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What is Become of the Rights of Men? Are You the Only Men who Have Rights?
Moral Contractarianism and the Legitimation of Universal Human Rights

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What is Become of the Rights of Men? Are You the Only Men who Have Rights? Moral Contractarianism and the Legitimation of Universal Human Rights

Abstract: In this article I advance an account of human rights as individual claims that can be justified within the conceptual framework of social contract theories. The contractarian approach at issue here aims, initially, at a justification of morality at large, and then at the specific domain of morality which contains human rights concepts. The contractarian approach to human rights has to deal with the problem of universality, i.e. how can human rights be 'universal'? I deal with this problem by examining the relationship between moral dispositions and what I call 'diffuse legal structure'.
Keywords: human rights, contractarianism, Jeremy Bentham, moral dispositions, justice, diffuse legal structure

The relationship between the concept of human rights and the tradition of 'social contract' theories may be considered from two different perspectives. On the one hand, the very idea of human rights – of rights human beings would have solely in virtue of their being human beings – cannot be dissociated, from a historical point of view, from the tradition of political thought which emerged in the seventeenth century with Hugo Grotius and, later, with John Locke and which tried to ground the legitimacy of political authority by means of the idea of a 'social contract'. For this tradition, the contract, whether an actual or only an hypothetical one, is a procedure by means of which individuals would create a political order in the context of which their 'natural rights' – rights they would already possess previously to the enactment of any contract – would be protected. The contract, therefore, would not generate the individuals' rights, at any rate not those rights they would already possess in virtue of their being human beings. Contractarianism, in this sense, refers to a wide range of political theories which take for granted the basic premise that human beings are by nature bearers of some legitimate moral rights. But the nature of such rights has not been traditionally examined in the context contractarianism itself. This perspective within the tradition of social contract theories, thus, does not really ground human rights. It assumes that there are some

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natural or innate rights, and relies upon some non-contractarian moral theory for a justification of them.

On the other hand, a more recent development in the tradition of contractarianism has tried to advance a conception of morality entirely derived from the idea of a contract. I will refer to this recent development within the tradition of contractarianism as 'moral contractarianism' as opposed to 'political contractarianism'. Moral contractarianism denies that there are any rights or duties which individuals would have solely in virtue of their being human beings. Human rights are 'human', according to this specific sort of social contract theory, not because nature or God has endowed human beings with such rights, nor because human reason discovers them as the counterpart of a 'categorical imperative' the validity of which would be unrelated to the interests and dispositions that individuals actually have. Human rights are 'human' because they are created by human beings themselves. Human rights, conceived in this light, are the result of a rational reflection on how to implement the most basic interests we could possibly ascribe to *any* human beings. But it is important to bear in mind now that moral contractarianism, as it has been defended by some of its most prominent advocates such as J. L. Mackie, David Gauthier and, in the context of German philosophy, Peter Stemmer, and Norbert Hoester, is not a theory about human rights. Moral contractarianism is basically concerned with an elucidation of the structure of morality in terms of a cooperative scheme to which self-interested individuals would agree to adhere for the sake of mutual advantage. But moral contractarianism leaves open both the question relative to the content of morality and the question relative to the moral duties incumbent upon the state in the exercise of political authority.

The task of a contractarian legitimation of human rights consists, therefore, in providing reasons for the thesis that every human being is entitled to raise a number of legitimate claims against the state, irrespective of his or her nationality, ethnic background, religious creed, sexual preference, skin colour, political orientation, etc. These claims are, in simple outlines, of two sorts. On the one hand, they establish an ambit of immunity against state interference in the private life of individuals. And, on the one hand, they also impose on the state the duty to provide every individual with the minimal material means which should enable one to pursue a conception of the good life of his or her own choice. The first group of claims constitutes, broadly speaking, the so-called class of civil and political rights, whereas the second group relates to the so-called social, economic, and cultural rights. The way, if any, the first group relates to the second group concerns a question which, albeit philosophically

relevant, will not be examined here.[1] This question raises a number of problems which affect not only a contractarian legitimation of human rights, but practically any other human rights theory.

Another question which a contractarian approach must face, and which seems not to undermine other human rights theories, is the following: if a human right is a human creation, rather than a kind of natural entity every human being would be the bearer of solely on the grounds of his or her being a human being, then, at first glance, it is not clear how they could be used as a standard for the assessment of the moral quality of state power. For the prospect of appealing to manmade rights in order to assess the moral quality of manmade rights seem to involve a circular reasoning. Why, after all, should we suppose that moral norms – expressed in the vocabulary of human rights – are more reliable than state norms? Part of the attraction exerted by the idea of human rights, since at least the publication of the *Declaration of the Rights of Men and the Citizens* in 1789, stems precisely from the assumption that human rights, as natural entities, would function as a non-manmade standard in order to evaluate the morality of manmade norms. For the natural law conception of human rights, the aim of the state should be, indeed, to guarantee that individuals' natural rights shall not be violated. This idea is clearly conveyed in the second article of the *Declaration* of 1789: *'The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.'* Yet, once it has been assumed – as moral contractarianism does – that there are no natural rights at all, but only manmade rights, it seems that the very idea of *human rights* should be replaced by another form of moral evaluation of state power devoid of the metaphysical commitments which render the concept of 'natural rights' so problematical. The thesis that the so-called 'natural and imprescriptible' rights of men are but a philosophical fiction, to be replaced with a non-metaphysical moral standard, was clearly defended, for instance, by Jeremy Bentham shortly after the *Declaration* of 1789 appeared.

In a text known as *Anarchical Fallacies*, Bentham directs a twofold attack on the tenability of the philosophical ideas underlying the *Declaration* of 1789. Firstly, Bentham argues that the advocates of natural rights do not draw a clear-cut distinction between the concept of *interest* and the concept of *right*. And secondly, he also argues that the adoption of the so-called 'natural rights of the men' as the standard on the basis of which state norms

[1] On the relationship between these two classes of human rights, see e.g. Stefan Gosepath, 'Zu Begründungen sozialer Menschenrechte', in: ed. Stefan Gosepath / Georg Lohmann, *Philosophie der Menschenrechte*, 1998, 146-187; Ernst Tugendhat, 'Liberalism, liberty and the issue of economic human rights', in *Philosophische Aufsätze*, 1992, 352-370; Robert Alexy, *Theorie der Grundrechte*, 1985.

should be evaluated would inevitably lead to political chaos – to anarchy. As far as the first points is concerned, Bentham's thesis was that no matter how reasonable an interest may be, an interest, taken in itself, is neither a right nor a moral claim of any sort, but only a *wish* that a certain state of affairs obtains. Even interests which can be quite unproblematically ascribed to every human being, such as the interest in not being oppressed, or the interest in not having one's property usurped, are not in themselves kinds of rights, but at most a reason to create a system of norms in the context of which one's wish not to be oppressed or robbed might acquire a new status, namely: to become one's *right*. Bentham's point, thus, is that without the sort of institutional support generated in the context of a political community, one's claim against possible threats to one's life is not yet a reference to any rights at all. As Bentham puts it in an often-quoted passage from *Anarchical Fallacies*:

'That which has no existence cannot be destoryed – that which cannot be destroyed cannot require anything to preserve it from destruction. Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, - nonsense upon stilts.'

'In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights; – a reason for wishing that a certain right were established, is not that right – want is not supply – hunger is not bread.'[2]

For Bentham, the supposition that there are 'natural and imprescriptible' rights, therefore, constitutes a fallacy resulting from a conceptual confusion about our reasons for creating rights, and the rights themselves. But it is important to notice that although Bentham remained adamant to the thesis that there cannot be rights outside of a political community, he did not seek to establish the limits of state authority on the grounds of a contractarian moral theory. Bentham was, in this regard, an advocate of utilitarianism, not contractarianism. On the other hand, Bentham's attempt to defend the principle of utility as the 'test of morality' without appealing to metaphysical premises has been much criticised. Some critics even argue that, at this crucial point, Bentham's utilitarianism was only another version of a natural law moral theory.[3] Nevertheless, the problems underlying the attempt to ground a political morality in accordance with utilitarian moral principles – whether or not with reference to the idea of human rights – should not concern us here. I assume that the first aspect of Bentham's onslaught on the *Declaration* of 1789 is correct: reasons to create rights should not be

[2] Jeremy Bentham, 'Anarchical Fallacies', in: ed. J. Waldron, *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of the Man*, 1987, 53.
[3] Cf. e.g. J. A. Schumpeter: *History of Economic Analysis*, 1955, 132: *'*[…] *utilitarianism was nothing but another natural law system'* (quoted in Ross Harrison, *Bentham*, 1999, 105).

confused with rights themselves. I leave here unexamined though Bentham's own alternative to a human rights theory, for I am not interested here in the utilitarian approach to human rights, but in the contractarian approach. I would like now to turn now to the second aspect of Bentham's criticism: why does he refer to the idea of human rights as *anarchical*?

Bentham believed that, because human rights are a sort of philosophical fiction, it would be unwise to ground a political community on the basis of such vague ideas. He did not deny that the existing political order in France, previous to the Revolution of 1789, was unjust. But he did deny that an insurrection against unjust laws should be justified in the name of supposedly fictional entities such as human rights. As Bentham puts it:

'The revolution, which threw the government into the hands of penners and adopters of this declaration, having been the effect of insurrection, the grand effect is to justify the cause. But by justifying it, they invite it: in justifying past insurrection, they plant and cultivate a propensity to perpetual insurrection in time future; they sow the seeds of anarchy broad-cast: in justifying the demolition of existing authorities, they undermine all future ones, their own consequently in the number.'[4]

This second aspect of Bentham's attack on the *Declaration* of 1789 does not directly aim at a conceptual problem. Bentham suspected that the ideal of protection of human rights would not have the capacity to produce a stable and secure political order. For, in the name of human rights, individuals might feel entitled to insurge against the established political authority whenever their thought their natural rights had been infringed. Thus, Bentham concludes, *anarchy* rather than a well-ordered government would prevail. This conclusion, however, turned out to prove mistaken.

In the course of twentieth century most states have committed themselves to the ideal of protection of human rights. New declarations of human rights have been issued, such as, for instance, the *Universal Declaration of Human Rights* (1948), *The European Convention on Human Rights* (1950), and *The International Covenant on Civil and Political Rights*, along with the *International Covenant on Economic, Social and Cultural Rights* (1966). Several international human rights treaties have been adopted, and bodies such as the *Inter-American Court of Human Rights* and the *European Court of Human Rights* have been established to ensure the enforcement of human rights at an international level. Moreover, a series of non-governmental organisations, such as *Human Rights Watch* and *Amnesty International* were created for the promotion of human rights both at a domestic and at an international level. There is – it is safe to say – a widespread practice of human rights. Thus, contrary to the

[4] Jeremy Bentham, 'Anarchical Fallacies', in: ed. J. Waldron, *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of the Man*, 1987, 47.

scenario Bentham forecast toward the end of eighteenth century, the institutionalised practice of human rights did not degenerate into anarchy. Quite on the opposite, failure to engage in this practice has been often associated with the emergence of dictatorships, major political upheavals, civil wars, and genocides.

Engagement in the practice of human rights can take place in different forms. It may occur, for instance, at an individual level inasmuch as one supports a human rights organisation; it may take place at a collective level through organised protest and denunciation of human rights violations; it can occur at a state-level through the incorporation of human right laws into the constitution of a state; and it can also occur at an international level through endorsement of human rights treaties, or participation in humanitarian interventions. It hardly needs mention, however, that the practice of human rights has not prevented governments to act unjustly towards minorities, women, homosexuals, ethnic groups, etc. – both within and beyond their territories. But it is through the vocabulary of human rights that such acts of injustice have traditionally been referred to over the last sixty years. A contractarian legitimation of human rights, then, consists in providing reasons for engagement in this practice. But it is important to notice that the contractarian approach does not assume that previously to the emergence of this practice individuals were already endowed with human rights. For human rights are created, promoted, or defended in the very context of this practice. The very act of violation of human rights can only exist within the broader context of a practice which condemns such acts. Actually, even the question about the philosophical foundations of human rights is posed against the background of an ongoing practice – the practice of human rights. What is at issue in the contractarian legitimation of human rights, therefore, is the question about the reasons which may be advanced for the existence of, and further support for this practice.

Moral contractarianism poses the same question vis-à-vis the practice of morality: which reasons do we have to engage in and to support our moral commitments? It is quite clear that the practice of morality did not arise out of a 'contract' amongst self-interested individuals. This practice may well have originated, and was traditionally defended, on the grounds of religious and metaphysical ideas. But the reasons at the origins of a practice need not necessarily be the same reasons for one's engagement in, and overt support for this practice. The task of a contractarian moral theory, as Gauthier puts it, consists in a 'rational reconstruction' of morality, leaving aside the question relative to the factual roots of our moral ideas and moral dispositions.[5] The answer moral contractarianism gives for the

[5] David Gauthier, *Morals by Agreement*, 1986, 339.

question about the justification of morality is that, whatever the origins of morality may be, we would have reasons to create and support a system of self-imposed constraints in order to preclude individuals to advance their own good to the detriment of the good of other individuals. But our reasons to create this system are not themselves moral reasons.[6] In seeking to establish a system of rules for mutual advantage, we must not be guided by the prior moral intuition that it is always wrong to better one's own position by worsening the position of others, so that a system of rules would be created for the concretization of an intuition the validity of which would be unrelated to the system itself. One's sole reason to engage in the practice of abstaining from promoting one's own good without concern for the good of other individuals may be the realisation that it is deleterious to one's own good to act in a predatory way. Indeed, most of the basic goods an individual may be possibly interested in, such as the protection of one's own life against murder, or the preservation of property over the objects one creates, transforms, or acquires by means of one's own work, are goods which are generated on a collective basis. They cannot exist without the cooperation of other individuals. This means that one will not be able succeed in obtaining these goods for oneself, unless one is also willing to provide other individuals with the same goods. Morality, thus, according to moral contractarianism, has a *do ut des* structure: one refrains from being a menace to other individuals to the extent other individuals do not represent a menace to oneself; one helps other individuals with the expectation that they will also come to one's succour in similar circumstances.[7] The idea of a 'contract' in this context is a methodological procedure we recur to in order to examine the rationality of our moral practices, regardless of their factual origins. Thus, the practice of morality may be considered rational, if we recognise that we would agree to create this practice, by means of a 'contract' with other self-interested individuals, if this practice did not yet exist. But the realisation that such an agreement has never really occurred is not relevant for moral contractarianism, for what is at issue here is not its capacity to explain how our moral practices came into existence in the first place, but how we can justify their existence, and support its preservation, without appealing to religious beliefs, metaphysical assumptions, or evolution theory. Moral contractarianism, as we can see, does justice to Bentham's first criticism, for it does not mistake our *reasons* to create a system of rules for the rules themselves. Yet, once a system of rules has been created, there arises the question as to how to ensure that self-interested

[6] David Gauthier, *Morals by Agreement*, 1986, 5: *'We are committed to showing why an individual, reasoning from non-moral premisses, would accept the constraints of morality.'*
[7] Peter Stemmer, 'Moralischer Kontraktualismus', in: *Zeitschrift für philosophische Forschung*, vol. 56, 2002, 20.

individuals will constantly abide by the rules which they have themselves created, even if they would occasionally fare better by flouting these rules. At this juncture, we can see how the contractarian account of human rights I advance here differs from other contractarian approaches to morality. I would like to turn to this problem now.

In order to enforce compliance with the rules the individuals imposed upon themselves, it is necessary to create an instrument which has the power to sanction the individuals who flout the rules. According to the contractarian account of human rights, this power to sanction should be ascribed to the state, and only to the state. No other institution such as, for instance, the church, family clans, militias, or private individuals is entitled to play this role. But because the state has alone the power to sanction breaches of the rules which the individuals imposed upon themselves, there is always the danger that the state itself becomes a threat to its citizens, rather than an institutional instrument to guarantee the fulfilment of their most basic interests. From a historical perspective, the ideal of protection of human rights emerged exactly as an attempt to prevent the state from growing into such a threat. In the history of the practice of human rights the limits of state authority were initially conceived of in terms of a duty to respect the natural rights of men. State authority, then, would fail to be considered legitimate, if it were exerted through the violation of the rights individuals would supposedly possess previously to their participation in a political community such as the state. But the contractarian 'rational reconstruction' of human rights, on the other hand, does not presuppose the existence of rights of any sort previously to the establishment of an instrument to sanction breaches of the rules. – Contractarianism has learnt Bentham's lesson. Previously to the existence of the state, along with its power to punish, what exists is the individual's *wish* to have an instrument which ensures that their most basic interests – interest in not being murdered or robbed, for instance – will be fulfilled. Human rights are the institutional concretization of this *wish*. The interests which are aimed at through the creation of human rights are very basic ones, for they can be attributed to every human being. For this reason, Otfried Höffe, for instance, argues that a sort of minimal anthropology underlies the idea of human rights, for these rights are relative to minimal conditions which must obtain whatever conception of the good life a human being may reasonably seek to pursue. Because the fulfilment of these basic interests are a condition for the fulfilment of whatever other interests a human being may have, Höffe calls them, following Kant's idea of 'conditions of possibility', 'transcendental interests.'[8]

[8] Otfried Höffe, 'Transzendentaler Tausch – eine Legitimation für Menschenrechte?', in: ed. Stefan Gosepath / Georg Lohmann, *Philosophie der Menschenrechte*, 1998, 28-47. See also Jens Hinkmann, *Ethik der Menschenrechte: Eine Studie zur philosophischen Begründung von Menschenrechten als universalen Normen*,

As we can see, for the contractarian approach to human rights, as it has been put forth thus far, human rights can only exist in the context of the state. But, it might be objected now, is this account of human rights a satisfactory one? This account seems to throw over board the *universality* claim that the concept of human right has traditionally raised.[9] For in order to have human rights an individual must be lucky enough to be part of a state where the fulfilment of his or her 'transcendental interests' is warranted by constitutional law. Outsiders, on the other hand, can only *wish* to have human rights, either by becoming member of a state where human rights do already exist (and one must be, again, lucky enough to be accepted as a new member), or by changing the political order in his or her own state, an option which, as we all know, is not without risks. In order to advance a more comprehensive account of human rights from a contractarian perspective, so as to make sense of the *universality* claim, it is necessary now to turn our attention to the problem of compliance in the context of moral contractarianism.

Moral contractarianism involves a conception of practical rationality understood in terms of utility maximization. A choice is considered rational to the extent that it is likely to maximize one's own interest. But it is important to notice now that the kind of rational choice at the heart of moral contractarianism is not one which aims at a specific action, considered in isolation from other actions. The rational choice at issue in the context of moral contractarianism is one about a *disposition* – about a way of making choices.[10] The basic idea here is that, for the sake of utility maximization, it would be rational to choose to be moved by a kind of disposition which will prompt one to curb the full maximization of one's own interest for the benefit of other persons. A person disposed to promote his or her own interest, without concern for the interest of other persons, cannot expect to be granted participation in a scheme of cooperation for mutual advantage, for her behaviour represents a threat for the success if this scheme. Yet, she must participate in this scheme, if she wants to fulfil her 'transcendental interests.' Thus, for the sake of utility-maximisation, this person must choose to be moved by a disposition – a 'sense of justice', as Gauthier calls it – which will prompt her to curb the full maximisation of her interests to a point that will not be detrimental to the maximisation of the interests of other persons. For either she relinquishes the full-maximisation of her interests, and pursues their maximisation in such a way as to

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2002, 161-182.

[9] See e.g. Christoph Menke / Arnd Pollmann, *Philosophie der Menschenrechte*, 2007, 54-55.

[10] David Gauthier, *Morals by Agreement*, 1986, 182-183: *'A choice is rational if and only if it maximizes the actor's expected utility. We identify rationality with utility-maximization at the level of dispositions to choose. A disposition is rational if and only if an actor holding it can expect his choices to yield no less utility than the choices he would make were he to hold any alternative disposition.'*

accommodate the constrained maximisation of other persons' interests, or she will not fulfil her interests at all – or at any rate not with a degree of satisfaction she might expect to fulfil through cooperation with other individuals. For it would be irrational for other individuals to interact with a person who lacks a sense of justice, i.e. a person who is willing to reap the fruits of cooperation, without being prompt to cooperate in return. As Gauthier puts it:

'No one wants a person who altogether lacks a sense of justice as a fellow cooperator, for such a person may not reasonably be expected to be adequately disposed to uphold the terms on which interaction is mutually desirable. Even persons who would cooperate in order to victimize others wish for fair dealing among themselves. Since social cooperation is necessary if human beings are to survive, reproduce, and flourish, we may suppose that each person will want her fellows to possess a sense of justice, will prefer to interact with others possessing such a sense rather than others lacking it, and will want herself to possess a sense of justice as it increases their willingness to interact with her and so affords her a fuller realization of her own concerns.'[11]

Moral contractarianism, thus, deals with the problem of compliance in a different way: a person moved by a sense of justice will abide by the rules, not for the fear of being punished by the state, but because she realises that although the performance of an unjust action may occasionally pay off, being an unjust person does not. And, in being a just person, she will not indulge herself in occasional breaches of law. These two different solutions to the problem of compliance are not incompatible. They are, rather, complementary. Indeed, since it is not always clear the extent to which a person is truly moved by a sense of justice, individuals may establish state power, after having created morality, in order to make sure that compliance will be enforced. Thus, the claims of morality can be called 'anterior' to the establishment of state power without being in any relevant sense a 'natural' state of affairs. The social life in the context of a political community created for the protection of human rights – rights the individuals themselves have created – may, in its turn, strengthen the moral dispositions of its citizens.

A person who has developed a sense of justice, in the context of a political community where human rights do already exist, will *recognise* other individuals as bearers of certain legitimate moral claims. To the extent that this person is moved by a sense of justice, he or she will not *treat* other individuals solely as a means for the constraint maximization of his or her own interest; this person will *behave* towards them as bearers of certain basic rights. But who, in fact, are the *other individuals* at issue here? Are they his or her own fellow citizens (or co-nationals), or are they, rather, human beings at large? This is an important point, for it

[11] David Gauthier, *Morals by Agreement*, 1986, 195-96.

enables us now to deal with the problem of the universality claim which the concept of human rights raises.

In having a sense of justice, one may 'recognise' that it is morally wrong to do certain things to other individuals, even if the *other individuals* are not part of our political community. For this reason, one may find oneself 'treating' *other individuals* as real bearer of human rights – the same rights one actually has. Inasmuch as one has a sense of justice, one may come to 'behave' towards *other individuals* as though they were, no less than oneself, entitled to raise certain right-claims against those persons and institutions which neglect their 'transcendental interests', even considering that these claims, formally speaking, are not really rights, but the expression of the *wish* to have the same human rights one has. Among fellow citizens, the existence of human rights does not depend on a simple mutual 'recognition' that they – the fellow citizens – are bearers of rights; the existence of human rights depends, indeed, on something more than a respectful 'treatment' and 'behaviour' towards one another: it depends upon the existence of law, i.e. a common power capable of turning their respective interests into individual rights. Nonetheless, one's 'recognition' that *other individuals* can make certain legitimate claims, along with one's adoption of a kind of 'treatment' or 'behaviour' towards *them* and the institutions which disregard *their* 'transcendental interests' can exert enormous influence on the political order beyond the limits of one's own state.

Through 'recognition' one expresses one's *wish* that individuals other than one's own co-nationals also have human rights. Through the relevant 'treatment' and 'behaviour' one endeavours to fulfil this wish. The treatment and behaviour at issue here include actions as diverse as: campaigning for international human rights organisations; pressing one's government to sign human rights treaties or, as the case may, to respect these treaties; demonstrating against human rights violations; voting for politicians who publically support the ideal of protection of human rights; or fostering debates and publications on human rights, both at an academic and at broader level, etc. These actions represent an enlargement of the practice of human rights – a practice which was initially restricted to the limits of state boundaries. It is only in the context of this more encompassing, transnational practice that we can, now, account for the universality which the concept of human rights raises. Contractarianism affords reasons for one's engagement in these manifold practices. These reasons are derived from a sense of justice – a human disposition the rationality of which, as we have seen, can be explained on contractarian grounds, regardless of its religious, metaphysical or evolutionary roots. But it is important to stress that a sense of justice alone does not generate any human rights.

This rational reconstruction of the universality claim raised by the concept of human rights also enables us to understand, from a historical point of view, how the practice of human rights actually acquired the character of universality it has at the present time. Indeed, the human rights rhetoric, which arouse in the wake of the French Revolution and the publication of the *Declaration of the Rights of Men and the Citizens*, was initially thought of as a policy to be adopted within the strict limits of state boundaries. And even then it was not meant to apply to every human being as such. Instead, rather taking the text of the *Declaration* quite literally, it was meant to apply to every *man*. This left out, of course, women and children. Early supporters of the *Declaration* who argued for equal rights for women and illegitimate children were either simply ignored or brutally executed, as for instance the playwright and political activist Olympe de Gouges, author of the *Declaration of the Rights of Woman and the Female Citizen* (1791).[12] The real establishment of human rights for women, children, black persons, or individuals belonging to ethnic minorities was a very slow – and not always peaceful – process in many states, and it is still in the making in many parts of the world. But this process had as one of its primary goals to create a domestic legal structure within which fellow citizens would be entitled to raise the same basic claims any human being is expected to raise for the protection his or her own life. The question as to the claims raised by other human beings, living outside of the reach of this domestic legal structure, was not considered to be a matter one should really be concerned about, except perhaps for the sake of charity or benevolence toward human beings living in other states. This, of course, represented a 'two measure' attitude relative to the idea of human rights, for at the same time one state would recognise the human rights of its own citizens, it might well behave in a quite different way towards human beings beyond the reach its constitutional law. Although Bentham was not himself an advocate of human rights, he called attention as early as 1793 to the 'two measures' of the human rights policy the French revolutionaries had towards their colonies. In a text entitled *Emancipate your colonies! Address to the National Convention of France,* Bentham writes:

'You choose your own government, why are not other people to choose theirs? Do you seriously mean to govern the world, and do you call that *liberty*? What is become of the rights of men? Are you the only men who have rights? Alas! My fellow citizens, have you two measures?'[13]

[12] Long before the French Revolution, the English feminist writer Mary Astell had already provotically asked: *'If all Men are born free, how is it that all Women are born Slaves?* (*Some Reflections upon Marriage*, 1700).

[13] Jeremy Bentham, 'Emancipate your colonies! Address to the National Convention of France, A° 1793', in: *Rights, Representation, and Reform: Nonsense upon Stilts and other Writings on the French Revolution*, eds. Philip Schofield / Cyprian Blamires, 2002, 292.

It was not until the second half of twentieth century that the international community started to tackle the 'two measures' question more seriously. In the aftermath of the *Universal Declarations of Human Rights* of 1948 an ever-growing network of transnational treatises, international courts, and non-governmental institutions began to emerge to the extent of forming today a diffuse legal structure in condition to address human rights issues in diverse far-flung regions of the world. It is hardly necessary to mention that this diffuse legal structure is anything but perfect. But it is only in the context of this diffuse legal structure that we can speak nowadays of 'universal human rights'. Moral contractarianism, as I have tried to show in this article, give us reason to support the enlargement and maintenance of this diffuse, international legal structure.

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