CHAPTER 5

THE HOLDERS OF HUMAN RIGHTS

The Bright Side of Human Rights?

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1 Introduction

In her essay "The Dark Side of Human Rights," Onora O'Neill (2005) criticizes the duty-side or supply-side of human rights and some of its inherent limitations. By contrast, therefore, one may expect the right-side or benefit-side of human rights to amount to their bright side.

As a matter of fact, human rights are usually referred to by human rights theorists as the most obvious of rights: the rights that human beings have merely by virtue of being humans.[1] This is how they are said to differ fundamentally from other moral and legal rights that are status-dependent.[2] This apparently obvious statement seems in turn to warrant an unbounded and general account of the personal scope of human rights.[3] The generality of human rights is actually also echoed in contemporary international human rights law and practice. To quote Article 1 of the Universal Declaration of Human Rights (UDHR), for instance, human rights are the rights of "all human beings," who are described as being "born free and equal" in those rights.[4] This makes the question of the identity of human rights-holders redundant on the identity of human beings themselves.

So if human rights are simply the rights of human beings, why should human rights theorists be concerned about the holders of human rights? The first thing to say is that philosophers are and should be wary about deriving an "ought" from an "is" and about the idea that our *being* human implies our *having* human *rights*. Interestingly, human rights are one of the few entities in morality, and in international law, that are referred to in terms that relate directly to our identity as a species or a natural kind. This may cause confusions akin to the naturalistic fallacy, but also lead to other types of moral entanglements with biology.

More importantly, secondly, parts of the international human rights law and practice do not seem to sit easily with the generality of human rights. It is both more generous to some when it grants special protection to them through special rights, on the one hand, and more limitative to others when it excludes them from the scope of general human rights, on the other. I will refer to those boundaries in the general scope of human rights-holders as, respectively, their internal and external boundaries.

First of all, the so-called "international bill of rights"[5] includes general human rights, of course, i.e. rights that belong to all, such as those included in the two International Covenants on Economic, Social, and Cultural Rights (CESCR) and on Civil and Political Rights (CCPR), the Genocide Convention, the Convention against Torture, or the Convention on the Protection of All Persons from Enforced Disappearance. However, in some cases, they also grant special protection that not only reinforces the protection of general rights of individuals belonging to vulnerable groups (e.g. children for the Convention on the Rights of the Child (CRC), people with disability for the Convention on the Rights of Persons with Disabilities (CRPD)) or individuals under special threats due to their activity (e.g. migrants for the Convention on the Protection of the Rights of All Migrant Workers (CRMW)), but also grant them special rights (e.g. non-discrimination rights on racial or sexual grounds for the Conventions on the Elimination of Racial Discrimination (CERD) and on the Elimination of All Forms of Discrimination against Women (CEDAW) or non-discrimination rights of children on all usual grounds in the CRC[6]).[7]

Besides special protection and its prima facie non-egalitarian flavor within the scope of human rights-holders, secondly, there are also at least three exclusions from the scope of rights-holders in the international human rights practice that call for theoretical attention. First of all, what should one make of the exclusion or, at least, the limitation of the human rights of infants and of those who are elderly or have dementia, but also of those whose mental capacities are impaired? The fact that some human rights require a certain level of rational competence to be recognized and protected seems to belie the claim to guarantee the same rights to all human beings qua human beings. Secondly, how about the rights of vulnerable groups whose members' individual human rights do not suffice for protecting? Human rights' individual focus seems to artificially exclude the human rights of groups and hence the many benefits of collective belonging in human life. Finally, how should we justify the exclusion of non-human animals whose competences are equal and sometimes superior to those of some human beings? Human rights seem to be inegalitarian in their rejection of the (equal) moral status of the members of other species.

Human rights theorists have reacted differently to this ambivalence regarding the scope of rights-holders in the law and practice of human rights. So-called "ethical" theories of human rights that approach human rights as moral rights independent from their political and legal practice need not be too concerned by contradictions in the practice. Whenever the practice does not fit their moral blueprint, they may simply suggest it should be reformed. Still, authors in this group differ with respect to the scope of human rights-holders –albeit for reasons distinct from the variations in international human rights law[8]: some approach human rights as "birthrights" at the risk of proposing a list of human rights that is too broad,[9] while others stipulate a threshold of normative agency

and cap the range of human rights on that basis.[10] By contrast, so-called "political" theories of human rights that refer to human rights as political only cannot but be overconstrained by the practice.[11] Curiously, however, they do not really seem to be concerned by the latter's contradictions with respect to the scope of human rights-holders.[12]

In a legal theory of human rights like the one propounded here, i.e. one that starts from the practice of human rights, takes human rights as both, and at once, legal and moral rights as its object and aims at interpreting them in their best light, fidelity to the practice is key.[13] Nevertheless, disowning it, even partly if it is contradictory, and interpreting it in its best but also most coherent light are also an option just as justifications and critiques of the practice are inherent to human rights law qua normative practice. Of course, critical interpretations require a serious justification in each case. And this is what I will endeavor to provide in this chapter.

The aim of this chapter is to discuss the main boundary disputes pertaining to the holders of human rights. After a few remarks about what being a moral right-holder implies (Section 2), I will explain why being a human rights-holder means holding them equally (Section 3). The next section will be devoted to justifying the external boundaries of human rights against the corresponding critiques, starting from the most external boundary in three concentric circles (Section 4): the "species" boundaries, and the speciesism critique (Section 4.1); the "capacity" boundaries, and the rationalism critique (Section 4.2); and the "individuality" boundaries, and the individualism critique (Section 4.3). Finally, I will turn to the internal boundaries in the scope of human rights-holders, and in particular to the boundary between general and special human rights-holders. I will argue that the proposed egalitarian reading of human rights fits and justifies the core of the practice and accounts for the existence of some special human rights, but not all of them (Section 5).

A caveat is in order before starting. This chapter's discussion of the scope of human rights-holders is conditioned by other arguments made elsewhere,[14] and in particular arguments about the object of human rights, their justification, and their duty-bearers. Because human rights-holders are identified at the same time as their rights, they are tied to the latter's object of protection and to their specific and general justifications, but also, in the proposed relational account of human rights, to their duty-bearers. It should not come as a surprise, therefore, that in an account of human rights that approaches them as protective of interests and justified by reference to the equal political status they are constitutive of, it is the egalitarian dimension of human rights that also drives much of the argument for the identification of their holders.

2 Holding Rights

Human rights are "rights," i.e. normative relationships between a right-holder and a duty-bearer.[15] As such, human rights duties are directed: they are owed to someone, i.e. the right-holder.[16] Because most human rights are or may be reconstructed as claim-rights,[17] the right-holder also has a claim to that duty.

Two main features of human rights-holding flow from this. First of all, identifying a right implies identifying its right-holders, even though not necessarily all its concrete duty-bearers.[18] Human rights arise together with their holders becoming human rights-holders. This makes the identification of human rights-holders an essential part of the recognition of the existence of human rights and a primary concern in that context. Secondly, human rights qua normative relationships correspond to relationships of jurisdiction between a given State (or international institution) and a given person.[19] Without jurisdiction over certain people, whether territorial or extraterritorial, those people do not have human rights against that entity and that entity has no human rights duties towards those people.

What this means for the active or benefit-side of human rights is that human rights-holders are identified at the same time as their rights, on the one hand, and arise as a normative relationship together with a general jurisdictional relationship between the right-holder whose rights are identified and the duty-bearer, on the other.

Those structural features of the benefit-side of human rights may be derived from an analysis of the legal practice of human rights. First of all, international and European human rights law treats human rights as "claim-rights." Of course, some international and European human rights instruments include other normative entities than rights, such as imperfect duties, goals[20] to be realized progressively, and non-directly invocable principles. Their catalogue of rights *stricto sensu*, however, lists "rights" that are claimed by their holders against public institutions that owe them duties. Secondly, even though the legal practice of human rights focuses mostly on the supply-side or passive side of human rights, and hence on the identification and specification of human rights duties, their allocation and the justifications for their restrictions, one also finds, albeit more rarely, references in human rights-reasoning to structural features of the right-side or active side of human rights. The latter is not usually questioned, however, for its identity is taken to flow from the rights themselves and their recognition in the first place. Finally, jurisdiction is mostly considered as the trigger or condition for the application of human rights (e.g. Article 1 of the European Convention on Human Rights (ECHR)). It is understood as a relationship of effective and overall normative control or authority[21] between a State or international institution of jurisdiction over a person that gives rise to human rights between that person and the entity of jurisdiction.

3 Holding Rights Equally

Human rights are "equal" rights. This is because human rights qua relationships are equal relationships, but also relationships of equality to the extent that they are constitutive of our equal moral status in political circumstances. Their egalitarian dimension is what explains why they are held by all and are considered as general rights.

The first task in the elucidation of the relationship between human rights and equality, and hence of how they are independent of any other status, is clarifying the concept of

equality that is at stake in the human rights context. This requires an analysis of the most basic notion of equality: that of equal moral status (Section 3.1). In a second step, the discussion moves to a more robust notion of equality: that of political equality (Section 3.2). A final step in the argument turns to human rights as constitutive of our equal moral status in political circumstances (Section 3.3).

3.1 From Equal Moral Status...

Basic moral equality is usually referred to as equal moral status or basic equal status. It is useful to distinguish between the concept of equal moral status and its justification.

The concept of equal moral status, first of all, is best explained by dissociating the notion of moral status from that of equal moral status. In a nutshell, *moral status* pertains to the way in which a being is subject to moral evaluation, how it ought to be treated, whether it has rights, and what kind of rights it has.[22] Moral status goes further, therefore, than mere moral considerability: the latter is a standing that may be shared with many other sentient animals and even with things, whereas moral status only belongs to human beings.[23] When it is *equal*, moral status refers to the idea that "all people are of equal worth and that there are some claims people are entitled to make on one another simply by virtue of their status as persons" (Scheffler (2003: 22)).

There are two core ideas in this understanding of equal moral status: (i) the idea that all persons should be regarded as having the same moral worth and (ii) the idea that this equal moral status is relational and the basis for mutual moral claims. Those two aspects of equal moral status are non-dissociable.

First of all, the idea of equal moral worth of all persons pertains to the intrinsic and non-instrumental value of personhood. According to that idea, no person may be deemed inferior morally to another: all those who have the characteristics that are sufficient for being a person and hence the capacity for rational and moral agency have the same moral status.[24] This capacity threshold is a datum of moral experience and an inherent feature of equality. Equal moral status is, of course, compatible with important inequalities on other counts such as health, beauty, luck, etc. It is important to stress that what matters here is personhood and not human nature. The former captures what ought to be protected morally in human beings qua moral agents, and it escapes the naturalistic fallacy and many other misconceptions that come with the notion of human nature, as we will see.[25]

The second core idea in equal moral status pertains to its inherently relational nature.[26] One is at once a person valuable in oneself and a person equal to others, i.e. a person whose status and moral worth is defined by one's moral relations to others. The relational or, as Elizabeth Anderson (1999: 288–9) calls it, the social nature of equal moral status explains why the latter amounts to more than mere autonomy or rational capacity that is covered by the first core idea. The denial of equal status amounts to a judgment of exclusion and inferiority *to others* where this kind of judgment is "thought to disqualify one from participation as an equal in important social practices or roles."[27]

As a result, equal moral status does more than simply entitle persons to mutual claims. It can actually be defined by reference to those mutual claims. This is why it is often deemed as consisting in those mutual moral entitlements themselves.[28] Those mutual entitlements inherent in equal moral status are usually described as mutual basic moral rights.[29] Those basic moral rights are equal rights, as a result.[30] Since the equal moral status is universal, they may also be referred to as universal moral rights. As we will see, human rights are among those basic moral rights that constitute one's equal moral status in political circumstances, although they do not exhaust those basic moral rights even in political circumstances. Those mutual moral entitlements include other basic moral rights than human rights: rights that may bind other individuals and not institutions like human rights, on the one hand, and rights that do not need to be institutionalized and legalized unlike human rights, on the other.

The second question is the justification of a persons' equal moral status. Curiously, given its pivotal role in morality, but maybe because of that pivotal or even liminal role, the concept of equal moral status remains a largely unquestioned notion in much of contemporary moral theory.[31] So, the problem with the justification of equal moral status is not so much that moral philosophers are divided but that they rarely provide a justification of the equal moral status of persons.[32] Some authors, like Jeremy Waldron (2002a), actually see this lack of justification as a shortcoming of current moral theory on basic moral equality. Others, like Bernard Williams (2005), see that absence of justification as a virtue of the idea of equality.

Schematically, one may distinguish between two kinds of justification of basic moral equality: a Christian one that refers to God (and the idea of *imago dei*) and that is mostly based on Locke[33] and a non-religious one that refers to shared rational nature and that is mostly based on Kant.[34] The difficulty with the former is its religious and hence non-inclusive and teleological nature.[35] But the latter also suffers from important shortcomings. One of them is its metaphysical, and non-naturalistic or empirical inclination.[36] A way of rebutting this objection may actually be found in the second core idea to equal moral status, however: its relational and hence social nature. The social nature of basic moral equality enables one to make a certain number of empirical assumptions about people and their relationship in society.[37] More generally, there is no reason why the search for justification should be one for ultimate foundations and why a failure to identify those ultimate foundations should be a problem. The regress in the search for justifications has to halt at some stage. One may be satisfied with pausing at equality without further justification. This may be, for instance, because those moral values and principles are so widely accepted as part of people's moralities that one does not have to argue for them before using them to argue for human rights.[38]

3.2 Through Political Equality...

Equal moral status holds an intermediary ground between moral considerability, on the one hand, and more specific or robust notions of equality, like political equality, on the other. Political equality is the kind of robust equality that matters in a legal order and, accordingly, in the context of human rights law. Before discussing political equality itself, it is important to explain how one can get to political equality from basic moral equality and elaborate on the relationship between the two.

First of all, the circumstances of political equality. The relational or social nature of equal moral status alluded to before implies that, to borrow Allen Buchanan's words, "the proper acknowledgement of a person's moral status requires some sort of fundamental public recognition of equality (Buchanan 2009: 379)"[39] Equality is inherently public or political as result.[40] In a nutshell, public or political equality implies that people can see that they are being treated as equals by others and this takes the form of its recognition by the law and institutions.[41]

Of course, there are prepolitical circumstances in which individuals merely benefit from a social form of equal moral status. This means that not all individuals may claim political equality in a given political community on grounds of their equal moral status; their claim to political equality will follow their full membership in the community, i.e. their being subjected to the community's decisions and law, and their sharing interdependent and roughly equal stakes with others. Their equal moral status is intact, however, and they have the universal moral rights that constitute that status. They actually have a universal moral right to have human rights in a future or actual political community qua universal moral right to political membership, but that universal moral right is not yet a human right.[42]

Secondly, the vindication of political equality. Once the political conditions are such that political equality may be required on the grounds of equal moral status, the next question to arise is how political equality can be vindicated. The political dimension of equal moral status together with its rights-based nature lead to a further process: the struggle for equal participation rights is based on the public vindication of equal moral status.[43] This in turn implies struggling for the establishment of a democratic regime that includes all those subjected to a decision in the decision-making process. Democracy is indeed the way "of publicly realizing equality when persons who have diverse interests need to establish rules and institutions for the common world in which they live" (Christiano 2010: 121–2) and this in spite of persistent and widespread reasonable disagreement.[44]

3.3 To Human Rights...

The passage and relationship between equal moral status and equal political status are reflected in the recognition of universal moral rights as human rights (moral and legal), and the passage from one to the other.

As I explained elsewhere,[45] human rights amount to a subset of universal moral rights that are also legal rights, that protect fundamental objective interests against standard threats (urgency), and that belong to all human beings (generality) merely on the basis of their humanity (universality). Four structural elements qualify a human right on that

account, among which the first and the second deserve most attention for our purpose in this chapter. To become a human right, the objective interest protected has to be sufficiently fundamental to give rise to a universal and general right, first, and to be threatened generally and universally, second. Furthermore, the burden placed by the duties on the duty-bearer(s) has to be fair, third, and feasible, finally.

Corresponding to a general and universal interest is not enough for a human right to arise: there has to be a threshold of importance at which a given general and universal interest is regarded as sufficiently important to give rise to duties, and hence to a general and universal human right. What makes it the case that a given individual interest is regarded as sufficiently important to generate a human right duty and hence a human right may be found, I claim, in the normative status of each individual qua equal member of the moral-political community, i.e. their political equality or equal political status.[46] Only those interests that are recognized as socio-comparatively important by members of the community can be recognized as sufficiently fundamental to give rise to duties and hence as human rights. The recognition of human rights is done mutually and not simply vertically and top-down, and as a result human rights are not externally promulgated but mutually granted by members of a given political community.[47] This is particularly important for the generality of human rights, as it allows for the mutual assessment not only of the generality of the interests protected but also of the standard or general threats bearing on those interests, on the one hand, and of the general burdens and costs of the recognition of the corresponding rights and duties, on the other.

Evidence of the egalitarian threshold of human rights may be found in the relational and socio-comparative nature of human rights in practice. One may think of their systematic nature, for instance.[48] Human rights belong to everyone not only equally, but mutually, so qua rights not only of all but also against all. Another confirmation may be found in the non-inherently individualistic nature of human rights that protect basic individual interests that are also sufficiently general and hence deemed comparatively important within the political community. Actually, some human rights also protect individual interests in collective goods, like cultural rights, or individual interests whose social importance is part of the reason to protect them as rights, like the right to free speech.[49] Finally, the democratic dimension of human rights that is a regime-requirement of international human rights law post-1945[50] also confirms the egalitarianism of human rights.

Two objections may come to mind at this stage. The first pertains to the general or "generic"[51] dimension of human rights qua equal or general rights. If human rights are equal in the way I have argued they are, it is difficult to see how they could also be individual rights that protect each person specifically. It is key here to draw a distinction between an abstract human right that is general and the concrete human right and human right duties that correspond to that abstract human right in a specific individual case. Each abstract right has to be specified in an individual case and in the specific context of that individual to protect an individuated version of the generalized or generic interest protected by the human right.[52]

The second objection pertains to the parochialism of the proposed account of the equality of human rights and its democratic requirements. If human rights and political equality are tied in this way, one needs to explain how human rights may still be sufficiently universal.[53] As I discussed elsewhere,[54] international human rights law has consolidated progressively from transnational domestic practice and consensus over time, and this is how, once it is entrenched within the international legal order, it may legitimately constrain domestic politics in return. Moreover, once entrenched in international human rights law, the egalitarian and hence democratic dimension of human rights remains minimal. It can and should then be specified further in the domestic context.[55]

4 Holding Rights Equally, albeit Exclusively

Because they are equal along the lines explained so far, the holders of human rights are, I will argue in this section, born human beings who have reached (if they are adults) or have the ability to reach (if they are children) a threshold or minimal level of rational capacity.[56] This is also the way in which human rights-holders are approached in most of the contemporary international human rights practice and law.

There are three inherent limitations to the scope of right-holders in the proposed egalitarian reading of the practice, and three corresponding critiques, starting from the broadest set of boundaries: the "species" boundaries, and the speciesism critique (Section 4.1); the "capacity" boundaries, and the rationalism critique (Section 4.2); and the "individuality" boundaries, and the individualism critique (Section 4.3).

Before turning to a discussion of those three boundaries, two remarks are in order. First of all, there is another boundary underlying the scope of human rights-holders, and that is birth, on the one hand, and death, on the other. I am considering rights as post-birth rights, on the one hand, and as pre-death rights of the living and not the dead, on the other. The reason for this focus pertains to the individuality of human rights and to the circumstances of politics and their relationship to equal political status here and now. Those two structural features of human rights cannot be reconciled with pre-birth and post-death rights.[57] Again, there may be other moral considerations applicable to the fetus and to the dead, such as dignity[58] and various other duties of respect, but not human rights that constitute our equal political status as living individuals. Secondly, and for the same reasons, the idea of human rights as rights of the living excludes the protection of the interests of future generations qua human rights. Their interests may be protected through other moral considerations, but not as human rights here and now.[59] Qua rights, human rights are directed and hence require the identifiability of their right-holders as existing and not merely as potential right-holders (unlike their duty-bearers, who may only be potential[60]).[61]

4.1 Species-Related Boundaries and the Speciesism Critique

Human rights are rights that belong to human beings. Belonging to the human species seems, therefore, to constitute the most external boundary to the personal scope of human rights. To quote Article 1 UDHR, for instance, human rights are the rights of "all human beings" who are described as being "*born* free and equal" in those rights.

Human rights amount to the sole area of morality that seems to bear a direct reference to our identity as a species. Speciesism about human rights, i.e. the idea that human rights only belong to human beings and not to the members of other species, may be justified by reference to such biological qualities, but it need not.[62] It may also be grounded on moral qualities that happen to be held equally by human beings only.[63] Of course, this second brand of human rights' speciesism may be defeated by reference to other moral arguments.[64] Such critiques of moral speciesism are a version of a more general critique made against the "human prejudice" of morality.[65]

The problem with this critique of speciesism in the human rights context is that, first of all, human rights do not exhaust morality and the moral duties we have to other human beings and animals.[66] Secondly, the moral rights of members of other species are not excluded by the proposed account either. As a matter of fact, members of other species may share the same interests as human beings (e.g. health, security), and those interests may be protected by moral rights in some cases—although I am not making this argument here. We may even happen to have rights that have the same content (e.g. a moral right not to be tortured). However, their rights are not equal to ours. They cannot, therefore, be described as equal or shared rights and cannot amount to "human rights." Importantly, this does not amount to a human "nature" or human "species" privilege, but it is merely a matter of what makes us equal. What matters, indeed, is that, as things stand, we can only share them with those who we are in a public relation with, i.e. other human beings.

If human rights were called "persons' rights," along the lines of a suggestion made by Buchanan (2011: 214), things would look clearer with respect to both the naturalistic fallacy and the speciesist critique. Not only would the critique of speciesism be defeated as I have just argued it should and can, but it would no longer bite as a critique of a claim that looks speciesist in the first place, but merely as a critique of an egalitarian claim about human rights. As any egalitarian claim, it is bounded by reference to the group of those to whom we are equal. However, it is independent from our "nature."[67] This would also avoid the danger of normative essentialism.

To conclude, one cannot exclude that some non-human sentient animals may become equal to us one day, just as one may not exclude that intelligent machines may eventually.[68] On this view, human rights are not birthrights that only human beings have, or may acquire under further conditions, by the mere fact of their being born as human beings. In short, the claim is merely that humanity qua personality is currently a condition for having these rights, not that it is a necessary condition or even a sufficient one.[69] The question then becomes: what are the characteristics that give rise to our equal moral and political status and to the corresponding human rights? This is the question I will turn to now in the context of a second boundary to the scope of human rights-holders: their rational capacity.

4.2 Capacity-Related Boundaries and the Rationalism Critique

I claimed before that human rights belong to human beings who have reached (if they are adults) or have the potential to attain (if they are children) a threshold level of rational capacity. Rational capacity, therefore, amounts to a second boundary to the personal scope of human rights. The proposed reading corresponds to international human rights law and practice, where, although the exclusion is not explicit, incapable individuals are not regarded as right-holders.

Rational capacity as a practical capacity for rationality amounts in short to the capacity to reason and deliberate with others.[70] It goes beyond normative agency,[71] as a result. It is what makes us equal, and hence gives rise to our equal political status and the corresponding human rights. First of all, equality qua relational status implies sharing some common traits. The more basic and inclusive the equality, the more basic and widespread the traits. However minimal, some form of threshold for equality is a datum of moral experience. Secondly, in the political circumstances of human life, the capacity to reason and deliberate is an implication of politics and hence of equal political status.

Rational capacity works as a minimal threshold, and is not scalar. Whatever variations there are above that threshold do not matter for reasons of equality: what matters is who falls above or below the threshold, and hence who is to be treated equally and who is not.[72] The level at which the minimal threshold of rational capacity is set should reflect an average that has consolidated over time. The fact that it is indeterminate should not worry us given how indeterminate morality is. Nor should it be a concern that setting it is a matter of stipulation,[73] and hence largely contingent on law and democratic politics, and especially on international human rights law (e.g. Article 18 CRC and the age of 18 as trigger for (adult) human rights).

On the proposed egalitarian reading, human rights are not birthrights that all human beings have by the mere fact of their being born as human beings. Being born a human being is a condition under current circumstances, but not a sufficient one.[74] It is only if or once individuals have achieved a certain degree of rational capacity that they may be said to be human rights-holders. True, some human rights may require less or more rational capacity depending on their object, i.e. the interest protected, but they all require some minimal level thereof to amount to human rights. Human rights may not only be acquired above that level, but also be lost or never be acquired below. Importantly, human rights do not protect rational capacity itself. The latter is a threshold for one's equal moral and political status, but not something that is protected by that status and the human rights that constitute it.

Reacting to the consequences of the equality threshold and the requirement of rational capacity, some authors have tried to distinguish between paradigmatic and non-paradigmatic right-holders depending on whether the right-holder is situated above or below that threshold.[75] The problem with this compromise is that it is not tenable. Individuals situated below the threshold cannot be holders of a claim-right in a meaningful sense, as I argued before. Nor is it sufficient to defer to the supply-side of human rights and to understand the duties corresponding to the rights of those non-paradigmatic right-holders as being conditional upon their attaining the right level of rational capacity. Human rights duties cannot be conditional or progressive, but have to be unconditional and immediate. Since "ought implies can," the lack of feasibility of any of the corresponding duties at any given time prevents the human right from arising.[76]

The critique of setting rational capacity as a threshold for human rights is that it excludes certain human beings from the scope of human rights-holders and that this is prima facie contrary to the idea of the generality or equality of human rights. More precisely, it excludes those with impaired mental abilities: some, because they are still developing, like children, and others, because they never had them, like mentally disabled people, or have lost them, like elderly people. I will take those three groups of individuals in turn, and defend their complete or partial exclusion from the personal scope of human rights by showing how one should approach their "rights" when they have not yet acquired or have lost their rational competences. Note that excluding certain individuals from the scope of human rights-holders does not exclude them from the scope of morality.[77] Their interests should be protected and various imperfect duties may arise towards them without being owed to them as right-holders.[78] Moreover, as we will see, children and elderly people have special rights that protect their acquiring and loss of rational capacity and hence of human rights just before and after that acquisition and loss.

First of all, children's rights. Children's incomplete rational development leads to lesser or no human rights in some cases to the extent that human rights require a minimal level of rational competence. Infants and, to a lesser extent, children falling below that threshold have no human rights.

Interestingly, before the 1989 CRC, children were not regarded as holders of human rights, even general ones, under general international human rights instruments. As a matter of fact, children's interests were protected only indirectly and not as subjects of human rights by those instruments (e.g. Articles 25-6 UDHR; Articles 14 and 24 CCPR; Articles 10, 12, and 13 CESCR).[79] Nowadays, children's rights are recognized expressly and are either reinforced general rights or special rights that protect children only. Still, they do not belong to all children at once from their birth and very infancy onwards.[80] On the contrary, they are acquired by the child gradually, together with their acquisition of rational competences. This corresponds to the idea of "rights in stages."[81] Following Feinberg (1982), one may consider the rights of children whose relevant rational competences have not arisen yet to be "in trust" with their parents and/or the State (e.g. Article 5 CRC).[82]

Interestingly, the age limit of 18 (Article 1 CRC) as the cutoff date at which children's rights become adult rights, i.e. full general rights, confirms the rational competence

threshold for the acquisition of human rights. Age is used as a shorthand for intellectual development and competence. Even if it remains largely imperfect, it is sufficiently general to capture the different stages in the rational development of human beings and sufficiently determinate. Hence the distinction between infants who have no human rights, children who acquire them in stages and whose rights are in trust until then, and adults who are deemed rational (unless proven otherwise, as we will see) and who have all human rights.

Secondly, elderly people's rights. This is the other end of the spectrum of development of rational capacities, as it were, and a very sensitive issue. To date, there is no international regime of human rights specific to elderly people's rights.[83]

There are difficulties applying the "rights in stage" approach to elderly people, as their rights are not being acquired, but lost, on the one hand, and age cannot be used as a shorthand for loss of rational capacity by contrast to its development, on the other. Of course, the "rights in trust" construction may apply, and actually echoes much of the domestic civil law for the protection of the person. The problem remains as to when this should apply. We are left with a case-by-case assessment of that loss of rational capacity. This may explain why this task has been left to domestic administrative and judicial authorities in practice so far, and why there has been no international human rights law on the issue yet.

Finally, mentally impaired people's rights. The rights of mentally impaired people are non-existent in international human rights law and practice. For instance, the CRPD does not mention the issue of rational competences. The only exception is that of the developing child with disability (e.g. Article 7 CRPD), but this is for reasons pertaining to child development precisely.[84] This is no surprise given that it is the hardest case of all. Mentally impaired people only benefit from general human rights to the extent they reach the minimal threshold of rational capacity needed for the rights to arise. If they do not, there is no possibility of applying the "rights in stage" and "rights in trust," for their rights will simply not arise. They either never did or have ceased to for lack of rational capacity.

I will come back to two of those three groups of right-holders in the context of special rights and the internal boundary within human rights between general and special rights.

4.3 Individuality-Related Boundaries and the Individualism Critique

My argument so far has been that human rights belong to human beings who have reached (if they are adults) or have the potential to attain (if they are children) a threshold level of rational capacity. Individuality therefore, amounts to a third boundary to the personal scope of human rights: groups are excluded from the scope of human rights-holders. The proposed egalitarian reading of human rights-holders fits the core of international human rights law and practice where most human rights are rights of individuals.

Before discussing the reasons for restricting the personal scope of human rights to individuals, it is important to clarify what is meant by collective rights. Given their egalitarian dimension, the collective dimension of human rights is particularly central and does not necessarily turn them into group rights.[85] Thus, many individual human rights may be rights that pertain to interests that have a social or collective dimension or are constitutive of a social or political "role."[86] Such "collective" rights are not regarded as group rights *stricto sensu* on the proposed account.

There are three understandings of collective rights one may encounter depending on the criterion used to qualify them as collective.[87] The first understanding of collective rights understands group rights by reference to the *exercise* of the right. The interest and the right are individual, but the right is exercised collectively, such as the right to self-government. The second understanding of collective rights refers to the *kind of interest* protected by the right. The interest and the right are individual, but the interest protected is an interest in a collective good.[88] One may mention the right to be elected, the right to due process, or "minority rights,"[89] such as the rights that belong to women, children, or ethnic or religious groups. The right to self-determination is an example of a right falling into the first and second categories. Finally, a third understanding of group rights is based on the *right-holder*, when both the interest and the right are collective.[90] As examples, one may mention certain participatory cultural rights or the right to security.

Of all three, it is the third kind of group rights that is most commonly referred to qua group rights *stricto sensu*. It is also the only one whose exclusion is required by the proposed egalitarian reading of the personal scope of human rights. Among the difficulties raised by group rights *stricto sensu*, one should, first of all, mention their qualification as rights. While many authors regard group rights as moral rights, some argue against them for ontological reasons pertaining to the moral agency of groups.[91]

Secondly, among authors who favor the existence of moral group rights, very few accept that group rights qualify as human rights.[92] First of all, under the interest-based approach to human rights followed in this chapter, for a moral right to qualify as a human right, it has to protect a fundamental and general interest. Unlike their members, however, groups do not have fundamental interests. Even if they did, those interests are not general enough: they are group-relative. Even in a world of groups, the generality of groups could not be sufficiently transitive with that of individuals to warrant the egalitarian dimension of human rights. A second difficulty with the qualification of group rights as human rights has to do with the high-priority mandatory nature of human rights in morality. Group rights do not have the relational and systematic features of human rights qua moral entitlements.[93] Finally, groups cannot be equal to individuals politically, and cannot be said to participate in a meaningful way in politics (with individuals or among themselves).[94] There is only one relevant group on this understanding of political equality, and that is the relevant polity or group of citizens.

Of course, this interpretation of international human rights law leaves a small fraction of the practice unaccounted for— and, for instance, the alleged human rights of business corporations or religious groups under the ECHR. Even under the proposed reading, however, collective rights in the third category could be salvaged by being interpreted as individual rights. An alternative may be to refer to collective rights in the third category as rights of peoples (e.g. Articles 1(1) CCPR and CESCR) or as "group rights" *stricto sensu*, and not as human rights.[95]

5 Holding Rights Equally, albeit Specially

If human rights are equal rights that belong to all, the special protection granted by international human rights instruments to some people still needs to be explained and accounted for within the proposed egalitarian reading of human rights. This is the second kind of boundaries to the personal scope of human rights mentioned in Section 1: their internal boundaries.

The special protection granted to some human rights-holders in international human rights law occurs through different mechanisms. It may take place through a reinforced protection of general rights (e.g. religious freedom of the child in Article 14 CRC) or through special rights (e.g. the right to registration of the child under Article 7 CRC). In the latter case, special rights may be granted expressly or merely derived from the general ones through judicial interpretation (e.g. the right to security of vulnerable people derived from the prohibition of torture and degrading treatment in Article 3 ECHR[96]).

The reasons most commonly advanced for special rights pertain to the special vulnerability of right-holders, whether as such (e.g. children, elderly people, or people with disability) or due to the circumstances in which they are situated (e.g. migrant workers).[97] There are many difficulties with the concept of vulnerability in this context. Standard vulnerability to standard threats is indeed a key element in the structure of human rights.[98] Only those generalized or generic individual interests threatened by general or standard threats may be protected as human rights, for only those rights may be equal rights. Special vulnerability to special threats, as a result, cannot give rise to general or equal human rights.[99] Of course, within the category of general human rights-holders, some may be more vulnerable than others to standard threats. While this kind of special vulnerability may be protected while saving the egalitarian dimension of human rights, the former cannot. Special rights in that sense are not, at least prima facie, compatible with the equality of human rights. For instance, reinforcing positive duties of protection of the right to privacy of HIV patients or pregnant women is compatible with the equality of human rights, while granting a special right to migrants by mere virtue of their special vulnerability is not.

The way out of this dilemma may be to distinguish between special rights that are inegalitarian, and should be rejected on the proposed reading of the generality of human rights, and two subsets of special rights that may be justified on egalitarian grounds: non-discrimination rights (Section 5.1) and development rights (Section 5.2).

5.1 Non-Discrimination Rights and the Equality of Human Rights

Non-discrimination rights are individual rights, but the interests protected are individual interests in collective goods. Indeed, the inequalities at stake affect individuals with heightened vulnerability to the standard threats protected by human rights due to their belonging to a structurally disadvantaged group. Those individual rights are needed to protect the equal moral status of each individual within the larger group when his or her belonging to a subgroup is a source of social inequalities.[100] The key difference from other human rights, however, is that the absence of unequal treatment constitutes the actual objective interest protected by non-discrimination rights. Equal moral status does not merely play a role as a threshold of recognition of the importance of the protected interests, but actually becomes the interest to protect as well.

Of course, the prima facie inegalitarian nature of those group-specific or group-differentiated non-discrimination rights has been criticized.[101] Recognizing unequal rights to correct social inequalities seems, indeed, to fly in the face of the principle of equal moral status qua threshold of importance of all protected interests and human rights. It is difficult, however, to see how the egalitarian dimension of other human rights could be respected were those social inequalities to subsist. In that respect, non-discrimination rights reinforce the protection of the equal moral status of every person by other individual human rights. This echoes James Nickel's (2007: 163) idea that only those group-differentiated rights that can be derived from general human rights for their own protection may be justified.

5.2 Development Rights and the Equality of Human Rights

There is another group of prima facie special rights that may be justified on egalitarian grounds, and those are "development rights." They arguably may be justified on egalitarian grounds to the extent that they protect a person's rational capacity when it is developing (or waning[102]), the very capacity that can make its subject a human rights-holder and hence an equal member of the political community.

A case in point is children's rights.[103] The main feature of children's rights qua special rights is their concern for children's incomplete rational development. Special rights of the child that protect the specific interests of the child in acquiring rational competences are likely to have lower requirements of rational competence, albeit still situated above the minimal threshold of rational competence. Thus, one distinguishes between "liberty rights" (e.g. Articles 12–16 CRC) that only arise once the child is well above the rational threshold and is a quasi-adult, as it were, on the one hand, and "welfare rights" (e.g. Article 24 CRC) or "development rights" of the child (e.g. Article 28 CRC) that accompany the acquisition of rational capacity by the child, on the other.

6 Conclusion

International human rights law and practice reveal an ambivalent approach to the personal scope of human rights: human rights are often less equal or general than they claim and are claimed to be. The inequalities of human right are of two kinds: some vulnerable individuals are also protected by special rights, thus drawing an internal boundary within the scope of human rights-holders, while others have limited or no human rights at all, thus delineating an external boundary around the scope of human rights-holders.

In this chapter, I have presented an argument that fits and justifies the core of the practice of international human rights law regarding the scope of human rights-holders, while criticizing it at the same time for some of its contradictions. More specifically, I have argued for an egalitarian reading of human rights, before accounting on that basis for the humanity-based, capacity-related, and individualistic boundaries of human rights, on the one hand, and defending it against the tendency to expand the scope of special rights beyond what I have referred to as justified "non-discriminatory rights" and "developing rights," on the other.

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Notes

1. e.g. Tasioulas (2012a: 17); Griffin (2008: 83). See also Nickel (2007: 37); Gérard (2007: 21).
2. The generality of human rights should be distinguished from their universality: the former pertains to the personal inclusion of every single individual in every polity ("rights of all human beings qua *human beings*"), whereas the latter pertains to the territorial inclusion of all polities and hence of all individuals in those polities ("rights *of all human beings*…"). Of course, the generality of human rights implies their universality, but I will focus only on the former in this chapter.
3. I am not considering the rights of States under international human rights law in this chapter. See Besson (2012).
4. See Morsink (2009: 29).
5. See http://www2.ohchr.org/english/law/ and http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx, accessed July 8, 2014.
6. See also Besson (2013a).
7. See Mégret (2008), (2011).
8. Contra: Griffin (2008: 93); and Tasioulas (2012a).

9. See Tasioulas (2012a), based on Wolterstorff (2008: 327–9).
10. See Griffin (2008: 50, 92).
11. See, e.g., Beitz (2009); Raz (2010a), (2010b).
12. See, e.g., Nickel (2007: 37).
13. See Besson (2013d), (2015a).
14. See, e.g., Besson (2013c), (2014a), (2015a).
15. See Besson (2014a).
16. On the directedness of rights, see, e.g., Sreenisavan (2009); Wenar (2013: 207–8); Cruft (2013).
17. On "molecular" rights, see Wenar (2005).
18. See Nickel (2007: 23).
19. See Besson (2015a).
20. See Nickel (2013).
21. See Besson (2011), based on ECtHR, *Al-Skeini and others v. the United Kingdom* (appl. no. 55721/07), Judgment (Grand Chamber), 7 July 2011, Reports 2011; [2011] 53 EHRR 589.
22. See Buchanan (2009).
23. On the threshold of equal moral status, see, e.g., Buchanan (2009: 358–71) See also Section 4.1 of this chapter, "Species-Related Boundaries and the Speciesism Critique."
24. Buchanan (2009: 347).
25. See Buchanan (2009: 348–9).
26. See Anderson (1999: 289 and 313).
27. See Buchanan (2010: 708–10, at 708).
28. See Buchanan (2009: 378–9); Buchanan (2011: 233).
29. See Buchanan (2011: 233).
30. This is compatible with people having other moral rights that are different and non-general as long as they are neither basic moral rights nor human rights. See Buchanan (2009: 378–9).
31. See, e.g., Tasioulas (2013).
32. See Tasioulas (2013).
33. See, e.g., Waldron (2002: ch. 3). See also Wolterstorff (2008: 352–61).
34. See, e.g., Habermas (2010).
35. See Buchanan (2009).
36. See Tasioulas (2013); Williams (2005: 102).
37. See, e.g., Buchanan (2005: 77–8).
38. See Nickel (2007: 61).
39. See also Anderson (1999: 288–9); Habermas (2010: 472).
40. See Anderson (1999: 288–9).
41. See Christiano (2010: 121).
42. See Besson (2013b), (2015a).
43. See Buchanan (2009: 380) with reference to Waldron (2002: ch. 3). See also Anderson (1999: 317–18).
44. See also Anderson (1999: 289).
45. See Besson (2014a).
46. See Forst (2010), (1999: 48); Christiano (2008: 138, 156).
47. See Cohen (2004: 197–8; Forst (2010); Baynes (2009: 382).
48. See, e.g., Waldron (2002).
49. See Raz (1986: 180); Wenar (2013: 206, 218).

50. See, e.g., ECtHR, *Zdanoka v. Latvia* (appl. no. 58278/00), Judgment (Grand Chamber), 16 March 2006, Reports 2006-IV; [2007] 45 EHRR 17, par. 98.
51. I owe this term to Rowan Cruft.
52. See Besson (2014a).
53. See Besson (2013c).
54. See Besson (2015b).
55. See, e.g., Buchanan (2005: 78–80), (2008). See also Besson (2015b).
56. See also Tasioulas (2012a).
57. See also Griffin (2008: 83).
58. On (equal) dignity as a redundant justification of human rights, see Besson (2013c).
59. For a defense of the human rights of future generations, see Feinberg (1980); Caney (2008).
60. See Besson (2014a). Contra: O'Neill (2005).
61. For a rebuttal of the potentiality argument, see also Griffin (2008: 84).
62. Note that these biological arguments themselves are far from uncontroversial. For instance, the definition and boundaries of the human species (e.g. *homo sapiens*) are still evolving. This makes biology-based moral arguments like those of Tasioulas (2012a) or Wolterstorff (2008: 313) difficult to maintain.
63. See, e.g., Liao (2012), although he may object to the qualification of his argument as a type of "moral speciesism."
64. See, e.g., Singer (2009).
65. See Williams (2006: 150).
66. e.g. Griffin (2008: 95).
67. Buchanan (2011: 122).
68. See Buchanan (2011: 209–41.). See also Liao (2012).
69. Buchanan (2011: 213–4).
70. Buchanan (2011: 121).
71. See, e.g., Griffin (2008: 93).
72. See Buchanan (2011: 215).
73. See Griffin (2008: 88 and 91–4) (on the criteria for a justified stipulation).
74. See also Griffin (2008: 50).
75. See, e.g., Tasioulas (2012b).
76. See Besson (2014a).
77. For a similar exclusion, see Kant (1996: nos. 15–21).
78. See O'Neill (1988); Griffin (2008: 91, 95).
79. See, e.g., Inter-American Court of Human Rights, *Legal Status and Human Rights of the Child* (OC-17/2002), Advisory Opinion, 28 August 2002, par. 137.
80. See Locke (1988: ch. 6, no. 55): "Children, I confess are not born in this full state of Equality, though they are born to it."
81. See Archard (2006); Griffin (2008: 94–5).
82. Of course, those entrusted "rights" are neither the parents' nor the children's, for the latter have no human rights yet.
83. See Mégret (2011).
84. See Mégret (2008).
85. See Raz (1986: 179, 247–8).
86. See Raz (1986: 180). See also Wenar (2013: 206, 218).
87. Buchanan (2004: 409–13).
88. See, e.g., Raz (1986: 247–55); Réaume (1988: 10).

89. See Nickel (2007: 155); Gérard (2007: 188 ff.).
90. See, e.g., Waldron (2002).
91. See Waldron (2002); Tamir (1999).
92. See, for a discussion, e.g. Waldron (2002); Tamir (1999).
93. See Waldron (2002); Tamir (1999).
94. See also Gérard (2007: 201).
95. See also Gérard (2007: 59–66).
96. See ECtHR, *L. v. Lithuania* (appl. no. 27527/03), Judgment, 11 September 2007, Reports 2007-IV; [2008] 46 EHRR 22, par. 46. See the critique by Judge Sajo in ECtHR, *MSS v Belgium and Greece* (appl. no. 30696/09), Judgment (Grand Chamber), 21 January 2011, Reports 2011; [2011] 53 EHRR 2.
97. See Besson (2014b).
98. See Besson (2013c). On standard or general threats in general, see Shue (1996: 13–34).
99. Nor does vulnerability in itself justify rights in the first place: see also Griffin (2008: 85 and 90–1).
100. See Altman (2011). See also Nickel (2007: 155).
101. e.g. Waldron (2002); Nickel (2007: 161–3).
102. Even though, strictly speaking, aging is not a form of development in biological terms (mostly for reproductive reasons), I will refer to those special human rights as development rights.
103. See O'Neill (1988); Archard (2004).

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