view “takes the doctrine and discourse of human rights as we find them in international political practice as basic.”⁷ Whereas Rawls relies on a philosophical “political” conception of the law of peoples, Beitz takes current doctrine as well as practice to be authoritative. He follows Rawls, however, in defining the function of human rights as “justifying grounds of interference by the international community in the internal affairs of states.”⁸ Although he takes a broad view of the forms that such interference may take (and of the agents

3. John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 27 and 79.

4. *Ibid.*, 80.

5. *Ibid.*

6. Charles Beitz, “Human Rights and the Law of Peoples,” in *The Ethics of Assistance: Morality and the Distant Needy*, ed. Deen K. Chatterjee (Cambridge: Cambridge University Press, 2004), 196. See also Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), 7–12 and 102–6, where the idea of a “practical conception” is laid out in detail.

7. Beitz, “Human Rights and the Law of Peoples,” 197.

8. *Ibid.*, 202–3. See also Beitz, *The Idea of Human Rights*, 41–42, 65, and 143.

of such interference),⁹ he shares Rawls's idea that the content of human rights is determined by their role as grounds for external interference. Joseph Raz, finally, argues for a "political" approach to human rights "without foundations," such that human rights provide a "defeasibly sufficient ground for taking action against violators in the international arena."¹⁰ Thus political reflections about the possibility and desirability of external intervention play a major role in judgments about human rights violations; the consequence is that human rights "lack a foundation in not being grounded in a fundamental moral concern but depending on the contingencies of the current system of international relations."¹¹

C

Whereas Raz is willing to pay the price of nonfoundationalism, others fear it may be too high and look for justifications for human rights that avoid the ethical assumptions of the aforementioned accounts. Taking its lead from Rawlsian concerns about liberal parochialism and the search for *political-moral* justifications which can be the focus of an international "overlapping consensus," a contest of modesty, so to speak, has developed about the most "minimal" but nevertheless sufficient normative justification for human rights. Some, like Michael Ignatieff, focus on rights that protect bodily security and personal liberty as the minimal core of human rights,¹² and they presuppose only a "minimalist anthropology" that provides reasons for the avoidance of grave evils. Others fear that such a "lowest common denominator" approach runs the risk of mixing,¹³ in Joshua Cohen's words, "justificatory minimalism" with "substantive minimalism."¹⁴ While the former is seen as a justified "acknowledgement of pluralism and embrace of toleration" in the international realm, the latter is to be avoided, for, according to Cohen, "human rights norms are best thought of as norms associated with an

9. See Beitz, *The Idea of Human Rights*, 33–40.

10. Joseph Raz, "Human Rights without Foundations," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 321–38, 328. Jean Cohen also holds the view that the function of human rights is "to override, or set limits to the domestic jurisdiction of states"; thus she argues for a very limited "subset of legally institutionalized and enforceable international human rights" (Jean Cohen, "Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization," *Political Theory* 36 [2008]: 578–606, at 582 and 599).

11. Raz, "Human Rights without Foundations," 336.

12. Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001).

13. R. J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986), 48–49.

14. Joshua Cohen, "Minimalism about Human Rights," *Journal of Political Philosophy* 12 (2004): 190–213, at 192.

idea of *membership* or *inclusion* in an organized political society.”¹⁵ And the latter requires, first and foremost, having the right “to be treated as a member,” that is, to “have one’s interests given due consideration” politically.¹⁶ Human rights claims, then, are essential for securing social and political membership, while the moral agnosticism—or “unfoundationalism”¹⁷—which Cohen proposes leaves open the normative reasons for the claim to membership. The hope is that such a conception of rights can win support “from a range of ethical and religious outlooks” in “global public reason.”¹⁸ From that angle, Cohen argues, no human right to democracy will be seen as justifiable, for an “acceptable political society” needs to respect certain membership rights, though not a right to democracy in a fuller sense.¹⁹

III

How is it possible to navigate between these three ways of highlighting certain aspects of human rights, namely, their normative core as protecting basic human interests, their role in international law and political practice, and their claim to be universally justifiable across cultures and ethical ways of life? No doubt, human rights have a certain substance, function, and justification, but have the three views addressed them in the correct way? I think not.

In order to prepare my reflexive argument for a fourth approach and to understand the deeper normative grammar of human rights that I want to highlight, it will be useful to keep their historical dimension in mind (which I can only allude to briefly).²⁰ They first appeared as “natural” or “God-given” rights in early modern social conflicts and, quite often, revolutions, as, for example, in seventeenth-century England, when the Levellers claimed as a “birthright” a form of government that would wield power only if explicitly justified and authorized to do

15. *Ibid.*, 197, emphasis in original.

16. *Ibid.*

17. *Ibid.*, 199.

18. *Ibid.*, 210.

19. Joshua Cohen, “Is There a Human Right to Democracy?” in *The Egalitarian Conscience: Essays in Honour of G. A. Cohen*, ed. Christine Sypnowich (Oxford: Oxford University Press, 2006), 226–48.

20. I agree with Allen Buchanan’s point that neglect of the historical dimension of human rights might be a reason for the inattention in recent human rights discourse to the status-egalitarianism expressed by human rights. See his “The Egalitarianism of Human Rights,” *Ethics* 120 (2010): 679–710, at 688 (in this issue).

so by those affected;²¹ otherwise, “naturally” free persons would be subjected to “cruell, pitifull, lamentable and intolerable bondage” which they could rightfully resist.²² The language of these rights was a socially and politically emancipatory language, directed against a feudal social order and against an absolute monarchy that claimed “divine” rights for itself. That is a truism, yet an important one, for many of the views mentioned above, even some of those labeled as “political,” tend to neglect the essential political message of human rights: the claim to be not just a fully integrated member of society, but to be a social and political subject who is, negatively speaking, free from arbitrary social or political domination and who is, positively speaking, someone who “counts,” who is seen and recognized as someone with “dignity,” that is, with an effective right to justification. This right implies that there can be no legitimate social or political order that cannot be adequately justified to its subjects; in that sense, the original meaning of human rights was a republican rather than a classic liberal one. For even when the Levellers argued for personal rights to “property, liberty and freedom” (Richard Overton), they referred to the means that would make them independent social and political agents, free from feudal domination or tyrannical rule.²³ Reflexively speaking, the main point of this rights discourse was to claim the right to participate in the political structures that determine which rights and duties those subjected to them have.

The classic eighteenth-century statement of the notion of human rights is, of course, the *Declaration des droits de l'homme et du citoyen* from 1789, and it is no accident that “homme” and “citoyen” are connected here. The declaration gives individual rights a political meaning in founding a free society and a sovereign state. Article 1 declares the natural liberty and equality of human beings; article 2 states that the preservation of human rights to freedom, property, security and, importantly, resistance is the final aim of a political association; and article 3 locates the source of sovereignty in the people as a whole, called

21. It is important to note that this was often qualified as “well-affected,” restricting the claim to political equality to persons with a certain degree of economic independence. On this, see the famous Putney Debates of 1647 documented in Arthur S. P. Woodhouse, ed., *Puritanism and Liberty* (Chicago: University of Chicago Press, 1953). What I point to here is a certain logic of the historical argument for human rights that has also been used to criticize their concrete historical forms.

22. John Lilburne, “England’s Birth-Right Justified” (1645), in *Tracts on Liberty in the Puritan Revolution*, vol. 3, ed. W. Haller (New York: Octagon, 1965), 303. See also Rainer Forst, *Toleranz im Konflikt: Geschichte, Gehalt und Gegenwart eines umstrittenen Begriffs* (Frankfurt/Main: Suhrkamp, 2003), chaps. 5 and 6 (an English translation titled *Toleration in Conflict* is forthcoming from Cambridge University Press).

23. See Richard Saage, *Herrschaft, Toleranz, Widerstand: Studien zur politischen Theorie der niederländischen und der englischen Revolution* (Frankfurt/Main: Suhrkamp, 1981).

“nation.” Human rights, thus, are rights not to be subjected to tyrannical rule or to be deprived of one’s liberty and social standing, and they are also constructive rights, rights to be part of processes of political justification or, as article 6 puts it (using Rousseauian language), to participate in the formation of the “general will.” In other words, there is a basic right to be part of a political construction of a legitimate and generally acceptable basic structure through processes of public justification, ideally speaking. In his defense of the declaration against Burke’s criticism, Thomas Paine leaves no doubt that its main idea is the political autonomy of free and equal citizens: human rights are rights against unjustifiable social and political structures of domination (what Paine calls “despotism”), and they are most importantly rights to codetermine the laws that are to bind you.²⁴

Leaping forward two centuries (and leaving a big part of the story out), the Universal Declaration of Human Rights of 1948 also stresses the political meaning of human rights, even though it came about in a very different context, being deeply influenced by the experience of the most extreme and cruel forms of tyranny (to which it refers in the preamble). The declaration emphasizes strongly the connection between being safe from unjust and arbitrary rule and being a participant in political affairs. The “social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” which each person is entitled to is not meant to be one where rights are received as goods handed down from some authority. Rather it is to be one where no set of legally binding rights is determined without the participation of those who are the subjects of these rights.²⁵

What does this brief historical reflection mean for the issues of the normative substance, legal function, and moral justification of human rights? I will go into these questions in more detail in the following sections, but in a nutshell, using a distinction between morality and ethics as developed by Habermas and Dworkin, **I believe that a conception of human rights needs to have an independent and sufficient moral substance and justification, though not one of an ethical kind that relies on a conception of the good.** In the context at hand, an ethical justification rests on a notion of the good life, even if it is a very general one, while a moral justification is supposed to be neutral as to

24. Thomas Paine, *Rights of Man, Common Sense, and Other Political Writings* (Oxford: Oxford University Press, 2008). The democratic point of human rights is also stressed by Lefort’s reading of the declaration in Claude Lefort, “Politics and Human Rights,” in *The Political Forms of Modern Society*, ed. John B. Thompson, trans. Alan Sheridan (Cambridge: Polity, 1986), 239–72.

25. Christoph Menke and Arnd Pollmann (*Philosophie der Menschenrechte* [Hamburg: Junius, 2007]) also stress the political character of the Universal Declaration as a reaction to totalitarian government, yet they see this as a historical break rather than a continuation.

the question of the good or worthwhile life.²⁶ The moral basis for human rights, as I reconstruct it, is the respect for the human person as an autonomous agent who possesses a right to justification, that is, a right to be recognized as an agent who can demand acceptable reasons for any action that claims to be morally justified and for any social or political structure or law that claims to be binding upon him or her. Human rights secure the equal standing of persons in the political and social world, based on a fundamental moral demand of respect.²⁷ This demand is not seen to depend on the claim that it contributes to the good life of either the person showing or receiving respect; rather, mutual respect is owed independently of that.

From this it follows that the main function of human rights is to guarantee, secure, and express each person's status as an equal given his or her right to justification. The republican meaning of human rights I alluded to above locates their legal and political role in that protection and in the grounding of political autonomy—or “sovereignty,” to use an earlier language that needs to be qualified, since there is no absolute sovereignty in the political realm.

A moral justification for human rights has to be a universally valid and, as I argue, reflexive one. “Reflexive” here means that the very idea of justification itself is reconstructed with respect to its normative and practical implications. The argument states that, since any moral justification of the rights of human beings must be able to redeem discursively the claim to general and reciprocal validity raised by such rights, then such a justification presupposes the right to justification of those whose rights are in question. They have a qualified “veto right” against any justification that fails the criteria of reciprocity and generality and which can be criticized as one-sided, narrow, or paternalistic, as the case may be. Reciprocity means that no one may make a normative claim (such as a rights claim) he or she denies to others (call that reciprocity of content) and that no one may simply project one's own perspective, values, interests, or needs onto others such that one claims to speak in their “true” interests or in the name of some truth beyond mutual justification (rec-

26. Jürgen Habermas, “Discourse Ethics: Notes on a Program of Philosophical Justification,” in *Moral Consciousness and Communicative Action*, trans. Christian Lenhardt and Shierry Weber Nicholsen (Cambridge, MA: MIT Press, 1990), 43–115; Ronald Dworkin, “Foundations of Liberal Equality,” in *The Tanner Lectures on Human Values XI*, ed. Grethe B. Peterson (Salt Lake City: University of Utah Press, 1990), 1–119, here at 9. I have adapted the distinction in Rainer Forst, *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism*, trans. John M. M. Farrell (Berkeley: University of California Press, 2002).

27. Charles Larmore, *The Autonomy of Morality* (Cambridge: Cambridge University Press, 2008), chap. 6, also argues for a norm of moral respect as the basis for a publicly justifiable basic structure; he restricts this, however, to the political realm of justification.

iprocity of reasons). Generality means that the reasons that are to ground general normative validity have to be shareable by all affected persons, given their (reciprocally) legitimate interests and claims.

Thus, the reflexive approach manages to build the logic of the arguments against “false” (e.g., ethnocentric) universalizations, as well as against false critiques of false universalizability, into its own structure. The very basis for the first critique—which says that ethnocentric definitions of human rights violate the rights of participants to live in a social structure they see as legitimate—as well as the basis for identifying illegitimate forms of such criticism, which might veil authoritarian cultural arguments, is taken up and identified as *the right to justification*. In the following, I will try to explain this by engaging with the theories mentioned above in more detail.

IV

I shall start with a discussion of James Griffin’s view, for his book *On Human Rights* is one of the clearest and most comprehensive statements of an ethical justification for human rights within a teleological framework. I call it “ethical” because Griffin views human rights as “protections of our normative agency,”²⁸ and he defines this kind of agency as a precondition for “deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves.”²⁹ Hence, a substantive notion of the good informs this view, one which breaks down into the three components of “autonomy” (i.e., choosing one’s own path through life), the “minimum provision” (i.e., having adequate resources for choosing the good and acting on it), and the component of “liberty” (i.e., having the freedom to pursue the good).³⁰ Human rights are grounded in, or “derived from,”³¹ the “high value” we attach to our individual personhood as beings who have a higher-order interest in choosing and pursuing the good—in being “self-deciders.”³² Moreover, what Griffin calls “practicalities,” that is, considerations about human nature and society that help to determine what is necessary to secure the goods mentioned above and to justify to what extent this establishes obligations on others—constitute a second ground for human rights, or rather another component to the foundational story, since I doubt whether it can be seen as an independent second ground.

Without being able to do justice to the rich account of human rights that Griffin develops on that basis, I will briefly discuss the im-

28. Griffin, *On Human Rights*, 4.

29. *Ibid.*, 32.

30. *Ibid.*, 33 and 51.

31. *Ibid.*, 35.

32. *Ibid.*, 46 and 49.

portant points of divergence between his view and mine, the essential issue being the difference between a teleological and a deontological notion of “normative agency” as the foundation for a conception of human rights. First, Griffin rightly stresses the importance of a historical perspective, emphasizing that the idea of human or “natural” rights developed within the context of natural law framed by a religious doctrine. Hence, in modern times the need for an alternative normative grounding arose—this is still an unfinished business, as Griffin claims.³³ I agree with the claim that the “Enlightenment notion” of human rights is in need of an explicit philosophical justification, yet I think that the fact that the idea of natural rights was a polemical one directed against religious-political doctrines of the legitimacy of feudal social structures and absolute monarchy conveys a different and more determinate message than the one Griffin extracts from the historical account. As early as the sixteenth century (in the Dutch Revolution, e.g.), the discourse of human dignity was linked to the political question of opposing tyranny, that is, to protests against forms of political domination that did not regard those who are subject to such rule as persons to whom the exercise of political power had to be adequately justified.³⁴ The *political* question of freedom and justice was essential to the formation of human rights discourse: the dignity in question referred to the status of persons who were no longer to be treated as servants, as second-class citizens, as not worthy of being regarded as normative agents to whom rulers owed reasons. See, for example, what Pufendorf, whom Griffin cites,³⁵ has to say about human dignity and equality: “Man is an animal which is not only intensely interested in its own preservation but also possesses a native and delicate sense of its own value. To detract from that causes no less alarm than harm to body or goods. In the very name of man a certain dignity is felt to lie, so that the ultimate and most effective rebuttal of insolence and insults from others is ‘Look, I am not a dog, but a man as well as yourself.’”³⁶

That is a political notion of dignity as a relational concept, referring to the social and political standing of human beings as agents of justification who are equal to one another. Hence, I believe that the history of political struggles teaches us a particular political-moral lesson that Griffin in part mentions when he stresses that human rights were a “popular political force,”³⁷ but which in my view suggests a different

33. Ibid., 18.

34. See my *Toleranz im Konflikt*, chaps. 4–6.

35. Griffin, *On Human Rights*, 10–11.

36. Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (1673), ed. James Tully, trans. Michael Silverthorne (Cambridge: Cambridge University Press, 1991), 61.

37. Griffin, *On Human Rights*, 13.

normative notion of agency or personhood to lie at the center of the idea of 'human rights' than the one Griffin offers. It is one of an agent as a reason-giving and reason-deserving being—that is, as a being who not only has the ability to offer and receive reasons but has a basic right to justification. This is how I propose to substantiate the Enlightenment notion of human rights.

Thus, I agree with Griffin's view that a notion of human dignity and normative agency (or "personhood") stands at the center of human rights discourse, but I disagree as to how to reconstruct this notion. Yet the main consideration in that respect—my second point—is not so much a historical but a general and systematic one with respect to the normative grammar of these rights. The fundamental issue at stake is where to locate the normative "anchor" of a conception of human rights. A teleological view such as Griffin's identifies basic interests of persons in pursuing the good and transforms them into rights claims in accordance with their weight or value, while other interests (such as being loved, to employ that example again) do not qualify. Hence, certain subjective interests considered to be fundamental are turned into intersubjectively justifiable claims. Yet, reflexively speaking, in order to do that, a procedure of intersubjective justification seems to be necessary, as the main generator of normativity, so to speak. For only those interests can be grounds for human rights the denial of which cannot be reciprocally and generally justified among free and equal beings; not just the interests in autonomy and liberty that ground human rights must be shareable and turned into reciprocally justifiable claims but also the interpretation of what this means with respect to mutually binding rights "with enough content for them to be an effective, socially manageable claim on others."³⁸ Whereas Griffin at that point argues to include "practicalities"—considerations of human nature and society determinate enough to generate mutual rights obligations—as a second ground of human rights, I believe it is mutual justifiability all the way down (according to the criteria of reciprocity and generality) that confers normative weight to fundamental rights claims, not separate considerations of value or importance or considerations of social specificity. And for mutual justification to count as a morally binding procedure, the rights claim to be a subject of justification needs to be seen as prior and as independently morally valid. Thus, on the view I advocate, there is no "derivation" of particular rights from basic interests in pursuing the good; rather, human rights are seen as the result of an intersubjective, discursive construction of rights claims that cannot be reciprocally and generally denied between persons who respect one another's right to justification.

38. *Ibid.*, 38.

This kind of respect is owed in a deontological sense which I believe is necessary to carry the weight of what we mean by human rights.

An important consideration in that respect is that conceptions of the good—and corresponding interests—are reasonably considered to be contestable, even if they are as formal and general as the ones Griffin refers to. He is careful to attach human rights not to a particular notion of the good or flourishing life but to the general idea of being a “functioning human agent”;³⁹ still, the main function to be realized is the “capacity to choose and to pursue our conception of a worthwhile life.”⁴⁰ So it is for the pursuit of the good that we value autonomy—in our capacity as “self-deciders” about our good life: Our status as human beings “centres on our being agents—deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves.”⁴¹ This depends on the belief that the good life can only be called such when it has been autonomously chosen and pursued, which is a reasonable belief but which might also reasonably be doubted by someone who believes the good to consist in following a higher calling or in one’s duties as a member of a particular community in a traditional sense. Especially in an intercultural context, Griffin’s seems to be a partial, nonuniversalizable conception of the good and of a basic human interest in pursuing it. Hence, such a conception cannot ground universal human rights.

But even if one believed that autonomy is an essential condition of the pursuit of the good, the moral weight of a general duty to respect others as autonomous agents does not follow without an additional moral consideration: why should one’s prudential insight into the value of autonomy for oneself translate into a moral insight that one owes it to every other person to respect their autonomy? Griffin addresses this problem and argues for the independent normative reason-generating force of the value of autonomy: “To try to deny ‘autonomy’ its status as a reason for action unless it is attached to ‘my’ would mean giving up our grasp on how ‘autonomy’ works as a reason for action.”⁴² But that argument, it seems to me, not only requires a notion of autonomy that is truly universalizable and thus detached from a reasonably contestable conception of the good, it also presupposes a prior insight that in the realm of morality, and especially of human rights, reasons for action must be reciprocally and generally justifiable and shareable. And that again implies, reflexively speaking, the respect for every other person as an equal authority in the space of reasons where reciprocally valid

39. *Ibid.*, 35.

40. *Ibid.*, 45.

41. *Ibid.*, 32.

42. *Ibid.*, 135.

justifications are being sought. Persons with that status of normative agency have a human right to certain forms of respect because one cannot reasonably justify a denial of their basic claims to them. Thus, from a first-person perspective, respecting others' human rights cannot depend on my view that doing so contributes to my own good life or that doing so contributes to the good life of the others. For I might reasonably think that pursuing my self-interest in other ways would contribute more to my good, and I might also—from within a religious doctrine, for example—think that respecting another's right to the free exercise of religion leads this person to damnation. Still, I have to respect his or her basic rights—unconditionally. Hence, they have to rest on other grounds not reasonable to reject by anyone who sees himself and others as having the capacity of practical reason and of accepting the duty of justification as implied by the recursive principle of justification which says that every normative claim on others has to be justifiable on the basis of the criteria presupposed by its claim to validity.⁴³

In sum, when it comes to grounding fundamental human rights, the starting point is a basic claim to be respected as a “normative agent” who can give and who deserves justifying reasons. This is a notion of respecting an other's autonomy which is neither attached to a reasonably contestable notion of the good nor requires a translation of a prudential ethical value “for me” to a moral reason “for all.” The basic claim in that context is one of the active status as a justificatory equal, not of ethical interests and their importance in pursuit of the good. In other words, and this connects my moral argument and my historical one, the notion of normative agency I propose is also different from Griffin's in showing that the moral point of human rights does not just lie in the protection of normative agency but also in *expressing* our normative agency and autonomy in a practical sense as “norm-givers.”

Third, and connected to that last point, my view contrasts with Griffin's when it comes to the question of whether there is a human right to democratic political participation. Since Griffin's notion of autonomy as “deciding one's own conception of a worthwhile life” is, as he says, at a distance from political self-legislation, there is “no inferential route from human rights to democracy without adding some non-universal empirical premises” which would link democracy and human

43. In Rainer Forst, *Das Recht auf Rechtfertigung: Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Frankfurt/Main: Suhrkamp, 2007, English translation forthcoming as *The Right to Justification* from Columbia University Press), chaps. 1 and 2, I discuss the moral foundations of this view. As opposed to the interpretation of my approach by Menke and Pollmann, *Philosophie der Menschenrechte*, 57–68, I see the duty of justification as a duty of both practical reason and morality. The ground of human rights is the moral recognition of the other as having a right to justification, but that kind of recognition is an imperative of moral practical reason.

rights in a primarily instrumental way, given the circumstances of modern societies.⁴⁴ By contrast, I hold that the normative grammar of human rights, both historically and systematically, calls for a conception of basic rights to democratic participation. Not just from the internal perspective of those who fought or fight for such rights, but also from a principled perspective based on the right to justification, human rights should not be seen as rights to goods necessary for the “good life.” Rather, they should be seen as rights that put an end to political oppression and the imposition of a social status which deprives one of one’s freedom and of access to the social means necessary to being a person of equal standing. Grounding human rights on the right to justification captures this political and social meaning of human rights as standing in opposition to earlier, as well as modern, forms of social exclusion. What is primarily at stake in inclusion is being regarded as an agent worthy of effective political justification, of giving and receiving reasons in the political realm.

Finally, it is important to Griffin’s argument that without taking certain “practicalities” into consideration, no normative conception of personhood intended to substantiate a list of human rights can get off the ground. He emphasizes that we need to avoid arbitrary determinations of the threshold between what one can claim as a basic human right and what would be good to have but which cannot be claimed as such a right. There are states below the threshold of normative agency and states “above” it,⁴⁵ and the question is which is which. On this point, the alternative between Griffin’s teleological view and an intersubjective justificatory theory, such as I propose, is important, for while Griffin substantiates his account of particular rights with a notion of what it means to have the means to pursue a good life, I would hold that only those claims which can pass what I call the test of reciprocity and generality can count as justifiable human rights claims. Since every such rights claim must be generally and reciprocally justifiable in order to be binding, it is precisely these criteria that determine its content. So the main argument for the right to same-sex marriage, to take one of Griffin’s examples, would not be that enjoying a particular form of social union and raising children within a marriage is a substantive human aim and generally characteristic of a “worthwhile life,”⁴⁶ as Griffin argues, but that a society where the institution of marriage is reserved for some couples and denied to others without reciprocally justifiable reasons violates the demand of reciprocity. The test of reciprocity and generality—which requires a proper institutional form in a political context

44. Griffin, *On Human Rights*, 247.

45. *Ibid.*, 45.

46. *Ibid.*, 163.

in the first place—would, I believe, show that the reasons given to restrict this right to heterosexual couples only refer to beliefs, either ethical (human nature, the will of God) or empirical (findings about proper conditions for raising children), which cannot stand scrutiny as the basis for generally binding legal regulations.⁴⁷ Hence, it is not the ethical judgment about the importance or value of a practice that determines the normative rights claim but, rather, a claim concerning a social and legal standing that cannot reasonably be denied to citizens who are recognized as social equals.⁴⁸

V

Is the proposed view at odds with current human rights doctrine or practice, as proponents of the political-legal or “functionalist” accounts of human rights mentioned above might object? At this point, I concur with Griffin in his critique of Rawls and Raz.⁴⁹ To focus on the role of human rights as that of limiting sovereignty in the international realm misses the intranational purpose of human rights.

It is generally misleading to emphasize the political-legal function of such rights within international law (or political practice) of providing reasons for a politics of legitimate intervention, for this is to put the cart before the horse. We first need to construct (or find) a justifiable set of human rights that a legitimate political authority has to respect and guarantee, and then we will ask what kinds of legal structures are required at the international level to oversee this and help to ensure that political authority is exercised in that way. Only after we have taken that step will it become necessary to think about and set up legitimate institutions of possible intervention (as measures of last resort). The first question of human rights is not how to limit sovereignty from the outside; it is about the essential conditions of the possibility of establishing legitimate political authority. International law and a politics of intervention have to follow a particular logic of human rights, not the converse. Such a logic is not a simple one, one must add, for a number of additional factors need to be taken into account when it comes to the issue of legitimate intervention.⁵⁰

47. I have discussed this more fully in my *Toleranz im Konflikt*, 736–42.

48. This is not to say that ethical considerations are irrelevant for the justification of rights claims; rather, they are insufficient to establish the normative character of such claims as reciprocally and generally binding.

49. Griffin, *On Human Rights*, 24; see also his critique of Raz in James Griffin, “Human Rights and the Autonomy of International Law,” in Besson and Tasioulas, *The Philosophy of International Law*, 339–56.

50. For a comprehensive treatment of these issues, see Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004); a more skeptical view is expressed in Jean Cohen, “Whose Sovereignty? Empire versus International Law,” *Ethics and International Affairs* 18 (2004): 1–24.

Human rights do not serve primarily to limit internal “autonomy” or “sovereignty” (Rawls uses both terms) but to ground internal legitimacy. The claim to external respect depends on internal respect based on justified acceptance; however, that does not mean, to repeat, that one can infer the legitimacy of intervention—or the lack of “external legitimacy”⁵¹ or international “recognitional legitimacy”⁵²—directly from a lack of internal acceptance. Violations of human rights place the internal legitimacy of a social and political structure in question, but they do not automatically dissolve the independent standing of that state in the international arena. To be sure, violations of human rights can provide a strong reason for taking external action, and Beitz is right to point out that this can take several forms,⁵³ but this does not mean that the point of human rights can be defined as that of generating interference-justifying reasons, as Beitz and Raz argue. Rather, human rights provide reasons for arranging a basic social and political structure in the right way; hence, the primary perspective of human rights is *from the inside*. Otherwise, their moral point of not just protecting but also of expressing the autonomy of free and equal persons is not sufficiently taken into account. The main perspective is not that of the outsider who observes a political structure and asks whether there are grounds for intervention. In thinking about human rights and their justification, one must be careful not to assume the role of an international lawyer or judge who presides over certain cases of human rights violations and who at the same time wields global executive power.

In particular, since one important worry that drives “political-legal” views of human rights is to avoid a broad list of human rights which could serve to justify a wide range of interventions, reducing the list of core human rights accordingly is not the right conclusion.⁵⁴ Rather, the right conclusion is to devise legitimate international institutions with justifiable procedures for assessing and deciding cases of necessary external action.

VI

A similar mistake of misplaced perspective is made by “minimalist” normative justifications for human rights. The most obvious one is a “lowest

51. Jean Cohen, “Rethinking Human Rights, Democracy and Sovereignty in the Age of Globalization,” 591, following Michael Walzer, “The Moral Standing of States,” *Philosophy and Public Affairs* 9 (1980): 209–29, at 214.

52. Buchanan, *Justice, Legitimacy, and Self-Determination*, chap. 6.

53. Beitz, “Human Rights and the Law of Peoples,” 203. See also Beitz, *The Idea of Human Rights*, 33–40.

54. Even though Beitz criticizes minimalist views of human rights (see Beitz, *The Idea of Human Rights*, 106 and 142), his own critique of the human right to democratic institutions (*ibid.*, 185) attests to the reductivist tendency in “practical” approaches.

common denominator" approach, which would run the risk of being, to use a phrase Rawls coined in a different context, "political in the wrong way."⁵⁵ In looking for a possible universal consensus on human rights, one opts for a minimal justification and, all too often, for a minimalist conception of human rights. And even if Rawls in *The Law of Peoples* was not guilty of locating the justification of human rights in a presumably existing or possible universal consensus, he was willing to restrict the list of human rights so that certain important rights, such as equal liberties for persons of different faiths or a right to equal political participation, were not included.⁵⁶ One reason for this is the assumed connection between human rights and intervention just criticized, and another is the aim to respect nonliberal but "decent" peoples as worthy of being agents of justification when it comes to a common law of peoples (and to avoiding Western ethnocentrism). But the question of whether "decent hierarchical peoples" can or should be expected to conform to a "liberal" conception of human rights which is foreign to their cultural self-understanding, if asked from the perspective of the "ideals and principles of the *foreign policy* of a reasonably just *liberal* people,"⁵⁷ is misguided. For the essential question from a perspective that puts human rights first would be whether such peoples—or their governments—had legitimate reasons to deny their members equal liberties or the claim to political participation. This is what it means to say that we need to take "their" point of view properly into account in "our" perspective, assuming that we want to speak in this way.

Rawls presupposes that a "decent" society is characterized by a "common good conception of justice" and by a "decent consultation hierarchy,"⁵⁸ and thus we are to believe that there are no further claims to human rights raised since there is a high degree of internal acceptance in that society. However, if disunity and conflict were to appear in such a society and it "cracked," so to speak, and some members raised the claim to more demanding rights as human rights which they could justify reciprocally by attacking certain social and political privileges, would the internal authorities then have good reasons to deny these claims, and would outsiders have good reasons to say that the claims raised are not really human rights claims? I do not think so. Maybe there is not such a "crack" in every culture, but human rights discourse arose in, and has been tailored to, such situations in which societies encounter

55. John Rawls, "The Domain of the Political and Overlapping Consensus," in *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 473–96, 491.

56. Rawls, *The Law of Peoples*, 65 and 71.

57. *Ibid.*, 10, italics in original.

58. *Ibid.*, 61.

a crisis and some members are in danger. And then they want some “light” to get in, to cite the words of my epigraph, in the form of measures for an improved, and possibly equal, legal, political, and social standing, and there is no reason to dim that light when it comes to “nonliberal” societies. One needs to remember that historically this was the context in which human rights were invented in feudal or monarchical societies; therein lies their original and still essential meaning. Furthermore, there is no reason to assume that what those who engage in such struggles want is to transform their society into a “liberal” one as we know it. Human rights do not prescribe a concrete specification of the arrangements of a society. They provide a language that can be spoken in many tongues, but it is the language of emancipation. When we think about human rights, the proper perspective is the one in tune with that of the participants in social struggles.

Seen from this perspective, Joshua Cohen suggests a very appealing notion of human rights. As I mentioned earlier, he views human rights norms as norms that secure individual membership or inclusion in a political society, “and the central feature of the normative notion of membership is that a person’s interests are taken into account by the political society’s basic institutions: to be treated as a member is to have one’s interests given due consideration, both in the process of authoritative decision-making and in the content of those decisions.”⁵⁹ Cohen argues convincingly that there is a difference between a basic, universalizable account of such membership rights and a full-blown, say, liberal conception of social and political justice.⁶⁰ When it comes to the question of whether there is a human right to democracy, then, Cohen holds that a notion of democracy based on a strict version of political equality is too demanding; rather, a conception of human rights should call for forms of collective self-determination that need not be democratic in an egalitarian sense of the term.⁶¹ From the perspective of “global public reason,” he believes, it is reasonable to insist on human rights that ensure membership and inclusion, even if that does not mean full political equality, but it is not reasonable to insist on a liberal idea of free and equal persons.⁶²

Cohen’s argument for the “toleration” of nondemocratic societies in the international sphere as long as they exhibit a certain level of political self-determination, which allows for the assignment of special weight to “some social groups,”⁶³ attempts to do justice to the problem

59. Cohen, “Minimalism about Human Rights,” 197.

60. *Ibid.*, 210–13.

61. Cohen, “Is There a Human Right to Democracy?” esp. 233.

62. *Ibid.*, 244.

63. *Ibid.*, 233.

of reasonable pluralism in a global society and to avoid overly strict standards for “external reproach,” which may take the form of sanctions and intervention.⁶⁴ But it shares the problems of Rawls’s view. Cohen rightly stresses that the primary reason to argue against a narrow-minded “liberal” way of judging the legitimacy of a society’s basic structure and possibly to infer external permission to intervene is the respect for the collective self-determination of such a society. But then to express that respect by narrowing the human right to political self-determination (as expressed, e.g., in the Universal Declaration), such that if some of the politically marginalized groups in such a society were to claim a human right to equal representation, “we”—and not just those who are in power there—would say that they have no such right, seems to run the danger of contradiction. It is right to “resist the idea that the political society should be held to a standard of justice that is rejected by its own members,”⁶⁵ if that rejection is not the result of political pressure and domination, but to infer from this that these members do not have a human right to resist unequal and undemocratic forms of organizing political government is unwarranted. As with every other human being or collective, a political community can decide to settle for different forms of political organization, but the point of human rights is to strengthen those who dissent from certain “decisions” for unequal representation which have not been and cannot be reciprocally justified. One cannot limit the right to democracy by appealing to the principle of collective self-determination, for that is a recursive principle, with a built-in dynamic of justification that favors those who criticize exclusions and asymmetries. The right to democracy, as I conclude, is an undeniable right to full membership in a society, but it need not be claimed in a “liberal” sense if “liberal” means conformity to current social orders in the West.⁶⁶ Whether the members of a society interpret and use that right in such a way that it realizes a form of liberal or egalitarian democracy is up to them (as long as these decisions are not made under pressure and indoctrination) but, given the nature of human rights as protecting and expressing the right to codetermine one’s polity in an autonomous manner, there is no reason to doubt that there is a human right to democracy.

VII

Does the argument for human rights based on the notion of an individual right to justification of free and equal persons violate the claim

64. *Ibid.*, 234.

65. Cohen, “Minimalism about Human Rights,” 211.

66. On this point, see also Seyla Benhabib’s argument based on the idea of a “right to have rights” in her “Is There a Human Right to Democracy? Beyond Interventionism and Indifference,” The Lindley Lecture, University of Kansas, 2007.

to justificatory ethical impartiality, given the plurality of cultural understandings of the ethical good? I agree with Cohen that human rights norms should not depend on a “deeper outlook about the proper conduct of a good or righteous life”⁶⁷ and that a conception of human rights should be presented “autonomously,” that is, independently of any comprehensive philosophical or religious doctrine.⁶⁸ But these are considerations that do not place the approach I argue for in question, since it does not rely on any assumption about the good life but only on a conception of what we owe to each other in terms of equal respect. The imperative of equal respect is of a different kind from considerations about what my good life or yours demands, as I argued above. One might hold a deeply religious view that the “tutored life” in accordance with God’s will is the correct path in life, yet one would still have the duty to respect others as reason-giving and reason-deserving beings according to the principle of reciprocal and general justification. One must not see the notion of moral autonomy as internally connected to a liberal notion of the good.⁶⁹

Thus, I hold that, in order to avoid being “political in the wrong way,” an autonomous argument about the core of human rights has to be a moral argument that can justifiably claim general validity independent from particular conceptions of the good. How else should we understand the basic norm—in Cohen’s words—that “to be treated as a member is to have one’s interests given due consideration,” or that no person should be a “no-count”?⁷⁰ And what better ground for such an argument, what better basis for human rights could there be, reflexively speaking, than the claim that any account of the rights or duties of persons as members of a social and political basic structure should be capable of being adequately justified toward them? What “adequate justification” means here cannot, in turn, be determined without the possibility of everyone participating effectively in the practice of justification. There is no valid reason to deny such participation.

Hence, it is right to aim at “justificatory minimalism” as far as the avoidance of ethical doctrines of the good is concerned; yet it is implausible to argue both for an autonomous moral justification and to claim that such justification is “unfoundational”⁷¹ in the sense that it remains agnostic concerning its foundations. For then the moral validity of the core set of human rights is not borne by shareable and generally

67. Cohen, “Is There a Human Right to Democracy?” 237.

68. Cohen, “Minimalism about Human Rights,” 193.

69. See Rainer Forst, “Political Liberty: Integrating Five Conceptions of Autonomy,” in *Autonomy and the Challenges to Liberalism: New Essays*, ed. John Christman and Joel Anderson (Cambridge: Cambridge University Press, 2005), 226–42.

70. Cohen, “Minimalism about Human Rights,” 197 and 198.

71. *Ibid.*, 199.

binding reasons but by a multiplicity of reasons that have to “win support from a range of ethical and religious outlooks.”⁷² To be sure, Cohen does not see this as an attempt to ascertain a “de facto overlap” but as an “independent” argument for a normative notion of membership; yet this very independence gets lost in the absence of a free-standing moral normativity. There is no way of avoiding a substantive claim about the respect owed to persons as agents of justification, as agents to whom one owes certain reasons for claims that are to bind them. And given the dynamic in which human rights claims arise, there is no reason to assume that such claims for justification cannot be raised in many languages from within many traditions in which conflicts of a certain kind have arisen.⁷³

Let us suppose that we are confronted with a position—think of the so-called Asian values debate⁷⁴—which holds that such an understanding of justification and autonomy is foreign to a particular social context and cultural tradition. Therefore respect for that particular social order is demanded which is not to be measured according to a yardstick of human rights. On a closer examination, however, what exactly is the basis of this claim for respect?⁷⁵ Such a position, as I understand it, claims to defend the integrity of a certain social order as an integrated unity. The whole is supposed to constitute the identity of its members and vice versa; thus, violating the integrity of the whole also violates the integrity of the members of that society, and an imperative to respect human rights is seen as such a violation. Yet that seems unfounded, for the claim raised implies that a defense of communal integrity cannot come at the cost of the integrity of its members, be they a majority or a minority. At least that is what the position states, since it is not meant to be a majoritarian one which only addresses the

72. Ibid., 210. See also my critique of Rawls in *Contexts of Justice*, chaps. 3.1 and 4.2, as well as my *The Right to Justification*, chap. 4.

73. I do not deny that a free-standing notion of respect can be incorporated into different “background justifications” of cultural and religious kinds, to use a phrase by Charles Taylor, “Conditions of an Unforced Consensus on Human Rights,” in *The East Asian Challenge for Human Rights*, ed. Joanne R. Bauer and Daniel A. Bell (Cambridge: Cambridge University Press, 1999), 124–44. However, these backgrounds must not lead to interpretations of what kind of respect is owed to whom that reproduce the inequalities and asymmetries that human rights are supposed to correct. Given the moral grammar and social function of human rights, they need to have a moral weight of their own that can counterbalance “traditional” hierarchical or patriarchal normative outlooks.

74. As discussed, e.g., in Bauer and Bell, *The East Asian Challenge for Human Rights*, and in Daniel A. Bell, *East Meets West: Human Rights and Democracy in East Asia* (Princeton, NJ: Princeton University Press, 2000).

75. In the remainder of this section, I condense an argument I make at greater length in Rainer Forst, “The Basic Right to Justification: Toward a Constructivist Conception of Human Rights,” trans. Jonathan M. Caver, *Constellations* 6 (1999): 35–60.

interests of dominant social groups. Thus, there is an internal criterion of legitimacy built into the argument, namely, that of internal and unforced acceptance, for any forced acceptance of social or legal norms would be incompatible with the claim for communal integrity. That claim, then, is suspended when internal dissent arises concerning the acceptability of the dominant social idea of order or its realization. If a society denies criticism of its dominant justifications and of the ways in which justifications can be questioned and formed, its social integrity is placed in question—from *the inside*. In any justifiable social order, internal critique cannot be legitimately answered by force or domination; whatever substantive demands those who protest raise, they demand in the first place that their dissent should be heard, taken seriously, and channeled in such a way that it could lead to a reform of the social structure. Hence, human rights play a double role here: in one sense, they are basic claims for justificatory standing as a full member, and, in another sense, they can also be means to address particular shortcomings of a social structure, such as a lack of religious liberties or of the resources necessary for education or a decent income. Still, such substantive claims must also be fed into the justification procedures of a society, since the common political structure is the first addressee of these claims. Human rights are not immediate claims to certain substantive “goods” but to a certain social and political standing of persons as “norm-givers.”

The main insight I want to emphasize in this section is captured by a reflection of Uma Narayan’s concerning the difficulties encountered by feminists in non-Western societies in finding a critical language that avoids the pitfall of being seen as an “outsider” who speaks the “alien” language of human rights and betrays local traditions: “We all need to recognize that critical postures do not necessarily render one an ‘outsider’ to what one criticizes, and that it is often precisely one’s status as one ‘inside’ the culture one criticizes, and deeply affected by it, that gives one’s criticisms their motivation and urgency.”⁷⁶ Social criticism of patriarchal structures and of certain forms of brutality and violence associated with it is always context related and specific. However, there is no reason to assume that one cannot find certain basic standards of respect and equality which are implied in these many criticisms and which, first and foremost, imply the basic claim not to be subjected to actions, norms, or institutions that cannot be adequately defended toward those affected. According to Narayan, to assert that human rights express “Western values” represents a highly problematic form of cultural essentialism and Western

76. Uma Narayan, “Contesting Cultures: Westernization, Respect for Cultures, and Third-World Feminists,” in *The Second Wave: A Reader in Feminist Theory*, ed. Linda Nicholson (New York: Routledge, 1997), 396–418, at 412.

ethnocentrism, which denies the place of human rights in other sociocultural contexts and struggles.⁷⁷ Those who use the language of these rights are not “aliens” in their societies.

VIII

At this point, I should at least sketch what a comprehensive picture of human rights would look like given their many dimensions as stressed at the outset, namely, moral (rather than ethical), legal, social, and political. The normative basis for a conception of human rights is the right of every moral person to be respected as someone who has a moral right to justification, such that any action or norm that claims to be morally justified, as well as any social order or institution that claims to be legitimate, has to be justifiable in an adequate way. This means that moral actions or norms have to be justifiable with moral reasons in moral discourse (free from coercion or delusion) and that political or social structures or laws have to be based on or (at least) to be compatible with moral norms applicable to them and must be justifiable within appropriate legal and political structures (and practices) of justification. The criteria of justification for moral norms are those of reciprocity and generality in a strict sense, for, recursively speaking, such norms claim to be strictly mutually and universally binding. The criteria for legal norms are those of reciprocity and generality within political structures of justification, thereby presupposing the possibility of free and equal participation and adherence to proper procedures of deliberation and decision making.⁷⁸

Hence, the notion of “dignity” that lies at the heart of such a conception of human rights is not a metaphysical or ethical one, combined with a doctrine about the good life. Rather, dignity means that a person is to be respected as someone who is worthy of being given adequate reasons for actions or norms that affect him or her in a relevant way. And this kind of respect requires us to regard others as autonomous sources of normative claims within a justificatory practice. Each person is an “authority” in the space of reasons, so to speak.⁷⁹ Dignity is thus a relational term; its concrete implications can be ascertained only by way of discursive justification.

77. Uma Narayan, “Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism,” in *Decentering the Center: Philosophy for a Multicultural, Postcolonial and Feminist World*, ed. Uma Narayan and Sandra Harding (Bloomington: Indiana University Press, 2000), 80–100, at 91.

78. On the notion of democracy implied here, see Rainer Forst, “The Rule of Reasons: Three Models of Deliberative Democracy,” *Ratio Juris* 14 (2001): 345–78.

79. This also holds true for persons who cannot use their right to justification in an active sense, such as (to some extent) children or mentally disabled persons; the passive status of having that right does not depend on its active exercise.

With respect to human rights, we need to distinguish between what I call “moral constructivism” and “political constructivism” (using Rawls’s terminology in a different way).⁸⁰ Both are forms of discursive constructivism, in contrast to the idea of “deriving” rights from the basic right to justification. Every content of human rights is to be justified discursively, yet one needs to be aware of the twofold nature of human rights as general moral rights and as concrete legal rights. At the moral level, the construction leads to a list of those basic rights that persons who respect one another as equals with rights to justification cannot properly deny each other. That kind of list is to some extent general and subject to further elaboration, but it expresses basic standards of respect that must be secured in the form of basic rights, given that this form has proven historically to be the appropriate one for safeguarding individual claims and entitlements. It is important to emphasize that the basic right to justification is not only conducive to rights that secure the political standing of persons as citizens in a narrow sense; it is also the basis of rights to bodily security, personal liberties, and secure equal social status.⁸¹ To put it in negative terms, human rights are those rights which cannot be rejected with reciprocally and generally valid reasons,⁸² and that requirement opens up the normative space for claims that secure a person’s status as an agent with equal social standing. That implies rights against the violation of physical or psychological integrity as well as rights against social discrimination. The right to justification is not just a right to political justification; rather, it is a right to be respected as an independent social agent who at the same time codetermines the social structure of which he or she is a part.⁸³

Using the right to justification as an anchor does not involve any narrowing of focus of human rights, as one may fear,⁸⁴ for there are two ways to substantiate human rights on that basis, first by spelling out the requirements—and powers, so to speak—attached to the status of a socially and politically recognized agent of justification, and, second, via a consideration of the aspects of human life to be protected or

80. I explain the difference to Rawls in Forst, “The Basic Right to Justification,” 45–46.

81. The latter aspect is stressed by Buchanan, “The Egalitarianism of Human Rights.”

82. I modify here the “not reasonable to reject” formulation of Scanlon’s contractualist theory of justification; see Thomas Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), esp. chap. 5. I discuss the differences between Scanlon’s contractualism and discursive constructivism in *The Right to Justification*, chaps. 1 and 2.

83. This also captures the historical meaning of these rights; in briefly mentioning the social struggles of the Levellers, I pointed out that they were directed against feudalism as a social order as well as against absolute monarchy as a political order.

84. That worry has been raised, in different ways, by Allen Buchanan, James Griffin, and John Tasioulas, to whom I am particularly grateful.

enabled by basic rights that no person can morally deny to equal others with good reasons. At this point, claims about the importance of certain goods and about basic social interests reappear, though not as ethical values or interests from which certain rights claims can be derived, but as discursively justifiable claims to reciprocal respect between persons who recognize one another as autonomous and, at the same time, vulnerable and needy social beings. Human rights materialize and protect that status, and it is by way of procedures of reciprocal and general justification that claims based on human interests can be transformed into rights claims.

Hence, the political point of the right to justification is especially important, for there is a particular institutional implication of this moral argument for human rights. They are moral rights of a specific kind which are directed to a political-legal authority and have to be secured in a legally binding form; hence, they are an important part of what I call "fundamental justice." A fundamentally just basic political and legal structure is a "basic structure of justification" in which the members have the means to deliberate and decide in common about the social institutions that apply to them and about the interpretation and concrete realization of their rights. Human rights in that sense have a reflexive nature: they are basic rights to be part of the processes in which the basic rights of citizens are given concrete and legally binding shape. They are rights of a higher order, namely, rights not to be subjected to social institutions or legal norms that cannot be properly justified toward those affected and rights to be equal participants in such procedures of justification. Political constructivism thus has moral constructivism as its core, for there can be no legitimate interpretation and institutionalization of basic human rights that violates their moral core as explained above, but it is also an autonomous discursive practice of citizens who are engaged in establishing a legitimate social and political order. There are certain core rights presupposed by that political construction, and hence the idea of fundamental justice in a "basic structure of justification," but an essential point of the construction is to establish a contextualized structure of rights and institutions worthy of acceptance by a political community. The ultimate aim, ideally speaking, is "maximal justice," that is, a "fully justified basic structure."

It must be added that human rights are more wedded to fundamental than to maximal justice; the task of establishing a justified—and just—basic structure is more comprehensive and complex than that of establishing an acceptable and legitimate structure of basic human rights. Human rights are an essential part of the full picture of social and political justice, but they are only a part. As the realm of moral rights is larger than that of moral human rights, so is the realm of political and social

justice larger than that of legally established human rights.⁸⁵ It is important to stress in this connection that political constructivism is not simply a “realization” of fixed moral human rights; rather, it is a discursive exercise within proper procedures of justification.

Human rights, to sum up, are those basic rights without which the status of a being with a right to justification is not socially secured. They entail the essential personal, political, and social rights necessary to establish what I call a social structure of justification; and, second, they entail those substantive rights which no one within such a structure of justification can reasonably deny to others without violating the demands of reciprocity and generality. Recursively speaking, and that is my central idea, the point of human rights is that persons have the basic right to live in a society where they themselves are the social and political agents who determine which rights they can claim and have to recognize. This is the autonomous agency highlighted by human rights, today as well as in earlier times.⁸⁶ To put the double, reflexive character of human rights in a nutshell: they are rights that protect against an array of social harms the infliction of which no one can justify to others who are moral and social equals, thus presupposing the basic right to justification—but above that, they protect against the harm of not being part of the political determination of what counts as such harms.

IX

I have argued that human rights are an important component of an account of political and social justice. But other authors argue that they are “basic requirements of global justice,”⁸⁷ and so the question arises as to whether my account falls into a “statist” or a “cosmopolitan” category. Yet I would suggest avoiding these categories. Undoubtedly, the basic right to justification is a universalist starting point, and so is the result of the list of human rights by way of moral constructivism. Still, the account of

85. I agree with Griffin (*On Human Rights*, 41) on that point.

86. In an important sense, I share Habermas’s idea of the “equiprimordiality” of personal and political autonomy as well as of human rights and popular sovereignty, as explained in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: MIT Press, 1996), esp. chap. 3. In another sense, however, I diverge from it, for my notion of equiprimordiality sees the right to justification as one source for both, while Habermas sees different sources at work. In addition, none of these has the moral status of the right to justification for which I argue. For a discussion of this, see Rainer Forst, “The Justification of Justice: Rawls’s Political Liberalism and Habermas’s Discourse Theory in Dialogue,” in *The Right to Justification*, chap. 4.

87. Charles Beitz, “What Human Rights Mean,” *Daedalus* 132 (2003), 36–46, at 44. In his *The Idea of Human Rights*, 142–43, Beitz distances himself from this view, however. For another example of that position, see Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002), chap. 1.

political constructivism sketched above does not predetermine whether the political community that interprets and institutionalizes these rights is a particular or a global one. Thus, the questions at issue between globalists and statists have to be decided elsewhere, namely, with reference to a conception of transnational justice which aims at establishing a transnational order of justification based on considerations of the relevant contexts of justice.⁸⁸ In a sense, then, human rights are part of an account of transnational justice, but just a part of it, and they are agnostic with respect to the question of the proper political context for their realization. A full-blown conception of transnational justice is more comprehensive than a conception of human rights can be, and it entails numerous aspects of political and economic, as well as historical, justice. And even though the conception of human rights implies rights to the necessary means for an adequate standard of living which cannot be denied to any person to whom reasons are owed for the social structures to which they belong, this in no way satisfies the demands of justice, either nationally or transnationally, given the world as we know it.

What is important, however, is that the primary addressee of human rights claims is a political and legal basic structure with the form of a state. In that respect, a conception of human rights needs to combine moral-universalist and institutional aspects, even though I disagree with an institutional view which not merely argues that the state is the central institution for securing human rights but also contends that it is only violations perpetrated by official actors that count as human rights violations.⁸⁹ That is too narrow a connection. It is the task of a state to secure human rights and to protect citizens from human rights violations by private actors such as large companies, for example. Failure to do so, either because the state decides not to act even though it could or because it is too weak,⁹⁰ constitutes insufficient protection of human rights, though their violation is not the work of the state but of other agents. So the state is the main addressee of claims to protect rights, even though it is not the only agent who can violate them.

However, human rights do, of course, have a transnational moral as well as a legal meaning. Their moral meaning is that a violation of human rights is a breach of standards which the human community in general believes should be respected; thus, in case states prove to be either the perpetrators of such crimes or unable to stop them, the "world community" is called upon to react not just morally but also politically.

88. See Rainer Forst, "Towards a Critical Theory of Transnational Justice," in *Global Justice*, ed. Thomas Pogge (Oxford: Blackwell, 2001), 169–87.

89. See Pogge's argument in *World Poverty and Human Rights*, 58.

90. Pogge discusses the case in which the state is not willing to act and categorizes it as a kind of "official disrespect" (*ibid.*, 61).

That, however, calls for a “mediation” of such duties to avoid or put a stop to violations of human rights in the form of proper institutions, not just because it needs to be determined who has what kind of duty to assist those in need but also because a structure of justification needs to be established to avoid arbitrary judgments concerning cases of aid or of intervention.⁹¹ Hence, the moral meaning again has to be transformed on a legal and political level in order to establish credible international institutions to prevent, judge, stop, or sanction human rights violations. There is another form of political constructivism called for here whose task is to codify transnationally and internationally binding human rights in political and legal terms.⁹²

There are further aspects of the legal existence of human rights in international declarations and covenants that I cannot go into here. There are duties to establish institutions for those who had to flee their states because of human rights violations or for other reasons such as economic deprivation. The “right to have rights”⁹³ and to belong to a political community where one is protected from rightlessness is an important issue in a world of forced migration; so, too, is the duty to avoid the creation of zones of lawlessness, such as extraterritorial detention camps, in international conflicts.

X

Human rights are essential and fundamental standards of the legitimacy of a social and political order; even though such an order is their primary context and addressee, there are a number of reasons for an international order that aims to secure these rights. But their main point remains that, insofar as these rights are to establish the core of a justified social order, their normative ground is the basic claim to be respected as an agent who has a right to justification. The logic of justification combines reflexive, procedural as well as substantive, arguments for human rights, and every such right is to be seen as a claim that cannot be reciprocally rejected between persons who recognize that they owe one another a legal and political protection of their right to be a socially and politically autonomous agent of justification. Rights have to be un-

91. For the notion of “mediation” here, see Henry Shue, “Mediating Duties,” *Ethics* 98 (1988): 687–704.

92. This point is stressed by Jürgen Habermas in his “Remarks on Legitimation through Human Rights,” in *The Postnational Constellation*, trans. Max Pensky (Cambridge, MA: MIT Press, 2001), 113–30, and “Does the Constitutionalization of International Law Still Have a Chance?” in *The Divided West*, trans. Ciaran Cronin (Cambridge: Polity, 2006), 113–93.

93. See Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace, Jovanovich, 1979), chap. 9; for an interpretation and application of this thought, see Seyla Benhabib, *The Rights of Others* (Cambridge: Cambridge University Press, 2004), chap. 2.

derstood horizontally, so to speak, as reciprocally justified and binding claims to a certain moral, as well as a legal, a political, and a social, status. They express forms of mutual recognition, and in their concrete form they are results of procedures of discursive construction. Rights are not goods received from some higher authority; rather, they are expressions of reciprocal respect between persons who accept that, whatever form these rights take, everyone to whom they apply has a basic right to be an agent of justification, such that no set of rights can be determined without adequate justification.

The view I have explained is at odds with two rival ones. The first is a teleological view which grounds human rights in basic interests in well-being and derives basic rights to certain protections and realizations of these interests from them. The second regards human rights as having primarily a legal international existence, leaving their moral justification open. It seems to me these two views downplay the social and political point of human rights. They are not simply means to achieve or enjoy certain goods, and they are not primarily means to evaluate social structures from the outside in the international arena; rather, they are autonomous achievements of those who regard themselves and others as agents who resist being “mere” subjects of norms or institutions that are not responsive toward them. Their basic claim is one of status, but of a dynamic kind, namely, no longer to be treated as a justificatory nullity and thus the claim to “count” socially and politically. Rights confer upon agents social and political power in the sense of “normative power”: the power to codetermine the conditions of one’s social and political life. Human beings have a claim to such power, and human rights are a way to express that.