According to Samuel Moyn, literature on the history of human rights has proliferated in the last three decades; a subject which hitherto had drawn very little attention.[1] My own book, *Three Conceptions of Human Rights* is one of these histories, which was later supplemented by two articles in the *Journal of Constitutionalism and Human Rights*.[2] The most recent of these articles is, among other, critical of Moyn's own attempt of such a history in his book *The Last Utopia*. This article gives an outline of 'my' history of human rights and my critique of Moyn.[3]

Studying the origin of documents such as the French declaration of 1789 and UN declaration of 1948 is no simple matter. The provisions of these documents are elaborated collectively in complex ways and shaped by multiple influences, which can be difficult to disentangle. The provision concerning habeus corpus surely originates in the English Middle Ages and so forth. We have not tried to disentangle all these influences, but instead focused on the conception of rights discernable in these declarations. The conception of rights implicit in these declarations tells us something about the philosophical attitude guiding these texts independently of how they were produced. What we have then endeavoured to do is to trace the origin of these conceptions of rights in order to insert them into their philosophical and societal context.

This analysis allows us to conclude that human rights in the sense used in the 1789 declaration could not originate in the Greek and Roman antiquity. Such a conception of human rights is guided by the desire to give the individual a wider liberty implemented through individual permissions called rights and protected by the duties of others to respect these. Even though concerns for liberty was not absent from ancient Greece, such a concern was not articulated philosophically, and there is no reason to believe it sparked later concerns for liberty. We argue that such a concern was revived and articulated philosophically due to the encounter between Christianity and Greek-Roman philosophy in the first centuries of our era. The fixed rules of the Decalogue served as background obligations for the definition of permissions, which the canon lawyers of the 12th century renamed as rights. Human rights in the sense of the 1948 declaration would originate in a different tradition. While this tradition relies indirectly on Greek-Roman philosophy and in particular Aristotle, the actual elaboration of such a human rights theory is a recent phenomenon, even though antecedents can be found in Edmund Burke. Here rights are conceived as instruments for the good life and human perfection. In the 1948 declaration

this idea is expressed as the development of human personality. We have rights in this sense because otherwise we cannot perfect ourselves, which is our duty. Rights and duties are thus two sides of the same coin. Since rights serve perfection, we call this a perfectionist conception of rights.

The main thrust of the above-mentioned book has in this way traced two traditions of philosophical thought proposing each their understanding of human rights. The significance of these two traditions goes beyond the question of rights and touches on the role of morality in human life. Do humans have limited social obligations towards each other in order to ensure peaceful co-existence, while it is left to their own judgement how they should live their lives, or is moral perfection an essential aim of social life thus enabling man to realize its humanity? In the first case, rights protect the desire of individuals to live their own life, and in the second case, rights protect peoples endeavour to live a moral life. We call this last kind of theories moralizing, while the first ones are permissive. In our book we have recounted how rights came to serve these very different functions, and we will here shortly summarize our findings.

Short Outline

Moral philosophy in Greek and Roman antiquity is with few exceptions perfectionist. Most theories profess a species of eudaimonism. The key question was happiness, but they generally assumed that individual happiness was inextricably related to man's moral perfection. Being moral and acting morally was also the objective interest of every man.[4] The general assumption was that moral action had to be determined in the particular circumstances, hence the name circumstantialism for these kinds of theories, though it was possible to devise rules of thumb which should be embodied in man as virtues giving him the right disposition towards action. Different from these are theories issuing in universal and inflexible act prescriptions. All ethical theories have some aim or guiding concern, but these aims or concerns can issue in particular prescriptions for acting (act prescriptions) depending on the circumstances as the antique theories generally did or ask people to follow inflexible rules (universal act prescriptions), which was unknown in Greek and Roman moral philosophy.

Plato diverges somewhat from the general scheme common to Antiquity, making reason the

key notion. He is still rather sceptical about universal and simple rules.[5] How happiness was related to virtue and reason could then be explained in different ways and from there stems the various philosophical schools which thrived at different times in the Greek and Roman world. The antique world-view assumed that the world was reasonable and intelligible for man. This view was seriously challenged after the emergence of Christianity and this brought about an important rupture which changed the basis for philosophical reflection radically.[6]

The Judeo-Christian God was a commanding god demanding obedience from the believers. The idea that certain universal act-prescriptions had to be followed was foreign to Greek-Roman philosophy, which was thoroughly circumstantialist. Still, Christian apologists had to defend their religion within the terminology of Greek-Roman philosophy. For this purpose Platonism was a particularly convenient intellectual structure. Identifying God with the One allowed Christianity entry into the Greek-Roman culture, but the commands of God could not be ignored. The distinction between law and counsel made it possible to combine both considerations. In this way we got a distinction between two different kinds of obligation. Different authors could emphasize this or that obligation, but any Christian author somehow had to find a place for the law. The authority of Scripture had to be accommodated to Greek-Roman philosophical reasoning, since Scripture itself was presented as supported by reason.

Different solutions could make the synthesis between Greek-Roman philosophy and the Judeo-Christian religion work. For Western Christendom Augustine is the central figure. Inspired by his reading of Paul, Augustine developed a notion of permission, which could highlight the notion of Christian liberty. He wrote against those who make out of anything disadvantageous a sin. We can do many things without sin, which are not necessarily the best thing to do. Here we can glimpse our cluster of concepts: a law forbidding and commanding certain things leaving other things to everyone’s own judgement. These things are permitted even though certain things are necessary to achieve perfection, but everyone is not strictly obliged to seek perfection.[7] When Augustine wrote this during 419–420 the Roman Empire had only recently become officially Christian. Many other communities still co-existed with the Christian communities. The context is, therefore, one of intra-communitarian dispute about doctrine, since Augustine is here responding to a certain Pollentius having trouble with Augustine’s limitation of divorce to the sole case of adultery.

When the canon lawyers of the 12th century made Augustine's permission into an *ius* the context was, of course, very different. The Christian Church was now an independent government institution with its own laws and courts and judges to maintain it. *Ius* was a much-used term in Roman law, but rarely used in a subjective sense as belonging to an individual (one example is D. 35.2.1. pr.). Exactly how canon lawyers came to equate *ius* with permission, we do not know, but this use is well established.[8] That Augustine influenced them is well attested, since many of them refer explicitly to Paul and Augustine.[9] These lawyers equated the moral prescriptions of the Bible with natural law. Natural law was conceived as a collection of more or less general prescriptions. They add the idea of permissive natural law conceived as consisting of everything you can equitably do. There is some discussion about whether this is natural right proper, but the idea of a space of liberty, where the agent is not subjected to compelling prescriptions is well and truly there. Later authors will deduce from this that property and government belong to the permitted area, since the prescriptions of natural law say nothing about them, and the idea that they need the consent of everybody lies at hand. We do not know exactly when this deduction was made for the first time, but it is clearly present in the works of William of Ockham.

In between, however, we have seen a surge in Aristotelian thought on moral philosophy due to new translations. The influence of Aristotle is pervasive, but his ideas on moral and political philosophy is not followed by John Duns Scotus and William of Ockham (among others) opting instead for a position closer to that of Augustine. This is not the case with Thomas Aquinas who becomes the principal champion of Aristotelian moral and political philosophy. The challenge he faces is then to reconcile the general rules of the Decalogue with Aristotelian circumstantialism. Thomas's solution is quite ingenious, but we argue that in the end he cannot give to the Decalogue its full significance. Thomas maintains certain inflexible act-prescriptions as a limit on the pursuit of the common good. His theory retains, however, the basic tenets of Aristotelian circumstantialism. Since agreement with some inflexible act-prescription is not a sufficient criterion for the goodness of the action, which has to be made for a good purpose as well,[10] the pursuit of the common good will therefore dominate. The distinction between strict and loose duties becomes senseless in Thomas's theory. When all actions should further the common good, and for this reason there can be no genuine indifferent acts (an act which are neither morally commanded nor forbidden), this again implies that there can be no domain sheltered absolutely from public

intervention, and this fits well with a conception of rights, which vary with the interest of the common good.

This Christianized Aristotelianism was to have an immense influence, but other more orthodox Augustinians like Ockham were worried about this influence. They felt that divine omnipotence was imperilled by this Aristotelian influence. If it was not possible to discard Aristotle completely, Ockham, taking the lead from Duns Scotus, gave Aristotelianism a stronger Augustinian imprint by emphasizing the divine will and the contingency of the created world. Although Ockham radicalized Scotus in many respects, he remained, on the whole, within the same overall perspective. Ockham probably developed his ideas on rights, property and government from canon law sources. In short, the distinction between strict and loose duty makes it possible to envisage individual liberty in terms of permissions within a eudaimonistic structure with beatitude as the highest end. Permissions are then conceived as rights within the limits of the act-prescriptions of natural and divine law. Other matters are left to the individuals' own decisions, which include property and government. However, government when once settled cannot be revoked except in extreme cases.[11] The point of this theory was not to empower individual members of the society politically, but rather to bolster the claims of the temporal power against the papal claims of omnipotence. This theory gave the temporal power an independent source of legitimacy, and this was again part of Ockham's own quarrel with the pope about evangelical poverty. Ockham's position and arguments were taken up again by the Conciliarists, but to a different purpose. Their target was not so much the pope as the papacy. They challenged papal primacy within church government and claimed that final decisions belonged to a general council. The focus had changed, but the basic theoretical construct remained the same.

At the Reformation the cluster of concepts, consisting of individual rights as permissions, the supererogatory, property and government based on consensus and the common good as common interest, goes through a major change due to the redefinition of the term 'sin'.[12] Since the task of government was generally seen as peaceful coexistence and repression of mortal sin, and sin became a much more comprehensive term, the task of government was accordingly greatly enhanced. There was now much larger room for state intervention, and Reformation governments could decide about morality and manners. In this way, what would count as the task of government has also changed. After having initially endorsed this view, John Locke eventually went back on this move making matters outside natural law to

no business of government,[13] but now the context had changed, since different (if not all) religious communities were now living together. The duties of religion were now considered a private matter. Morality and manners, which were supervised by the Catholic Church before the Reformation, were now left to religious communities, between which people could choose. The area outside government action thus acquires a different content by this difference of context, since people now have greater liberty to choose their religious affiliation.

We argue that this Lockean view greatly influenced the drafters of the 18th century declarations of rights. In the American context Locke was important, but it is disputed how important he was. Recent scholarship tends, however, to reinstate the importance of Locke.[14] What makes Locke so important for us is the way he distanced himself from earlier Protestant political philosophy. Outside the concentric rings of natural and divine law, the Protestant prince could legislate according to his best judgement. Locke, on the contrary, limited the role of the prince to particular functions, and thus re-created a space of liberty for the individual. This solution was implemented in the American declarations (Virginia declaration and the Declaration of Independence) with Locke as the most probable inspiration. Even if this thesis is disputable, it is quite clear that these declarations are focused on freedom deploying a permissive conception of rights, and this is the most important point for our thesis. We can draw the same conclusion regarding the French declaration of the rights of man and the citizen, and as such link the 18th century declaration to the Augustinian-Ockhamistic tradition. However, while the rights language of permission and the consent theory of government formerly served to bolster the secular power against the spiritual power, the same language now serve to bolster the individual against the secular power. While the Americans used it against their colonial master, the French used it against their sovereign master, the King. Again, we have argued that Locke was particularly influential in implementing this solution.

This solution was not met with universal approbation. Both during the drafting process and after the adoption, the French declaration was severely criticized. Most of the critique is derived from a moralizing theory proposing an end, which makes inflexible act-prescriptions impossible or unfeasible. On this kind of theory it is not possible to have a fixed and stable space of liberty. Their critique concerns partly the impossibility of conferring eternal and indefeasible rights on individuals, partly the undesirability of abandoning people to their

own egoism. The best-known critics are Edmund Burke,[15] Jeremy Bentham[16] and Karl Marx.[17] The theories of Burke and Marx have been described as perfectionists, since they harbour a positive ideal about human perfection, while this is not true about Bentham's utilitarianism. Bentham and Marx reject the rights of man altogether, while Burke is not unwilling to use this term, though in a perfectionist sense.

Strong forces were working against human rights as they were understood in the 18th century. The Catholic Church remains critical, and the Church will eventually adopt their own concept of human rights inspired by Thomism and corresponding to the special sense Burke gave to human rights. Different forms of Marxism and Socialism remained hostile to human rights, considered as a species of bourgeois ideology. Some trends within socialism, for example Jean Jaures in France, adapted the human rights discourse to Socialist goals. However, human rights in the 18th century sense is still important in non-utilitarian liberal thought. Different forms of utilitarianism or more broadly non-perfectionist circumstantialism reject human rights or give them some subordinated role in their system as rules of thumb or guidelines. More historically minded or social science inspired approaches would also be sceptical about human rights. The 'rebirth' of human rights in the 20th century was not a 'rebirth' of human rights in the 18th century sense, but more like the culmination of the perfectionist version of human rights whether it was of Thomistic or Socialist inspiration. These two versions seemed to converge towards one another, and after the Second World War a short-lived perfectionist consensus produced the Universal Declaration of Human Rights of 1948 (UDHR).

The Universal Declaration of Human Rights outlines the moral foundation for the contemporary international human rights regime. We argue that some of the rights in the UDHR, i.e. the economic, social and cultural (ESC-) rights, make no sense if they are understood as permissive rights, but these rights can very well be understood as perfectionist rights. Since a perfectionist end implies a perfectionist conception of rights and such an end is present in the declaration, we conclude that these rights should be understood as perfectionist rights. Other rights in the UDHR could, however, be understood as permissive rights. Since all the rights in the declaration are not permissive rights, it is difficult to understand the end of the UDHR as the delimitation of a space of liberty, but a perfectionist end would not be incompatible with a mixture of permissive and perfectionist rights, since some kinds of liberty could seem necessary to fulfil the end. In that case the

perfectionist end of the UDHR would command all the rights, and the permissive rights should be used responsibly to attain this aim.

The examination of the drafters' views as expressed in the summery records consolidates this interpretation of the text, even though it has to be explained as an overlapping consensus between two types of perfectionism. Full blown perfectionism would consist in a very dense conception of perfection, that is, a conception which gives very detailed and comprehensive prescriptions about how to live one's life. This kind of perfectionism would have a strong moral dimension implying that social virtues are an integrated part of perfection. Social liberal perfectionism would focus on real freedom dissatisfied as they are with the formal freedom of the liberalists. Man should be made capable of effective use of his freedom, and this implies that he should possess certain qualities such as education, free time, means, health, etc. This kind of perfectionism would tend to be less dense, and do not suppose any moral dimension. The attachment of the individual to society would be due to some kind of social contract. The first conception was attributable to the Chinese representative, P. C. Chang, and some Latin American representatives, while the other conception was attributable to representatives from North America and Europe. It was, however, not possible to situate all the drafters precisely in relation to these conceptions, but there were good reasons to think that the large majority of representatives were somewhere between the two positions.

The UDHR was soon to be criticized from a liberal point of view. The economic, social and cultural rights had no place in liberal theory. These rights were not considered as real human rights. Only civil and political rights could claim to be real human rights. In order to avoid controversy and rally as large a following around human rights as possible, the human rights militancy of the 70s focused on subjects as torture, forced disappearances, arbitrary arrests on which there was wide agreement.[18] We argue against Samuel Moyn that this movement did not deploy a whole new conception of human rights. The difference between UDHR and the 18th-century declarations of rights does not lie in the existence of a special tie to the state, as Moyn claims, but in their basic philosophical assumptions.[19] We argue that the UDHR has a much larger potential for internationalization than older declarations focused on freedom. This means that this potential was present in 1948, but it leaves the question open why it did not unfold until the 70s. Our explanation goes in two steps; firstly, as Moyn also notes, the major reason for this delay was the Cold War.[20] Internationalism

seemed less realistic faced with a seemingly insurmountable ideological gap. We argue that other philosophical assumptions more akin to those of the 18th century in the guise of Reinhold Neibuhr and the Realist School in international relations came into the forefront forcing internationalism into the defensive. Institutionalism within international relations theory should be taken as an expression of a new effort to open the way to internationalism on the eve of the Cold War period. Secondly, human rights activism was minimalist and focused on a few fundamental and widely consensual rights, and it did not embrace the full program of the UDHR. Moyn explains this situation and its success by the failure of alternative utopias, and there is much to say for this explanation,[21] but why the human rights ONG's eventually adopted the whole perfectionist program of the UDHR is not principally due to a pressure for giving answers to all questions necessary for a new 'utopia'.[22] We suggest that working within the UN framework, intellectual coherence would anyway oblige them to do so.[23]

Our two traditions are thus still at work towards the end of the 20th century. Niebuhr and the Realists assume a conception of morality very much akin to that behind the 18th century declarations, even though they have a more ambiguous relation to the declarations themselves. For them, the determination of the actual rights is not so evident, and especially Niebuhr considers this determination as a matter of dispute, where morality and self-interest are difficult to disentangle.[24] The other strand has triumphed through the perfectionism of the UDHR, whether it is of Thomistic, Socialist, Confucian or other inspiration, and the momentum seems presently to be in its favour. The West has traditionally been very much focused on fixed rules when promoting human rights internationally, which seems wholly incongruous with the UDHR, while the so-called Global South has insisted on the indivisibility and interrelation of human rights, assuming that some kind of practical reason has to decide how they support or depend on each other or how supposed conflicts between them should be solved. This was rammed home at the Vienna conference in 1993, and this battle has largely been lost by those in the West who still cherishes the idea of fixed rules. Though fixed rules leave little flexibility for maximization or optimization of an accumulative end, and continuous adaptation to changing circumstances would be more efficient in this case, the social distribution of capabilities can, however, induce some people to adapt more than others, and rigid rules can protect persons by fixing lines of protection that cannot be overruled. This idea has often been criticized as a particular Western idea stemming from an individualist society

and sometimes imputed to Christianity. It would seem that this study support this idea.

The Question of Origins

The permissive conception of rights has been traced back to developments in early Christianity. The Decalogue of the Mosaic religion as they were assimilated by Christianity made it possible to establish the conceptual apparatus consisting in interdictions, commands, permissions and counsel. One could then say that Christianity played a crucial role for the development of human rights. But the Qur'an allows of the same kind of interpretation.[25] Just like Augustine speaks about prescription, interdiction, permission and advice, Muslim scholars speak about the obligatory act (*wajib, fard*), the prohibited act (*haram, mahdhur*), the permitted act (*mubah, halal, ja'iz*) and the recommended act (*mustahab, mandub, sunnah*).[26] Islamic law also embraces the principle of legality, such that actions which are not prohibited are permitted.[27] Other observers even emphasize the existence of a notion of right in early Islamic jurisprudence.[28] So why did human rights not develop in the Muslim world? If human rights are associated, as they are here, with the particular move that bolsters the individual against the state, and not with the move bolstering secular powers against the spiritual power, then we will have to note that these rights did not develop in the Christian world for 1700 years. It is thus not probable that they were indissolubly linked to Christianity, if nobody actually thought about this for 1700 years. What actually made Locke reinvent the space of liberty and Enlightenment thinkers turn this liberty against the reigning power as a special prerogative of the individual, has probably something to do with developments in contemporary society.

Our cluster of concepts is not essentially Christian, but developed in Christianity because of contingent factors such as the combination of Roman law and church government; the dispute between secular and spiritual powers and individualistic conceptions of man. Nor do they seem to be related to any metaphysical or epistemological principle. Ockham subscribed to voluntarism while Locke adhered to intellectualism. They adopted a species of nominalism, but Duns Scotus preferred realism. A Platonic view of epistemology against an Aristotelian conception makes no difference. A teleological or mechanical conception of nature is all the same, when it comes to our cluster of concepts. What then allowed this cluster to persist in spite of changing philosophical inclinations? Important spiritual or material interests must have brought this about. With respect to the Middle Ages we will

point to a strong religious interest in maintaining Christian liberty which relieves men from ceremonial prescriptions and leaves them to strive after perfection of their own free will. There was an important material interest in keeping the social order clear from church and religion. These interests in freedom and the independence of secular society were an important background for the development of human rights, but they were essentially related to neither Christian theology nor philosophy. They were related to the existence of fixed rules and the dispute between secular and spiritual power. The first you could find in Islam and other religions, while the second seems more particular to Western Europe.

The Long Perspective

We have travelled a lump of human history stretching from Plato to the aftermath of the Second World War. Our account of this period must inevitably be a very concentrated one. Why work on such a long stretch of time? The concepts and terms we are using to speak about ethical and political questions often have a long history. We do not assume this history to be a smooth and simple one. Terms get new meanings or maybe plural meanings. Concepts are carried by new terms or become part of them, or they enter into new associations with other concepts, which change their significance or functions. We do not assume that terms and concepts have followed each other from the 'beginning' to the 'end'. This is a complicated story, which is wholly contingent and riddled with ruptures and displacements. We do not assume that certain concepts and terms had to appear or develop in a particular way. We only endeavour to map their presence at specific moments. We establish the framework, which will allow us to study the use of terms and concepts more specifically in their concrete environment. We consider it important to have the big picture, for example when we have to compare thinkers from different periods. It is important to know that the term 'sin' has changed its meaning with Luther and the consequences this has for the proper functions of the state, when we compare Luther with the Conciliarists. This gives a particular edge to subsequent Protestant political philosophy, which otherwise might have gone unnoticed, since they use the same conceptual apparatus as the Conciliarists. These kinds of 'movements' are easier to see in the big picture. The big picture also makes it easier to see whether terms and concepts forged in one period are still pertinent in a later period. We are sometimes so used to a particular conceptual scheme that we are not aware that changes in some other context leave them without a *raison d'être*. This has to some extent happened with the rule-based moral theory, which persisted

without its foundation in divine command, and the *raison d'être* somehow had to be reinvented. These kinds of disruptions are easier to spot in the big picture.

What we do is to map their presence in texts. What meets us in the first place is the terms (words and phrases) and we will have to determine their precise meaning in these texts and the concepts they might carry with them. Since we are mainly dealing with abstract and technical terms in mainly scholarly texts, we have to determine their meaning in their theoretical context. The term 'common good' would, for example, mean something different in the Augustinian-Ockhamistic tradition than in the Aristotelian-Thomistic tradition. In the first tradition the common good is the haphazard common interest of contingent societies, while the second tradition conceives the common good of a particular society as an integral part of the common good of an objective and universal society. Establishing the big picture will not exempt us from a contextual determination of the meaning of the particular term. However, in order to extract the abstract sense of the terms, we neither have to establish their perlocutionary nor their illocutionary sense, and neither their ideological role nor their social function or justification. Nonetheless, this extraction of meaning from the theoretical context does involve an elaborate reconstruction of the theory in question as far as this is possible.

Conclusion

So far we have only considered two of the three conceptions. The first two conceptions studied are what John Rawls would call comprehensive conceptions.[29] The force of the third conception should then consist in being a non-comprehensive conception: i.e. a minimal standard of decency accepted by different comprehensive conceptions. This conception is defined by the fact that it allows more than one coercive normative order, and for this reason we call this conception pluralist in regard to politics. This means that human rights are not thought to exhaust the possibility for coercive measures in the state. Other normative claims can legitimately be enforced beside those of human rights. This has some implications for how we consider the function of government and consequently for democracy as a form of government. From the point of view of perfectionism it is the object of government to deploy the practical reason which will determine the decisions or enact the rules necessary for making people more perfect. From the point of view of classical liberalism it is the object of government to enact the rules necessary to protect freedom. In

both cases positive rights coincide with human rights. In the third conception this is not necessarily the case. Government should, of course, enforce human rights, but these are not exhaustive, so it is somehow left to the government to fill out the rest. In some sense we are back to Protestant political philosophy here, where the prince could fill the space left over by divine and natural law. Apparently, it seems less controversial to revive this theory today, when the prince has been replaced with democracy.

What would then be the function of human rights today according to this theory? The third conception is an umbrella conception, so it can be fleshed out in various ways according to how human rights are justified, which functions are assigned to them and how the individual rights are defined. We would suggest that their function is to establish the conditions for the exercise of autonomy and individual protection against the vagaries of collective decisions. Conceived in this way, human rights allow democratic institutions a vast field within which they act freely. They are not just left with some details to settle concerning the implementation of a political project set out in advance. It is for democracy to make a choice between different political projects, and in this way human rights stand above ordinary political divides. This also means that human rights become an external standard with respect to the constitution and ordinary legislation. Human rights become the standard according to which these should be judged.

If human rights should express an actual universality, we must bring them down to a value that is likely to rally a broad consensus. We proposed autonomy, since it relates to the formation of opinion. It ensures that everyone can make up their own opinion and decide knowingly without pressures or restrictions in terms of information. This value is essentially that of the Enlightenment. This does not mean we did not know before. Socrates is a shining example to the contrary and Dumont believes that he finds it in the ancient Indian religion of the Vedas,[30] however, the philosophers of the Enlightenment strongly advocate this idea from the 17th century onwards.

If this value seems likely to rally around it a broad consensus, it is because it is a prerequisite for any discussion, and discussion is a prerequisite for any thoughtful consensus. So to all those who agree to submit to the vagaries of discussion and participate in the game of persuasion, autonomy should be an acceptable basis. This is fortunately a very large portion of the overall world population, and those are the members of the world

public opinion that we must persuade. These people consider themselves as independent and for that reason they gather information and consider the arguments for and against. They constitute the future of human rights. What really matters is that people consider themselves as independent and that they see human rights as their guarantee for being able to continue to be so. The effort to promote human rights must therefore concentrate on public opinion; protect, expand and enlighten it.

Such a conception could serve as a base for the re-interpretation of the existing UN regime. The existing regime suffers from incoherence due to the fact that the covenants were supposed to implement the UDHR, which we have argued is perfectionist, but they are doing this with a traditional legal vocabulary which is dependent on a permissive conception of rights. This has created many troubles with how to cope with ESC-rights within such a conception. These rights simply do not work as permissive rights and they cannot therefore be considered as non-derogable or non-justiciable. In a perfectionist perspective all rights are derogable according to what would fit the common good and all rights are justiciable as long as this would promote the common good. In this perspective there are no fixed rules and every virtue is enforceable if this proves expedient. In order to conserve fixed rules and thus give personal autonomy a convenient protection one should take the existing civil and political rights (ICCPR) and combine them with the core ESC-rights as outlined by the UN,[31] which seems susceptible of immediate enforcement. These rights could be conceived as human rights according to the third conception.

Bibliography

Aldeeb Abu-Sahlieh, Sami A. (2006). *Introduction à la société musulmane, Fondements, sources et principes*, Paris : Eyrolles.

Augustine (1982). 'De Conjugiis Adulterinis', in *S. Aurelii Augustini Opera Omnia*, *Patrologia Latina 40*. Reimpression of 1857 edition. Turnhout: Brepols.

Baderin, Mashood A. (2003). *International Human Rights and Islamic Law*, Oxford: Oxford University Press.

Bentham, Jeremy (2002). *The Collected Works of Jeremy Bentham, Rights, Representation,*

and Reform: Nonsense upon Stilts and other Writings on the French Revolution. Oxford: Oxford University Press.

Brunschwig, Jacques (1996). »Stoïcisme ancien », in *Dictionnaire d'éthique et de philosophie morale*, Vol. 2 : 1856-1864.

Burke, Edmund (1968). *Reflections on the Revolution in France*. London: Penguin Books.

Dihle, Albrecht (1982). *The Theory of Will in Classical Antiquity*, Sather Classical Lectures 48, Berkeley 1982.

Dumont, Louis (1985). *Essais sur l'individualisme* Paris : Éditions du Seuil.

Huyler, Jerome (1995). *Locke in America. The Moral Philosophy of the Founding Era*. Lawrence: University Press of Kansas.

Jacobsen, Mogens Chrom (2011). Three Conceptions of Human Rights. Malmö: NSU-Press.

Jacobsen, Mogens Chrom (2014). 'Ideology and the Universal Declaration of Human Rights', in *Journal of Constitutionalism and Human Rights*, Avril 2014: 8–30.

Jacobsen, Mogens Chrom (2016). 'The Internationalization of the Universal Declaration of Human Rights.", in *Journal of Constitutionalism and Human Rights*, January 2016:

Locke, John (2008). *Two Treatises of Government. Cambridge Texts in the History of political Thought*. Cambridge: Cambridge University Press.

Luther, Martin (1889). "De votis monasticis Martini Lutheri iudicium" (1521), in *D. Martin Luthers Werke, kritische Gesammtausgabe*, Vol. 8. Weimar : Hermann Böhlau.

Marx, Karl and Engels, Friedrich (1976). 'Zur Judenfrage', in *Werke*, Vol. 1. Berlin/DDR: Karl Dietz Verlag. URL: http://www.mlwerke.de/me/

Moosa, Ebrahim (2004). 'The Dilemma of Islamic Rights Schemes', *Worlds & Knowledges*

Otherwise Fall Number, first published in *Journal of Law and Religion*: http://www.jhfc.duke.edu/wko/dossiers/1.1/MoosaE.pdf

Moyn, Samuel (2010). *The Last Utopia*. Cambridge, Mass.: Harvard University Press.

Moyn, Samuel (2011). 'The First Historian of Human Rights', in *The American Historical Review*, Vol. 116, No. 1: 58–79.

Niehbuhr, Reinhold (1948). *The Nature and Destiny of Man, Volume II; Human destiny*. London: Nisbet & Co. Ltd.

Munir, Lily Zakiyah (2006).'Islam and Human Rights': http://www.lfip.org/laws718/docs/lily-pdf/Islam_and_Human_Rights.pdf

Plato (1982). *Republic I*. Vol. 5. Loeb Classical Library 237. Cambridge Mass.: Harvard University Press.

Rawls, John (1996). *Political Liberalism*, New York: Columbia University Press.

Thomas Aquinas (1882). *Corpus Thomisticum*, Textum Leoninum Romae 1882 editum ac automato translatum a Roberto Busa SJ in taenias magneticas denuo recognovit Enrique Alarcón atque instruxit. URL : http://www.corpusthomisticum.org/

Thomas Aquinas (1947). *The Summa Theologica*. London & New York: Benziger Bros. URL.: http://dhspriory.org/thomas/summa/index.html

Weigand, Rudolf (1967). *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus*, München: Max Hueber Verlag.

William of Ockham (1992). *A Short Discourse on Tyrannical Government*, Cambridge: Cambridge University Press.

Zuckert, Michael P. (1994). *Natural Rights and the New Republicanism*. Princeton: Princeton University Press.

Notes

[1] Moyn, 2011: 58.

[2] Jacobsen, 2011, 2014, 2016.

[3] Part of the text is taken – but somewhat modified – from a second edition of my book, *Three Conceptions of Human Rights*, which is in course of publication. For precise and extensive references, please refer to Jacobsen, 2011, 2014, 2016.

[4] Brunschwig, 1996: 1858, 1861.

[5] Plato, 1982: 425 c-e, p. 363.

[6] Dihle, 1982: 1.

[7] Augustine, 1982: PL 40, 459–462, I.14-17.15-19.

[8] Weigand, 1967: *passim*.

[9] DG II C. XXVIII, c. 8.

[10] Thomas Aquinas, ST. Ia IIae 18 a. 4 co.

[11] William of Ockham, 1992.

[12] Luther, 1889: 580–581.

[13] Locke, 2008.

[14] Huyler, 1995: 1–28; Zuckert, 1994: 18–25, 150–166, 305–319.

[15] Burke, 1968.

[16] Bentham, 2002.

[17] Marx and Engels, 1976.

[18] Moyn, 2010 : 130 ff.

[19] Moyn 2010: 12.

[20] Moyn, 2010: 131.

[21] Moyn, 2010: 8.

[22] Moyn, 2010 : 218 ff.

[23] Cf. http://humanrightshistory.umich.edu/files/2012/08/Petrasek.pdf (consulted 15-04-2015).

[24] Niebuhr, 1948: 264–265.

[25] Munir, 2006: 4.

[26] Aldeeb Abu-Sahlieh, 2006: 249–254.

[27] Baderin, 2003: 14–15.

[28] Moosa, 2004: 5 ff. In fact Moosa argues that the concept of right elaborated in the first period of Islam makes certain inherited notions of ethics incompatible with modern notions of human rights. Those who consider the Islamic understanding of rights compatible with modern notions have difficulties in explaining how they abandon the presumptions of traditional Islamic jurisprudence. He believes there is no way out, so that one has to accept a quantum shift.

[29] Rawls, 1996: 140, 154–155, 175.

[30] Dumont, 1985: 37–38.

[31] Cf. Core Human Rights in the Two Covenants: http://nhri.ohchr.org/EN/IHRS/TreatyBodies/Page%20Documents/Core%20Human%20Rights.pdf