Chapter Three
The Language of Human Rights as a Language of Politics

A. Human rights as the political creed of modernity

No-one will deny that there are many facets to the idea of human rights.\(^{193}\)
This idea, however, has, above all, been one thing: a political project seeking in all historical contexts to change the world. The language of human rights is primarily a language of political change.\(^{194}\)

We call three authors to the witness box to testify on the symbiotic relationship between law and politics conveyed by the concept of human rights. The first is Ben Golder. He describes human rights as grounding and restricting politics, as the political credo of modernity: “Human rights in this very familiar guise represent the preeminent universalist political credo of late modernity: idealist, foundationalist, metaphysical, irreducible to calculation. Indeed to call them a political credo is not quite to do them justice – human rights, according to this reckoning, are both pre- and supra-political, providing the moral foundation and limits to politics itself.”\(^{195}\)

Our second witness is Makau Wa Mutua, who, writing about the symbiotic relationship between politics and human rights, rightly points out that we are well advised not to take the often unpolitical rhetoric of many human rights actors at face value: “Since the Second World War, international human rights law has become one of the most pre-eminent doctrines of our time. Diverse groups from sexual minorities to environmentalists now invoke the power of human rights language. But this universal reliance on the language of human rights has failed to create agreement on the scope and content of the human rights corpus. Debates rage over its cultural relevance, ideological and political orientation, and thematic incompleteness. What these debates obscure is the fact that the human rights corpus is a political ideology, although its major authors present it as non-ideological.”\(^{196}\)

The third author is Samuel Moyn, who begins his impressive book on the history of human rights as follows:

\(^{193}\) See the overview in Mutua (2000).
\(^{194}\) On the political history of ideas in a “language of political change” see the introduction to this book, 1–31.
\(^{195}\) Golder (2016) 684–685.
\(^{196}\) Mutua (2000) 149.
“When people hear the phrase ‘human rights’, they think of the highest moral precepts and political ideals. And they are right to do so. They have in mind a familiar set of indispensable liberal freedoms, and sometimes more expansive principles of social protection. But they also mean something more. The phrase implies an agenda for improving the world, and bringing about a new one in which the dignity of each individual will enjoy secure international protection. It is a recognizably utopian program: for the political standards it champions and the emotional passion it inspires, this program draws on the image of a place that has not yet been called into being. It promises to penetrate the impregnability of state borders, slowly replacing them with the authority of international law. It prides itself on offering victims the world over the possibility of a better life. It pledges to do so by working in alliance with states when possible, but naming and shaming them when they violate the most basic norms. Human rights in this sense have come to define the most elevated aspirations of both social movements and political entities – state and interstate. They evoke hope and provoke action.”

This passage stresses what is characteristic of the human rights project: first, it is a utopian project that goes beyond “pure” politics, calling to mind a favourite book, Ernst Bloch’s “The Principle of Hope.” Second, it is a genuinely political project because inspired by the will “to improve the world.” And, third, it is consequently a project intended to be realized, driven by a dynamic almost impossible to check, which is accordingly a thorn in the flesh of politics.

B. The idea of human rights at the interface between ethics, politics, and law

I. The life of the human rights concept in overlapping normative worlds

In the realm of administrative organizational law, some organizations or institutional arrangements are often found to be at home in two normative worlds, private law (most frequently) and public law. In the age of the “cooperative state” and “private-public partnerships,”

A prime example in Germany is the defunct “Treuhandanstalt” – the federal trustee agency that administered the property of the former German Democratic Republic – for historical reasons a cross between government agency and liquidation management – which led a life between different jurisdictions: company law (in its capacity as “controlling enterprise”) and public law (as “Anstalt des öffentlichen Rechts – “institution under public law”). But human rights are not about life in various jurisdictions but about life in various normative worlds. With the aid of three authors we cast a brief glance at this special situatedness of the human rights project. Writing about modern human rights as a task for Christians and Muslims, Heiner Bielefeldt rightly places the human-rights understanding of freedom at the “focus of ethics, politics, and law”:

“However wrong it would be to monopolize human rights as a simple progress ideology of the modern age, it would be just as wrong and one-sided to treat it only as a sort of emergency brake against a general ‘decline narrative’ of modernity. In modern crises of traditional, ethical consensus grounded directly in religion and of traditional legal institutions, a new conceptualization of freedom has asserted itself. With hitherto unheard of conviction, the moral subject position of the human being, his/her responsibility and self-determinacy has been made the focus of ethics, politics, and law. This modern view of freedom has also become definitive for human rights. Human rights differ from premodern conceptions of law essentially in their pursuit of politico-legal recognition for equal freedom and participation for the individual. The guiding human-rights principle of equal, solidary freedom finds exemplary expression in Article I of the Universal Declaration of Human Rights: ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

In similar vein, our second author Winfried Brugger has this to say about the position of human rights between morality, law, and politics under the heading “positivity and suprapositivity of human rights”:

“The demands of human rights express protest against conditions and modes of action that those affected regard as political and social oppression. The acts criticized can often be attributed to state-made laws and regulations adopted by political

201 On this phenomenon of hybrid organizational forms in the modern administrative state, see Schuppert, G. F. (2000), recital 120 ff.
majorities or dominant minorities. Nor can it be excluded that political power holders have acted in line with prevailing social morality.\textsuperscript{204} For minorities who feel they are oppressed, this means that, if their situation cannot be improved within the framework of the social and political system, they will have to assert and justify their demands for justice at levels of argument that go beyond \textit{enacted and enforced law} and prevailing positive social morality. The demands of human rights operate at this level. Human rights claim to be ‘law of the law’, ‘higher’, ‘pre-state’, ‘natural’ law of the individual or humanity as such, a normative yardstick against which extant positive law is to be measured. Such higher law can clearly not be validated by state legislation or by social acceptance: its validity needs to be derived from bodies of norms of \textit{enlightened, critical morality}.\textsuperscript{205}

If human rights are grounded above all in enlightened, critical morality, this does not mean that they are not part and parcel of the world of law and politics. As far as the world of law is concerned, Brugger\textsuperscript{206} comments:

“[Human rights] always have a \textit{tendency towards juridification}. The champions of human rights want to see them incorporated into the existing legal system (or if this is not possible into a new legal system) and integrated under constitutional law so that political rule can be transformed from a coercive system into a true ‘Rechts-Ordnung’ – a true order of law and rights.\textsuperscript{207} As the ‘basis of freedom, justice, and

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\item \textsuperscript{204} An example illustrates this. After the drafting of the American constitution in 1787, discrimination against people of colour in the United States was long endorsed by both enacted law and prevailing social morality. The United State Supreme Court described the position in \textit{Dred Scott v. Sandford}, 60 U.S. (19 How.) 393, 403 f. (1857) as follows: Afro-Americans “were at that time considered as a subordinate and inferior class of beings … They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise or traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public policy, without doubting for a moment the correctness of this opinion.”

\item \textsuperscript{205} Brugger (1989) 559.

\item \textsuperscript{206} Brugger (1989) 559–560.

\item \textsuperscript{207} This was fully evident in the American Revolution. The colonists had long sought to combat certain interventions and discrimination by the Crown, evoking traditional English rights. When this proved to be of no avail, they necessarily fell back on a “higher” law than the positive English law in force, namely on innate, natural, inalienable human rights – which they claimed the Crown had violated. See the impressive Declaration of
peace in the world' human rights are intended to prevent injustice, so that people are not obliged to rise against tyranny and oppression as the last resort.”

As far as belonging to the world of politics is concerned, Bruggers shows that it is ultimately impossible to make a fine distinction between morality, law, and politics in the field of human rights. They are inseparably interwoven:

“There is … no naive anti-politics attitude underlying the human rights issue. Human rights thinking recognizes that political disputation is justified and necessary not only between competing interests but also between different conceptions of justice. It is not by chance that the guarantee of democratic participatory rights is a vital line of development in the history of human rights. However, human rights thinking also posits limiting the legitimation of political decision-making through state authority, even by majority decision. Political decisions can find greater or less acceptance, generating different degrees of consensus and dissent. From the perspective of basic and human rights, this produces an important substantive and ultimately institutional distinction: decisions are made in every polity that the parties affected, whether they agree with them or not, can no longer accept as having been reached in keeping with the relevant criteria for justice and legitimacy but must consider unacceptable, unjust, and arbitrary. There would then be no more contentious legal cases that could be sufficiently legitimated by majority decision. Prima facie they would them be indisputable cases of injustice, to be prevented wherever possible. To dispel any suspicion of a violation of justice, political (and in the given case, democratic) legitimation is then not enough. To secure justice and realize the common good in such cases, political power would have to be subject to substantive limitation through suitable precautions and more thoroughgoing examination of the public interests driving state intervention, above all the separation of powers, the entrenchment of fundamental rights, and their safeguarding by constitutional courts.”

Our third author in Wolfgang Schluchter, who shall have the last word on the subject:

“The legal principles of human rights bridge the gap between the ethic of responsibility and positive law. … They are a ‘component’ of both ethics and law. … From the point of view of ethics, they are legal to the extent that they mean an institutional guarantee; and from the perspective of law they are ethical to the extent that they are inalienable and therefore vested with supra-empirical dignity …”

Independence on 1776, which enumerates and deplores the “long train of abuses and usurpations,” the “absolute despotism,” and the “absolute tyranny” of the Crown.

Preamble to the Universal Declaration of Human Rights. See also Article 1 (2) of the Basic Law.


Schluchter (1979) 155.
As interim appraisal we offer an observation and two conclusions. The observation is concerned with the parallelism of the human rights concept and notions about justice and the common good. The duty of all state power to further the common good is – as we have seen in the case of human rights – both supra-positive guiding principle and legal concept, as Bardo Fassbender shows:

“The notions of ‘common good’, ‘common weal’, ‘public interest’, and ‘public spirit’ born in antiquity have in modern times become politico-social guiding concepts – precisely by virtue of their substantive vagueness, their shifting meaning, the changes in their orientational function, and finally because of the various political options associated with them’. Over the past two decades, the conceptuality of the common good has gained new momentum in political theory and social philosophy – against the backdrop of the state losing its long defended monopoly as guardian, interpreter, and enforcement agent of the common good, while a pronounced societal pluralism has made agreement increasingly difficult on a universally binding, substantive exposition of the common good as identity-forming definition of the characteristics of the ‘polity’. … The common good is also a legal concept. Peter Häberle has even spoken of ‘jurisprudence as a science of the common good’. In the legal order of the Federal Republic of Germany, the ‘common good’ or ‘public interest’ serve to justify authority under public law and – limiting fundamental rights and imposing obligations – as legal title and basic rule for resolving disputes where interests collide (principally in relations between the individual and the state, but also between different statutory bodies).”

The first conclusion is that the human rights project would not be beneficial were the triad of morality, law, and politics to be dissolved, leaving only one of the three to carry the load. This could be a real danger if reliance were to be placed solely on juridification of the human rights idea, virtually “filing it away.” Without constant input from morality and ethics it would not only lose its bridging function: the language of human rights would surely lose its

211 On this use of the common good as “value-related formula” on the one hand and legal yardstick on the other, see Stolleis (1987) col. 1061.
215 As per 13 November 2014, the two most important agreements, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) have been ratified by 168 and 162 states respectively (overview in the United Nations Treaty Collection 2014). This has induced me to speak of the enforcement of human rights as a “juridified revolution” (See Schuppert, G. F. (2015) 247 ff.)
force as a “language of political change.” If this is the case, our second conclusion must be that the *language of human rights has to be a multilingual language*, which can enter the debate on the good and just order of a society as a language of morality, law, and politics. Only then can the human rights project successfully *bridge* ethics, law and politics.

II. The standard-setting force of human rights

In the face of unacceptable rules of positive law, as Winfried Brugger has shown, “an opposing ‘higher’, ‘pre-state’, ‘natural’ law of the individual or humanity as such” is needed as a “*normative yardstick*.”\(^{216}\) The search for such a supra-positive standard is particularly incontestable when – as under the Nazi regime – “unacceptable laws” claimed validity as positive state-made law and were accordingly implemented, or should one rather say “executed.” In the Federal Republic of Germany, this search for touchstones in coming to terms with Nazi injustice after the Second World War led to a renaissance of natural law. Under the heading “Natural Law or Legal Positivism,”\(^{217}\) a collection of essays edited by Werner Maihofer addresses the subject.\(^{218}\) But this natural law renaissance was short-lived, producing a subjective “criterion gap” in the country, which not only encouraged receptiveness towards human rights but also resulted in their being incorporated in the constitution, the “Basic Law.”

As Samuel Moyn has described at length,\(^{219}\) the triumphant progress of human rights as normative yardstick began with the “Universal Declaration of Human Rights” in 1948 – slowly at first, but picking up speed from the 1970s. Every form of political rule in the world was now inexorably measured against the yardstick of human rights. We can therefore speak of the standard-setting force of human rights.

Dieter Gosewinkel has discussed this standard-setting force of the language of human rights in a recent publication on citizenship in Europe in

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218 It is striking what a high proportion of these contributions have appeared in Church publications; see, in the order of the list of contents: Süsterhenn (1947); Wolf (1947/48); Weinkauff (1951/52); Utz (1951); Dombois (1955); David (1956).
219 Moyn (2012).
the twentieth and twenty-first centuries. He notes the “breakthrough of a political movement for human rights,” also substantially borne by international organizations such as the “International Labour Organization” (ILO):

“The instrumentalization of human rights in the turmoil of the Cold War and their violation in the state-building process in decolonized regions did not prevent the new universal legal standards from attaining independent status as an effective global measure of equality and justice, and in the 1950s and 1960s, to win a great deal of support in Europe, notably on the anti-imperialist left. This involved highly heterogeneous motives and tendencies. For example, the protest of the European and American left against the Vietnam War and the Russell Tribunals of the 1960s cited the violations of human rights laid down in international treaties and codifications. The cultural upheaval, symbolized as international event by 1968, brought forth new social movements. They justified their demands, more radical than those of the established movements, on grounds of new human rights standards, whose universalism was above state-made law and, so to speak, put this law under ‘top-down’ political pressure for change.”

He has this to say on the rise of human rights as guiding political idea in the United States of the 1970s:

“All these phenomena, which in the late sixties and early seventies consolidated into an international human rights discourse and a global politics of human rights, displayed strong differences – up to and including manifest contradictions – with respect to strength, motivation, and geographical orientation. But they also shared characteristics that proved decisive for the rise of human rights politics in the decades that followed: evocation of legal standards that ranked both legally and morally above the state and put pressure on the state, the claim of global validity for these standards and the transnational organization of the enforcement of human rights norms.”

In Europe, too, human rights unfolded their full force only in the seventies:

“However, it was only in the 1970s that they became an effective political weapon in Europe in the struggle for individual rights, which gradually began to change political systems themselves. This had been preceded by two United Nations human rights covenants concluded in 1966 on civil and political rights and on economic, social and cultural rights. The Soviet Union had joined in 1973 and Poland in 1977. But the political dynamite developed only in the mid-1970s through a particular constellation in which an intergovernmental agreement on human rights standards had been taken up by civil-society groupings and used effectively in opposing their own governments. In Helsinki in 1975, the Conference for Security and Coopera-
tion (CSCE) concluded an agreement between 35 European countries with a highly contested agreement on human rights at its heart.\textsuperscript{223}

Taking the example of Poland, Gosewinkel discusses the impact of the “Helsinki effect” on political practice:

“When – after the opposition movement had invoked the constitution – the Polish government in 1976 envisaged an amendment to confirm the ‘unwavering and fraternal ties with the Soviet Union’, the dissident movement, which was rapidly winning support in society, veered to international law: it now argued that every constitutional amendment should be in keeping with the CSCE agreement. The opposition to the communist regime had thus established a new legal hierarchy: national guarantees of civil rights in the constitutions of socialist countries had to meet the international standard of human rights and were subject to corresponding scrutiny.\textsuperscript{224}

So much on the standard-setting force of human rights.

C. The idea and history of human rights reflected in three major narratives

I. The narrative of Paul Gordon Lauren: the triad of visions, visionaries, and dramatic events

Writing about “visions seen”\textsuperscript{225} in his history of human rights, Lauren describes the idea of human rights as one of the most influential visions of our time:

“Among all ... visions, perhaps none have had impact across the globe more profound than those of international human rights advocates. Thoughtful and insightful visionaries in many different times and diverse locations have seen in their mind’s eye a world in which all people might enjoy certain basic and inherent rights simply by virtue of being human. They have viewed these rights or fundamental claims by persons to obtain just treatment as stemming from nature itself and thus inherited by all men, women, and children on earth as members born into the same human family entitled to be accorded worth and dignity. Moreover, with this premise they have envisioned a world without borders or other distinctions that divide people from one another in gender, race, caste or class, religion, political belief, ethnicity, or nationality. Such visions of human rights have contributed to the long struggle for the worth and dignity of the human person throughout history. More recently, they have heavily shaped the entire discussion about the meaning of

\textsuperscript{223} Gosewinkel (2016) 474.
\textsuperscript{224} Gosewinkel (2016) 479.
\textsuperscript{225} Lauren (1998).
However, changing the world requires not only visions but also a type of actor that Lauren call a visionary:

“The evolution of international human rights, … has required in the first instance people serving as visionaries. There must be thoughtful men and women not only capable of imagining possibilities beyond existing experience themselves, but also of conveying these visions to others. They may do this through their teachings, as in the messages of the prophets Isaiah and Muhammed, the parables of Jesus, the instructions of Kong Qiu, or the lessons of Siddhartha Gautama and Chaitanya. They may achieve this through other forms of communication that infuse dreams such as the speeches of Cicero or Franklin Roosevelt, the poetry of Sultan Farrukh Hablul Matin or Ziya Gokalp, the letters of Abigail Adams, the manifestos of Karl Marx, the journals of Hideko Fukuda, the pamphlets of H. G. Wells, the decisions of the judges presiding over the International Military Tribunal at Nuremberg, the encyclicals of Pope John XXIII, or the songs of the civil rights movement such as ‘We Shall Overcome’. These visionaries may transmit their ideas to others by means of lengthy treatises such as the published writings of Bartholomé de Las Casas, John Locke, Mary Wollstonecraft, or Kang Youwei. Or, they may convey visions through resolutions or proclamations such as the Universal Declaration of Human Rights.”

Interesting in this passage is not only the list of visionaries from Muhammad to Pope John XXIII but also the catalogue of media visionaries have used to spread their message, with particular stress on “manifestos, resolutions and proclamations.” The declaration could be described as a specific form of the language of human rights, if not the specific form of this language.

Paul Gordon Lauren sees a third necessary element apart from visions and visionaries as “conditions for change”: “events of consequence,” by which he means historical events generally described as revolutions: “One of the reasons why these cause-and-effect relationships occur is that events such as revolutions and wars destroy existing structures of authority, privilege, and vested interests, thus making change possible. Violence and upheaval – whether they occur in Europa, North America, Latin America, Asia, Africa, the Middle East, or islands of the Pacific – result in a transformation of established institutions of control.”

So much for the first narrative.

228 Lauren (1998) 290.
II. The narrative of Lynn Hunt: reading novels and declaring rights

1. Reading novels

In this chapter we have already made acquaintance with Lynn Hunt’s “Inventing Human Rights” when explaining human rights not only as a reaction to the experience of injustice but also as a consequence of people’s growing awareness of their own autonomy. Hunt points out that autonomy and empathy belong together, and that it is empathy that comes into play when reading novels; not just any sort, but the “epistolary novels” so popular in the eighteenth century. This literary genre invited the reader, especially the female reader, to identify with the correspondents and to share their joys and sorrows:

“Novels made the point that all people are fundamentally similar because of their inner feelings, and many novels showcased in particular the desire for autonomy. In this way, reading novels created a sense of equality and empathy through passionate involvement in the narrative. Can it be coincidental that the three greatest novels of psychological identification of the eighteenth century – Richardson’s *Pamela* (1740) and *Clarissa* (1747–48) and Rousseau’s *Julie* (17619 – were all published in the period that immediately preceded the appearance of the concept of ‘the rights of man’?"

Hunt’s argument is convincing. Our brief look at the history of globalization as communication history has shown, more or less in passing, that the eighteenth century was the century of correspondence, not primarily business correspondence, but that between people with ties of friendship who used letters as a medium for the free expression of feelings and sensibility:

“The eighteenth century was the golden age of friendship and therefore it was the golden age of the letter. The enthusiasm of friendship could be given free and uninhibited expression in letters; the letter could be called ‘the bulletin of sensibility and friendship’; lively correspondence was the criterion of friendship. … The craving for friendship necessarily entailed a craving for letters. ‘Let us rather exchange amicable letters’, Luise Gottsched wrote to a friend. ‘This is and remains our most delightful occupation for as long as we must be apart’. To write to friends was ‘the most agreeable, enjoyable occupation’ and one knew no greater ‘pleasure’ than to receive letters from friends. With what jubilation they are greeted! They are awaited

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232 See Steinhausen (1968).
‘like the Messiah! With what yearning they are awaited! – ‘I languish, my dearest friend’, wrote Nicolai to Merck, ‘for a letter from you’.”

If letters were thus the form of expression for feelings and sensibility, the epistolary novel, according to Lynn Hunt, was the appropriate medium for engendering awareness of one’s own interiority, communicable to others.

“By its very form, then, the epistolary novel was able to demonstrate that selfhood depended on qualities of ‘interiority’ (having an inner core), for the characters express their inner feelings in their letters. In addition, the epistolary novel showed that all selves had this interiority (many of the characters write), and consequently that all selves were in some sense equal because all were alike in their possession of interiority. The exchange of letters turns the servant girl Pamela, for example, into a model of proud autonomy and individuality rather than a stereotype of the downtrodden. Like Pamela, Clarissa and Julie come to stand for individuality itself. Readers become more aware of their own and every other individual’s capacity for interiority.”

2. Declaring rights

Just as letters and novels in epistolary form were the appropriate medium in the eighteenth century for gaining awareness of one’s own personality, “declarations” seemed to be the obvious medium for communicating that one had become aware of one’s own rights, of rights rooted in one’s own person. This was the case with the declaration of the American colonies in which they expressed their political will to free themselves from the British Crown in the language of a “declaration of rights”:

“The events of 1774–76 thus temporarily fused particularistic and universalistic thinking about rights in the insurgent colonies. In response to Great Britain, the colonists could cite their already existing rights as British subjects and at the same time claim the universal right as equal men. Yet, since the latter in effect abrogated the former, as the Americans moved more decisively toward independence they felt the need to declare their rights as part of the transition from a state of nature back into civil government – or from a state of subjection to George III forward into a new republican polity. Universalistic rights would never have been declared in the American colonies without the revolutionary moment created by the resistance to British authority. Although everyone did not agree on the importance of declaring rights

233 Steinhausen (1968) 307 f.
234 Steinhausen (1968) 48.
or on the content of the rights to be declared, *independence opened the door to the declaration of rights.*

This “*rights talk*”, as Lynn Hunt calls it, spread like an epidemic: “Despite its critics, rights talk was gathering momentum after the 1760s. ‘Natural rights’, now supplemented by ‘the rights of mankind’, ‘the rights of humanity’, and ‘the rights of man’, became common currency. Its political potential vastly enhanced by the American conflicts of the 1760s and 1770s, talk of universal rights shifted back across the Atlantic to Great Britain, the Dutch Republic, and France.”

The most important destination of this “travelling rights talk” was naturally France, where the “language of rights” finally imposed itself:

“The American precedents became all the more compelling as the French entered a state of constitutional emergency. In 1788, facing a bankruptcy caused in large measure by French participation in the American War of Independence, Louis XVI agreed to convocate the Estates-General, which had last met in 1614. As elections of delegates began, declaratory rumbles could already be heard. In January 1789, Jefferson’s friend Lafayette prepared a draft declaration and in the weeks that followed Condorcet quietly formulated his own. The king had asked the clergy (the Frist Estate), the nobles (the Second Estate), and ordinary people (the Third Estate) not only to elect delegates but also to write up lists of their grievances. A number of the lists drawn up in February, March, and April 1798 referred to ‘the inalienable rights of man’, ‘the imprescriptible rights of free men’, ‘the rights and the dignity of man and the citizen’, or ‘the rights of enlightened and free men’, but ‘rights of man’ predominated. *The language of rights was now diffusion rapidly in the atmosphere of growing crisis.*”

This spreading “language of rights”, as Hunt shows, had an internal logic, what we could call a logic of *ongoing expansion*, embracing first religious minorities, then slaves, and finally women, as well. Hunt therefore speaks of the “*bulldozer force of the revolutionary logic of rights*."

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III. The narrative of Samuel Moyn: a political history of the reception of human rights

In “The Last Utopia,” Samuel Moyn presents a quite different narrative from those of Lauren and Hunt. For him the real story of human rights after decades of political insignificance begins with their “explosion” in the 1970s. It is worthwhile considering this story, albeit in much abbreviated form, because it shows what a key role certain actors play in the diffusion of ideas, whether we call them in general terms “transfer agents” or specifically “human rights activists.” Moyn highlights three such “diffusion agents.”

* Social movements and NGOs
The role of NGOs in promoting human rights has been described ad nauseam. We limit ourselves to Moyn’s comments on the role of social movements:

“Most of all, social movements adopted human rights as a slogan for the first time. As the 1970s continued, the identification of such causes as human rights struggles snowballed, continuing across the world throughout the decade (indeed through the present). This serial amplification occurred even as states negotiated the Helsinki Final Act, signed in 1975, that inadvertently provided a new forum for North Atlantic rights activists. And then came 1977, a year of shocking and altogether unpredictable prominence of human rights. One of the most fascinating lessons of the period is how little known were the Universal Declaration and the project of international human rights when it began, and how these earlier ‘sources’ were discovered only after the movements that claimed them got going.”

* The prominent role of Amnesty International
Samuel Moyn is clearly fascinated by the pioneering role of Amnesty International (AI). He has this to say about the organization’s modus operandi:

“Indeed almost alone, Amnesty International invented grassroots human rights advocacy, and through it drove public awareness of human rights generally. Its contribution would reach its highest visibility when it received the Nobel Peace Prize in 1977, the breakthrough year for human rights as a whole, though it began its work years earlier. Unlike the earlier NGOs that invoked human rights occasionally or often, AI opened itself to mass participation through its framework of local chap-

239 MOYN (2012).
240 See, for example, BIANCHI (1997).
ters, each acting in support of specific, personalized victims of persecution. And unlike the earliest human rights groups, it did not take the UN to be the primary locale of advocacy. Skirting the reform of international governance, it sought a direct and public connection with suffering, through lighting candles in a show of solidarity and writing letters to governments pleading for mercy and release. These practical innovations depended in equal parts on a brilliant reading of the fortunes of idealism in the postwar world and a profound understanding of the importance of symbolic gestures.”

One particularly successful method employed by Amnesty International has been the collection and dissemination of information about unacceptable conditions and practices:

“Amnesty International’s novel methods of information gathering went in the 1970s far beyond its original methods of forming adoption groups to write pleas for individual release. And these methods were also critical to how it came to be (and, soon enough, were copied by other organizations). Even before the very early translation of dissident texts provided by AI’s London-based research bureau, the organization had begun to focus its attention on torture in the later 1960s. It pioneered the gathering of information about depredations under Greek military rule from 1967–1974. Providentially, in 1972 the organization opened a Campaign against Torture, published a global analysis of the problem, and initiated a petition drive (the first signatory being Joan Baez, who opened it at an April 1973 concert). Seán MacBride, for his contribution to the campaign, won the Nobel Peace Prize in 1974, thereby raising the profile of human rights and broadcasting the very idea that social movements could coalesce around them. After the political coups in Chile and Uruguay, Amnesty International and other NGOs were active in gathering information and raising consciousness about infractions in those two countries. The information they gathered was spread most notably at the United Nations and in Washington, D.C., where AI opened an office in 1976. Such activities prompted some of the first analyses of AI’s campaigns for wider publics, both in the academy and at large.”

* **Jimmy Carter Superstar**

Samuel Moyn identifies President Jimmy Carter as an absolute star in the popularization of the human rights idea. “Coming out of nowhere,” he was the right man with his deep-rooted morality in the right place and at the right time to spread the message of human rights: “In the right place at the

right time, Carter moved ‘human rights’ from grassroot mobilization to the center of global rhetoric.\textsuperscript{244}

Jimmy Carter’s inaugural address on 20 January 1977, which focused on commitment to the message of human rights, dramatically enhanced the standing of the human rights idea. This is particularly worth noting, because, as the phenomenon of American “civil religion” shows,\textsuperscript{245} each newly elected president of the United States quite deliberately takes the opportunity of the inaugural address to stress the unity of the profoundly American civil religion and the policy he intends to pursue. Jimmy Carter did just this:

“The year of human rights, 1977, began with Carter’s January 20 inauguration, which put ‘human rights’ in front of the viewing public for the first time in American history. This year of breakthrough would culminate in Amnesty International’s receipt of the Nobel Peace Prize on December 10. Carter’s inaugural address on January 20 made ‘human rights’ a publicly acknowledged buzzword. ‘Because we are free we can never be indifferent to the fate of freedom elsewhere’, Carter announced on the Capitol steps. ‘Our commitment to human rights must be absolute’. The symbolic novelty and resonance of the phrase in Carter’s policy is what mattered most of all, since he embedded it for the first time in popular consciousness and ordinary language. Arthur Schlesinger, Jr. once called on the ‘future historian’ to ‘trace the internal discussions … that culminated in the striking words of the inaugural address’. No one, however, yet knows exactly how they got there. But soon after, the term was being interpreted as ‘almost a theological point for Carter. He can’t stamp out sin, but he keeps on praying’.\textsuperscript{246}

But that was not all: in a speech at a ceremony at Notre Dame University, Jimmy Carter even declared human rights to be the \textit{basis for the future foreign policy of the United States}:

“But by spring, Carter gave a programmatic address at Notre Dame’s commencement, laying out a full-scale foreign policy philosophy based on human rights, while Secretary of State Cyrus Vance offered some specifics at the University of Georgia Law School. Even as Carter’s subordinates ‘groped’ to define policy, American elites embarked on an extended discussion of human rights, from their historical origins, to their contemporary meaning, to their case-by-case implications. The issue had become relevant and even ‘chic’, Roberta Cohen, executive director of the International League (who would shortly join the Carter human rights bureau), told the \textit{New York Times}. ‘For years we were preachers, cockeyed idealists, or busybodies and now we are respectable. … Everybody wants to get into human rights. That’s fine,

\begin{footnotesize}
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\item \textsuperscript{244} Moyn (2012) 155.
\item \textsuperscript{245} See my little book: Schuppert, G. F. (2012c) 67 ff.
\item \textsuperscript{246} Moyn (2012) 155.
\end{itemize}
\end{footnotesize}
but what happens if they get bored?’ This upsurge in interest could not compare to that of the 1940s, when even the highest officials did not use the language of human rights (except Winston Churchill once out of office), and internationalists were concerned with the UN alone. In the 1970s, by contrast, popular mobilization and then Carter’s interest kicked off a much larger and more public discussion that continues in the present.”

So much to the narrative of Samuel Moyn.

IV. What the three narratives teach us

All three narratives deal with the “big idea” of human rights, an idea that is so influential that Marcus Llanque in his history of political ideas has no hesitation in calling present times the “age of human rights.” This idea of human rights has gone through a long juridification process, and now finds expression largely in the language of law, to be precise, in the language of law as a language of politics. Despite the depressing stories of growing violations of human rights in the most recent Report of Amnesty International, it can be said that the human rights idea has now imposed itself.

This, however, is only one side of the coin. As the book titles “Visions Seen” and “The Last Utopia” suggest, the idea of human rights cannot be fully juridified. It can remain effective only if it keeps its visionary and utopian roots and continues to draw inspiration from them. If these roots are severed with the stamp “dealt with” as in the human rights conventions, the triad of morality, law, and politics would crumble. The human rights idea would lose its specific role as a morally grounded normative yardstick of politics. In attaining the goal of improving the world it would accordingly still be necessary to read novels and declare rights.

As “rights talk” pertinently indicates, the global dissemination of the human rights idea has always been an ongoing communication process. To succeed, talking about rights has always needed more than a globally comprehensible language. As a result, globalization of the human rights message

249 Shetty (2017) 38 f.
necessarily poses a permanent translation problem. As far as the problem of a common language is concerned, Samuel Moyn rightly stresses that the language of human rights – which also became the language of dissidence in the Soviet Union and the Eastern Bloc and of resistance against Latin American military dictatorships – could become a “lingua franca”:

“It was the decision of a sector of the Latin American left to resist the regional repression in human rights terms that helped make the fortune of the concept in that region and beyond. As in the Soviet Union before, it also mattered that the language proved to be highly coalitional and ecumenical in providing a lingua franca for diverse voices.”

And it is convincing that Moyn so strongly emphasizes the importance of Jimmy Carter as a human rights activist. Not in his role as successfully human rights politician but as a president of the United States who spoke the language of human rights – as “plain language.” Marcus Lanque is therefore quite right to regard it as an essential function of human rights to provide a common language spanning cultural boundaries:

“One can really make politics with human rights and not only set political goals. This points to greater potential for interpreting human rights than the assumption of hegemonic liberalism will have us believe. The human rights idea had already embarked on different paths in the Universal Declaration of Human Rights. The declaration is based not only on a liberal-individualistic understanding of law but also takes account of social and political contexts. It was therefore no systemic inconsistency when in the course of decolonization the collective dimension of human rights was more strongly stressed, along with the self-determination of nations, sovereignty over natural resources, and the protection of indigenous peoples. Humanity, too, can be addressed as a subject of rights, rights to collective goods such as biodiversity, nature, water, the sea, and the atmosphere. Human rights thus provide a language at least for conceptualizing basal conflicts across all cultural differences, hence paving the way to universal communication and cooperation.”

If this is the case, it is only logical to follow Florian Hoffmann in understanding the discursive nature of human rights as the key aspect. Ben Golder summarizes the argument as follows, bringing us back to the parallels with the concept of the common good:

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252 See Bachmann-Medick (2012).
“... for Hoffmann it is precisely this discursive character of human rights (human rights ‘talk’) that ‘secures’ their democratic open-endedness and incipient plurality. … Neither the ‘objective’ discursive meanings of human rights nor their unofficial ‘subjective’ articulations by individual speakers can ever finally be determined or delimited, and for him the very meaning of human rights only emerges fleetingly and from time to time when different discourses and subjective understandings of human rights encounter, affect and modify each other in ‘a dynamic process of mutual feedback loops’. For Hoffmann, this ‘pragmatic perspective aims to comprehend human rights discourse, not in terms of what it could be, or ought to be, but in terms of what it arguably is, namely a plural, polycentric, and ultimately indeterminate discourse amenable to use by nearly everybody everywhere’, which is consequently ‘beyond the control of those creating them, and is ultimately uncertain. There is no single correct signification and thus use of human rights’.”

In other words, if a global history of ideas and knowledge is to be written, the career of the language of human rights as a “language of rights” and a “language of political change” would be an essential element in the project. This being the case, we conclude this chapter with a glance at the various ways in which the language of human rights has been used in various historical contexts and by various actors.

D. The language of human rights as the language of politics at work

I. The myth of a “pure” history of ideas

Writing about human rights between politics and religion, Wolfgang Reinhard reflects on an aspect that naturally captures our attention: the history of ideas and human rights. He posits that there are no free-floating, ready-to-use ideas: they are always born and used in an interest-driven context:

“Pallas Athene, the combative goddess of wisdom, is believed to have emerged fully armed from the head of Zeus. Thus the Greek myth. Ideas are similarly considered to emerge ready-to-use from the brains of geniuses. Thus the myth espoused by the history of ideas. When demythologized, the process looks more modest and more complex. Often enough, a genius merely formulates a long overdue concept. Although a cultural repository of thought provides the raw material for new ideas, these ideas first have to be formulated as they come into being. Often enough, what is new about them is that they establish and conceptualize hitherto incommunicable, perhaps even inconceivable states of affairs, even though with hindsight we can identify their beginnings and roots in the history of ideas. The new is produced by
certain interests under certain underlying conditions, often enough by the need to legitimate the outcome of a development in a changing or in an unchanged environment.\textsuperscript{258}

This need to legitimate certain developments brings us to our next topic.

II. Two notable contexts of application for the language of human rights

1. The language of human rights as a language of legitimacy

There is no disputing that the protection of human rights is of crucial importance for the legitimacy of the secular state. Winfried Brugger:

“Throughout history, the question of [the legitimation of political power] has found a variety of answers. From antiquity until well into the Middle Ages, power relations were mostly based on descent and tradition. This traditional justification of governmental power was flanked by religious justification, which until well into modern times was an essential support for secular and spiritual rule in the Western hemisphere, and in some non-Western cultures such as Islam is still so today. In the modern age, however, a third line of justification for the state has come to the fore, which, from a global point of view, must now be considered dominant. Only a state that respects human rights can count on acceptance by its citizens and describe itself as a state governed by the rule of law.

The 1789 French Declaration of the Rights of Man and the Citizen states this succinctly in Article 2: ‘The goal of any political association is the conservation of the natural and imprescriptible rights of man’, and in Article 16: ‘Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution.’

Developments over the past 200 years can thus be summed up as follows: the justification of the modern state depends essentially (if not exclusively) on respect for human rights.”\textsuperscript{259}

Although it is not fully clear what finally moved the deputies of the French National Assembly to draft the Declaration of the Rights of Man and of the Citizen, they were obviously aware that the special revolutionary situation called for a fundamentally different basis for the legitimacy of political power than in the past:

\textsuperscript{258} Reinhard (2014) 313.
\textsuperscript{259} Brugger (1989) 538–539.
The Assembly finally voted on August 4 to draw up a declaration of rights without duties. No one then or since has adequately explained how opinion finally shifted in favor of drafting such a declaration, in large part because the deputies were so busy confronting day-to-day issues that they did not grasp the larger import of each of their decisions. As a result, their letters and even later memoirs proved tantalizingly vague about the shifting tides of opinion. We do know that the majority had come to believe that an entirely new groundwork was required. The rights of man provided the principles for an alternative vision of government. As the Americans had before them, the French declared rights as part of a growing rupture with established authority. Deputy Rabaut Saint-Etienne remarked on the parallel on August 18: ‘like the Americans, we want to regenerate ourselves, and therefore the declaration of rights is essentially necessary’.

With regard to the function of human rights as fundamentally new legitimation concept for state power, Hunt adds:

“In one document, therefore, the French deputies tried to encapsulate both legal protections of individual rights and a new grounds for governmental legitimacy. Sovereignty rested exclusively in the nation (Article 3), and ‘society’ had the right to hold every public agent accountable (Article 15). No mention was made of the king, French tradition, history or custom or the Catholic Church. Rights were declared ‘in the presence and under the auspices of the Supreme Being’, but however ‘sacred’, they were not traced back to that supernatural origin. Jefferson had felt the need to assert that all men were ‘endowed by their Creator’ with rights; the French deduced the rights from the entirely secular sources of nature, reason, and society. During the debates, Mathieu de Montmorency had affirmed that ‘the rights of man in society are eternal’ and ‘no sanction is needed to recognize them’. The challenge to the old order in Europe could not have been more forthright.”

2. The language of human rights as the language of justification

As far as the language of law as a language of justification is concerned, we have become well acquainted with this phenomenon in connection with the language of international law. The language of human rights as – to quote Bardo Fassbender – key element of the common good under international law – is clearly well suited for deployment in political controversies and conflicts, as the following examples show.

The suitability of the language of human rights as an element in political justificatory rhetoric.

Samuel Moyn offers numerous examples of this suitability in his book on the history of human rights. The first example concerns justification of the entry of the United States into the Second World War particularly its involvement in the struggle against Nazi Germany. The authoritative grounds were stated by Roosevelt and Churchill in the so-called Atlantic Charter. Moyn has this to say:

“The declaration proclaimed the Allies, convinced that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands’. Human rights began first of all as a war slogan, to justify why the Allies had to be ‘now engaged in a common struggle against savage and brutal forces seeking to subjugate the world’. But no one could have said what the slogan implied.”

The “justificatory language” of human rights, as our second example shows, proved extremely useful in justifying the founding of the United Nations, for which good reasons had be found in the light of the failure of the League of Nations: “To the extent that [the American internationalists] remained in the negotiations, human rights and other idealistic formulations reflected a need for public acceptance and legitimacy, as part of the rhetorical drive to distinguish the organization from prior instances of great power balance. It was a narrow portal to offer morality to enter the world, and a far cry from a utopian multilateralism based on human rights.”

Now to the third example: the language of human rights has played a crucial role in the political rhetoric of anti-communism and anti-totalitarianism. Samuel Moyn:

“By the later 1930s, however, a dominant understanding began to crystallize in this prewar struggle over the phrase’s implications: it came to be antitotalitarian, a meaning codified most clearly by the most prominent world figure ever to use the phrase before FDR [Frank Delano Roosevelt, G.F.S.], Pope Pius XI, in largely neglected references dating from 1973. ‘Man, as a person’, Pius declared in Mit brennender

263 MOYN (2012).
265 Concept in MOYN (2012) 57.
266 MOYN (2012) 59.
Sorge, his famous encyclical decrying the fate of religion under the Nazis, ‘possesses rights that he holds from God and which must remain, with regard to the collectivity, beyond the reach of anything that would tend to deny them, to abolish them, are to neglect them’. The pope was on his own journey, having discovered only in these years that the ‘totalitarian’ regimes were hostile to Christianity, after a period of judicious waiting and alliance seeking.267

This example is important because, especially after the Second World War, the Christianization of human rights was to be observed.268 Writing about modern human rights as a task for Christians and Muslims, Heiner Bielefeldt269 describes how, in the light of the success of the human rights idea, both Christianity and Islam have sought to claim this idea for themselves as home grown.

Very prominent was naturally the omnipresent anti-communist thrust of the language of human rights. Samuel Moyn comments:

“Then, by 1947–48 and the crystallization of the Cold War, the West succeeded in capturing the language of human rights for the crusade against the Soviet Union; the language’s main promoters ended up being conservatives on the European continent. Having failed to carve out a new option in the mid-1940s, human rights proved soon after to be just another way of arguing for one side in the Cold War struggle.270 … human rights became almost immediately associated with anticommunism. Besides an international controversy around discrimination against South Asians in South Africa, the two major cause célèbres in which human rights were invoked at the United Nations and in international fora generally were anticommunist in spirit. In one, the Soviet Union was criticized on human rights grounds for prohibiting women who were Soviet citizens from migrating to join their foreign husbands abroad; the second, and most visible of all, revolved around the internment and trial of Cardinal József Mindszenty, the Primate of Hungary, in 1948–1949, and related abuses of Christians in Eastern Europe like the house arrest of Cardinal Josef Beran in Czechoslovakia – both campaigns occurring so quickly after the Universal Declaration as to help define its bearing.”271

269 BIELEFELDT (1996).
270 MOYN (2012) 45.
* The invention of responsibility to protect

On this prominent justification,272 Andreas Rödder273 has this to say, under the heading “between human rights imperialism and indifference: responsibility to protect and humanitarian intervention”:

“The sovereignty of states and universal human rights have repeatedly been evoked as basis and ideals for the international order, especially after 1990 – and have often been at odds. The concept of responsibility to protect,274 formulated in 2005 by the United Nations and adopted by 192 countries, provided a theoretical loophole. If a state failed to meet its responsibility to protect its population, the protection of people against serious violations of human rights justified armed intervention from outside and against the sovereignty of the state in question.”275

We now make a sweeping turn to the “dynamics of the rule of law.”

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272 The Global Centre for the Responsibility to Protect (https://www.globalr2p.org/) summarizes this responsibility to protect by sovereign states as follows:
The R2P Concept
The Responsibility to Protect – known as R2P – refers to the obligation of states toward their populations and toward all populations at risk of genocide and other large-scale atrocities. This new international norm sets forth that:
* The primary responsibility to populations from human-made catastrophe lies with the state itself.
* When a state fails to meet that responsibility, either through incapacity or ill-will, then the responsibility to protect shifts to the international community.
* This responsibility must be exercised by diplomatic, legal, and other peaceful measures and, as a last resort, through military force.

These principles in a 2011 report of the International Commission on Intervention and State Sovereignty and were endorsed by the United Nations General Assembly in the 2005 World Summit Outcome Document paragraphs 138 and 139.

274 See COHEN (2012).