

## The ontology of human rights and obligations

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”If we are going to make sense of the notion of rights we have to answer the question, What exactly is their ontological status?”<sup>1</sup>

### 1. Introduction: The problem of the ontology of human rights and obligations<sup>2</sup>

The idea of human rights has immense global reach and significance, morally and politically. Still, there are many central and unresolved questions regarding the philosophical foundations of human rights. Recently, social ontologists and human rights theorists have asked the same question: What is the ontological status of human rights and obligations?<sup>3</sup>

Human rights are often taken to have a natural, or non-conventional, component since we are believed to have human rights in virtue of being human rather than members of a particular society. This question – what is the ontological status of human rights? – and its answers thus points to an interesting development in the field of social ontology: to extend the investigation from social to moral phenomena, that is, from *institutional* rights and obligations to *human* rights and obligations.<sup>4</sup> Or put differently, the analysis of human rights might extend the explanatory scope of theories of social ontology into moral reality, and perhaps bridge the divide between the social and

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<sup>1</sup> John R. Searle, *Making the Social World*, p. 175.

<sup>2</sup> I will discuss three different senses of rights and obligations; institutional rights and obligations which are dependent on institutions to exist and which an individual have in virtue of her institutional membership, e.g. Searle’s deontic powers and H.L.A. Hart’s special rights; natural rights understood as rights an individual have in virtue of being a human, rather than in virtue of her institutional membership; and human rights understood as natural, equal and universal.

<sup>3</sup> John R. Searle, *Making the Social World*, Susan James, ”Rights as enforceable claims”. *Proceedings of the Aristotelian Society*, New Series, Vol. 103 (2003); Carol Gould, ”A social ontology of human rights” in *Philosophical Foundations of Human Rights*.

<sup>4</sup> Social ontologists move from institutional to presumed non-institutional rights and obligations in explaining the ontological status of human rights. Important work in human rights theory have moved in the opposite direction, i.e. from presumed non-institutional to institutional rights and obligations, e.g. Hannah Arendt’s work.

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the moral. For example, in *Making the Social World*, John Searle extends his investigation to include presumed non-institutional rights, namely, human rights:

There is a peculiar intellectual hole in current discussions of human rights. Most philosophers, and indeed most people, seem to find nothing problematic in the notion of universal human rights. Indeed, Bernard Williams tells us that there is no problem with the existence of human rights, only with their implementation and enforcement.<sup>5</sup>

Note the distinction between the *existence* of human rights, their *implementation* and *enforcement*, which implies that these are three separate questions. Searle's concern is with the existence, and he uses the status function account to give the existence conditions for human rights.

Susan James is another theorist emphasizing the importance of institutions in analyzing human rights. James provides a naturalistic account of human rights, arguing that human rights should be understood as practical entitlements, or effectively enforceable claims, i.e. human rights only exist when they are effectively enforceable. James thus collapses the distinction between existence and enforcement, which contrasts to Searle's account. For a right to be effectively enforceable, there must be "a network of interlocking set of institutions from which duties and rights flow"<sup>6</sup> according to James. So, the existence of institutions is a necessary condition for the existence of human rights on James's account.

Jeremy Bentham's famous passage regarding the nature of rights springs to mind: "What is the state of things to which the supposed existence of these supposed rights is meant to bear reference? A state of things prior to the existence of government, or a state of things subsequent to the existence of government?"<sup>7</sup> That is, are the rights referred to in our human rights talk *natural* in the sense of not being dependent on institutions to exist, or *conventional* in the sense of being

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<sup>5</sup> John R. Searle, *Making the Social World*, p. 174.

<sup>6</sup> Susan James, "Rights as enforceable claims".

<sup>7</sup> Jeremy Bentham, *Anarchical Fallacies* [120]

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dependent on government, or at least institutions to exist, or perhaps like James argues; *practical* entitlements that only exist insofar as they are effectively enforceable? This debate points to a number of interesting ontological questions regarding human rights: How are human rights possible? What is their mode of existence? What are they? Are they natural or conventional? Do they exist at all?

### **1.1 Purpose of this paper**

The purpose of this paper is threefold. First, I will offer a critique of Searle's analysis of human rights as deontic powers deriving from status functions (hereafter "the status function account of human rights"). More precisely, I will argue that his proposed solution to the problem that human rights can exist without being recognized while status functions cannot, rests on a failure to make a distinction between type and token, or the general right (as a kind) and specific instances of that right. I argue that his solution only works for specific instances of human rights and not for human rights as such. Consequently, his proposed analysis of human rights is inadequate since the real problem concerns human rights as a kind.

Second, given that the above argument shows the status function account of human rights to be mistaken, I will offer another interpretation, or reinterpretation, of Searle's account of human rights. This reinterpretation amounts to the view that his proposed justification (what I will refer to as "the argument from human nature and values") in fact provides *conditions of existence* for the human right to free speech, while the status function account provides *conditions of recognition* for the human right to free speech. This, I believe, is a more plausible view. However, it has not previously been discussed since critics have interpreted his view as a status function account of human rights. But, as we will see, this reinterpretation draws on two completely different theoretical frameworks. And furthermore, it is no longer an institutional account of human rights, since the

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ontological question is answered by employing the idea of human nature and a conception of what is valuable rather than status functions.

Third, I will sketch another type of justification for agent's being free in a certain sense. This justification starts from and is closer to the original status function account, and thus does not draw on two completely different theoretical frameworks. More specifically, it starts from the existence of some status functions and then uses the connection between recognizing these status functions and imposing desire-independent reasons for action on oneself and others, which in turn presupposes a freedom to bind one's will in the first place. The basic idea is that there is an important theoretical asset in Searle's framework – the insistence on the deontic status of rights and how the recognition of rights gives rise to desire-independent reasons for action – which has previously been overlooked. Furthermore, this would be a new way of justifying that agents are free in some respects, which starts from within the social world.

Let us begin with a purely conventional account of human rights – Susan James's enforcement account – and then investigate Searle's account.

## **2. Institutional accounts: Rights as effectively enforceable claims**

"By exploring the view that rights depend on the existence of specifiable mechanisms for enforcing them, backed up by effective methods for implementations, we have perhaps refined our appreciation of their character."<sup>8</sup>

James's account of the ontology of human rights implies, contrary to common belief, that these rights are not universal.<sup>9</sup> And this implication is one of her main points since she argues for the twofold claim that rights are less useful than we think and that we would do better shifting to

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<sup>8</sup> Susan James, "Rights as enforceable claims", p. 139.

<sup>9</sup> James uses "rights" in her article rather than "human rights". Given the challenge that is her main concern, to avoid empty gestures and mockery, and other similar passages, a plausible interpretation is that human rights is her concern. In this section, when I refer to James's view of rights, rights should therefore be taken to mean human rights.

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another central concept – justice – in our social critique and efforts to improve society. She offers a narrow analysis of rights as *practical entitlements*, meaning that rights must make a difference to those who hold them. On James's view, rights only exist when they are effectively enforceable. What, then, make a right effectively enforceable? James states three *conditions* of enforceability and four wider *circumstances* in which these conditions are likely to emerge. The three conditions of enforceability are:

- (i) a network of interlocking set of institutions from which duties and rights flow;
- (ii) a duty bearer who can and will fulfil her duties;
- (iii) a right-holder who is capable of exercising her rights.<sup>10</sup>

A central feature of this view is that rights are dependent on institutions to exist. The conventional character of James's conception of rights is also clear in the four circumstances she refers to in explaining when the three conditions of enforceability are likely to emerge: First, that there is an *effective source of political authority*; second, that there is an *even distribution of power* between members of the society in question; third, that there are *adequate resources* for agents who are to fulfill their obligations; and fourth, that there are *shared moral beliefs*, e.g. about the importance of rights.<sup>11</sup>

This analysis is narrow indeed. James's strong conditions of enforceability imply that much fewer people than we normally think have rights, and this is actually one of her main points. The background of her analysis of rights as practical entitlements is a central challenge to human rights: that an appeal to human rights is no more than empty gestures and mockery for those suffering severe human rights violation without any possibility of redress. James's account avoids this charge since rights on this view does make a difference in the lives of those who hold them. Her view of

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<sup>10</sup> James, p. 140.

<sup>11</sup> Ibid, p. 140.

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rights is in opposition to traditional moral or legal views of rights understood as either moral and/or legal claims.<sup>12</sup>

There are important advantages with James's view of rights as practical entitlements. First, she does point to a central challenge to human rights. Her account meets this challenge by offering a narrow definition which avoids the charge of empty gestures and mockery since rights on this view make a practical difference to those who hold them. Second, she offers a constructive and naturalistic account of rights and thereby demystify them. James is clear on the constructive aspect of rights: "... the preconditions of a right may themselves have to be created or altered before the right itself can emerge."<sup>13</sup> Third, she emphasizes previously neglected, or at least downplayed, concepts in human rights theory – obligations and institutions – and employs these in giving a clear account of rights.<sup>14</sup> So, this "enforcement account" is one interesting answer to the ontological status of human rights.

However, collapsing the distinctions between existence, implementation, and enforcement, is the basis of a central objection to James's view raised by Saladin Meckled-Garcia, namely, that there cannot be any rights violations in societies where her three conditions of enforceability are not met, since individuals in these societies do not have rights in the first place.<sup>15</sup> James concedes this point, but emphasizes that this does not mean that it is not morally wrong, or unjust, to treat people in certain ways. She uses the distinction between something being right vs. someone having a right to make this point. Furthermore, she argues that one might still insist on that these rights ought to exist as enforceable claims.<sup>16</sup> I think there is another central difficulty with James's view; it might

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<sup>12</sup> James states clearly that her view is distinct from viewing rights as legal claims: "This analysis of what a right requires departs from a standard view which locates the rights guaranteed by particular societies in legal institutions and refer to them as 'legal rights'", in "Rights as enforceable claims" p. 141.

<sup>13</sup> James, p. 142.

<sup>14</sup> Thomas Pogge's work is an important exception to this statement.

<sup>15</sup> Saladin Meckled-Garcia, "Neo-positivism about rights. The problem with 'rights as enforceable claims'", *Proceedings of the Aristotelian Society*, Volume 105 (2005).

<sup>16</sup> Susan James, "Rights, moral and enforceable: Reply to Saladin Meckled-Garcia" *Proceedings of the Aristotelian Society* New Series, Vol. 105 (2005), pp. 149-153.

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be so *revisionary* that she no longer discusses different conceptions of a human right, but rather two different concepts of rights altogether, since a central feature of the concept of a human right is its universality. These two challenges have a common core, namely, the conventional character of human rights. In the next section, I discuss Searle's solution to these problems, which is different from James's: He aims to preserve the universality and explain how human rights can exist even if not recognized, while at the same time (on one interpretation) still provide an institutional account of human rights. The conception of human rights he discusses has three central features; *natural*, i.e. they follow from our nature, *equal*, everyone has equal rights with everyone else and *universal*, i.e. all human beings have them.<sup>17</sup>

## **2.1. Institutional accounts: The status function account of human rights and obligations**

In *Making the Social World*, Searle extends the investigation from institutional rights and obligations to human rights and obligations, and propose a status function account of human rights. He argues that being human is a status function like any other, and that human rights are deontic powers deriving from this status function. And he offers a justification of human rights based on human nature and a conception of what is valuable. There are a number of other claims and distinctions made in this chapter, such as the distinction between negative and positive rights. One of the main claims is an argument against (nearly all) positive human rights, since they are viewed as putting unreasonable demands – human obligations – on all others.

The main puzzle to be solved is how one can make sense of two conflicting intuitions; to explain how one can preserve both the common sense idea that human rights exist even if not recognized while at the same time agreeing with the skeptics that rights only exist if they are recognized within a legal system. This conflict is spelled out in the inconsistency (given that 'exist' is interpreted univocally) between the two statements below. His aim is to explain that this

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<sup>17</sup> Searle, *Making the Social World*, p. 180.

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inconsistency is merely apparent, i.e. that the two statements can be interpreted in a way which make them consistent, by drawing on the ambiguity of 'existence'.

1. The universal right to free speech did not exist before the European Enlightenment, at which time it came into existence.
2. The universal right to free speech has always existed, but this right was recognized only at the time of the European Enlightenment.<sup>18</sup>

To solve this puzzle, i.e. explain how these two statements can be made consistent, Searle develops an account of human rights in the last chapter of *Making the Social World*.

A number of central points are made in this chapter. First, there is the status function account of human rights, and second, there is the justification of the universal human right to free speech. Third, there is the insistence of the deontic status of rights and that rights provide agents with desire-independent reasons for action. I will discuss each point in turn.

## **2.2 The status function account of human rights**

What, then, is a status function? In *The Construction of Social Reality*, Searle argues that we need three and only three building blocks to explain institutional facts: collective intentionality; imposition of functions; and constitutive rules. According to this theory, an institutional fact is identical with the status function that is imposed on an object by collective intentionality according to the structure of constitutive rules: "X counts as Y in context C".

Constitutive rules play an important role in this theory since these constitutive rules explain what an institution is; an institution is a system of constitutive rules. It is important to make clear that people must collectively accept the constitutive rule that define the institution. Only when the constitutive rules are accepted can we create individual institutional facts within the institution. So, an institutional fact, e.g. the fact that I own my apartment, can only exist given that we have

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<sup>18</sup> Ibid., p. 177.

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accepted the constitutive rules of private property. And the nature of institutional facts is explained through the form of constitutive rules as well since an institutional fact is represented by the Y term in the formula. If we turn to an examination of the institutional facts themselves, the Y term, we might wonder: What kind of statuses are these? Another way to put this question is: What is the content of Y? We have seen that an institutional fact is identical with the status function that is imposed on an object by collective intentionality, and that this imposition follows the form of constitutive rules: “X counts as Y in context C”. Therefore, the question – what kind of statuses are these? – is a question about the intentional content of the Y term. The intentional content is conventional powers and the two main types are positive deontic powers, i.e. rights, and negative deontic powers, i.e. obligations.

In short, an institutional fact is identical with the status function that is imposed on an object by collective intentionality according to the form of constitutive rules: X counts as Y in context C. Institutional facts are observer-relative, ontologically subjective but epistemically objective. Collective acceptance is partly constitutive of institutional facts. And the class of institutional facts is equivalent to the class of existing status functions.

I now turn to the status function account of human rights and obligations. The same theoretical apparatus – collective intentionality; constitutive rules; imposition of function – employed in analyzing institutional rights and obligations, (positive and negative deontic powers), is now employed in analyzing human rights. The central idea of the account is expressed like this:

The logical structure is that we must treat being human as a status, like being private property, being a secretary of state, or being married. In the formula X counts as Y in context C, the Y term is ‘human being’; so if you qualify as a human being, you are automatically guaranteed human rights.<sup>19</sup>

But, can human rights plausibly be analyzed with this conceptual apparatus? Let us first consider the advantages before we turn to the challenges. There are at least three advantages with this

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<sup>19</sup> Ibid., p. 181.

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position. First, if human rights are deontic powers deriving from status functions, then we would have increased our knowledge about their nature and existence, i.e., offered a solution to the problem of the ontology of human rights and obligations. The ontological status of human rights and obligations would be explained by showing that the *conditions of existence* are the same as for institutional rights and obligations, thus there is no more a mystery with these types of rights and obligations than with institutional rights and obligations. This analysis also serves to clarify the *nature* of human rights. The analysis implies that human rights and obligations are dependent on collective intentionality and institutions to exist, and thus that human rights and obligations, like institutional rights and obligations, are essentially social (conventional).

Second, the analysis of human rights as status functions could be used to answer skeptics, such as Jeremy Bentham and Alistair MacIntyre, by arguing that if you take the position that statements about natural or human rights are nonsense you are also committed to the view that statements about other institutional rights are nonsense, which is implausible. Searle writes: "Nobody says the belief in money, private property, or friendship is nonsense."<sup>20</sup>

Third, if the conceptual apparatus developed to explain parts of the social world prove to be able to explain a wider range of phenomena, alleged moral phenomena such as human rights, the explanatory force of the theory is extended.

### **2.3 The objection: Status functions cannot exist without recognition while human rights can**

"Furthermore, I contend that Searle's collective acceptance account of human rights cannot adequately account for the fact that people have these rights even when they are not recognized."<sup>21</sup>

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<sup>20</sup> Ibid., p. 182.

<sup>21</sup> Frank Hindriks, "Restructuring Searle's Making the Social World" in *Philosophy of the Social Sciences*, 43 (3) (2013), p. 373.

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Given these advantages, it is important to investigate the plausibility of this view. Searle brings up a challenge with his own analysis since there seems to be an asymmetry between human rights and other status functions; we want to say that human rights can continue to exist without being recognized while this is not the case for other status functions, i.e. they cannot exist without being recognized since collective intentionality is partly constitutive of the phenomena in question.

Frank Hindriks brings up a similar challenge. In a recent article, he raises central objections to and proposes a revision of Searle's new theory of social reality.<sup>22</sup> One objection is that the status functions account of human rights implies that human rights only exist if they are recognized, and hence, this account is flawed since we clearly wish to say that human rights exist even if they are not recognized: "... human rights cannot just be status functions because, in spite to Searle's argument to the contrary, such an account of human rights cannot do justice to the fact that people have these rights even when they are not recognized."<sup>23</sup> Hindriks makes three related claims in this passage: First, that Searle offers a status function account of human rights; that this account is flawed, and that this is due to the failure of not being able to say that human rights still exist even if they are not recognized. Hindriks's article aims at a general critique and reconstruction of *Making the Social World*, and hence does not go into great detail when it comes to the human rights critique.

I will offer a more in-depth argument here and strengthen Hindriks's argument by adding a different sense of "recognition" to this debate. However, I will question one of Hindriks's premises, namely, that this is a status function account of human rights in section 3.

Let us return to Hindriks's argument. The first claim is that this is a status function account of human rights. And this implies that human rights are social rather than moral, according to this view:

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid., p. 374.

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Unsurprisingly, Searle also analyzes the notion of a human right in terms of deontic powers. He argues that a human right is an institutional status that we have imposed on all human beings ... Human rights, then, are status functions. This implies that, as such, a human right is a social right rather than a moral right. We could refrain from assigning such rights, and if we did, people would not have them.<sup>24</sup>

Hindriks's objection, in short, is this: Searle offers a status function account of human rights. This view entails that human rights exist due to collective recognition, which is in conflict with the claim that human rights can exist without collective recognition. And we clearly want to say that human rights can exist without collective recognition, which this view cannot. Therefore, it is flawed.

Hindriks writes:

In spite of the fact that he provides an institutional account of human rights, Searle tries to make sense of the idea that human rights remain in existence in some sense even when they are no longer recognized. This is surprising because the institutional account entails that human rights exist due to the fact that they are collectively recognized. Searle suggests that the claim that unrecognized rights still exist means that the relevant agent still is a human being, which implies that she meets the (only) condition that has to be met in order to have such a right ... It is not obvious, however, that the fact that this condition is met implies that the right exists. Given the institutional account he provides of them, Searle's existence claim about human rights in the absence of recognition is problematic.<sup>25</sup>

Hindriks's argument starts from the fact that collective intentionality is partly constitutive of status functions on Searle's account. This is indeed a central tenet of the status function account. I would like to clarify this by bringing out two related assumptions on Searle's view behind this tenet. These two assumptions will also be central in my elaboration of Hindriks's objection:

- (i) Concepts which refer to social phenomena are self-referential: "Logically speaking, the statement 'A certain type of substance, x, is money' implies an indefinite inclusive disjunction of the form 'x is used as money or x is regarded as money or x is believed to be money, etc.' But that seems to have the consequence that the concept of money, the very definition of the word 'money,' is self-referential, because in order that a type of thing should satisfy the definition, in order that it should fall under the concept of money, it must be believed to be, or used as, or regarded as, etc., satisfying the definition."<sup>26</sup>

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<sup>24</sup> Ibid., p. 385.

<sup>25</sup> Ibid., p. 385.

<sup>26</sup> Searle, *The Construction of Social Reality*, 1995, p. 32.

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- (ii) The relation - what seems to be the case comes prior to what is the case - holds for all observer-relative features of the world: "It is a logical consequence of the account of the distinction as I have so far given it that for any observer-relative feature F, *seeming to be F is logically prior to being F*, because — appropriately understood — seeming to be F is a necessary condition of being F. If we understand this point, we are well on the road to understanding the ontology of socially created reality."<sup>27</sup>

Given these assumptions, claiming that human rights exist despite not being collectively recognized is indeed problematic. What, then, does Hindriks mean by "recognition"? He distinguishes between three different ways in which human rights might not be recognized. First, there might be disagreement about the human rights themselves, or the content of the Y status function, for instance, a debate of whether or not the UNDHR favors western values over eastern values, according to Hindriks. Second, there might be disagreement about what conditions should be fulfilled for someone to count as having a human right, that is, there might be disagreement about the X term, e.g. is it only men holding property who have rights, or all human beings? Third, the rights might not be recognized in practice, or in other words, the rights might not be enforced, for instance, prisoners of war might be tortured despite the existence of human rights. Hindriks states that the third interpretation is not the relevant sense of recognition in this debate (James will disagree about this point), and that Searle's theory cannot account for either of the former two relevant senses of "recognition". Hence, it is flawed since we clearly wish to say that all human beings have human rights even if they are not recognized in either of these two senses.

#### **2.4 The response: Status functions can exist without being collectively recognized**

Searle uses a parallel to meet this challenge and show that there is in fact no asymmetry between human rights and other status functions. The proposed solution is to emphasize the ambiguity in "existence" which in this context can be taken to mean that "existence without recognition" and

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<sup>27</sup> Ibid., p 13.

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”existence as recognition”, and that human rights share this ambiguity with other status functions.

The ambiguity is explained like this:

But what about cases in which something satisfies the X term but is denied the recognition that goes with the Y term and correspondingly denied the functions that go with the Y status? So, for example, it has sometimes occurred in American history that somebody who was born in the United States and thus automatically qualified as an American citizen was denied the rights of citizenship and perhaps some would deny that we has a citizen. We can say either he lost his citizenship rights or that he kept this citizenship rights but they were not recognized.<sup>28</sup>

If we use the ambiguity of 'existence' stated above, given that someone or something satisfies the X term, then we can make the two statements consistent by interpreting statement (1) in terms of existence as recognition. Searle writes:

We can say with Bentham and MacIntyre that rights, like other status functions, function only to the extent they are recognized. No recognition, no deontic powers. At the same time, it seems that we can share the common sense assumption that you do not lose your rights in cases where they are denied or not recognised. The existence of the ground of the status function in the satisfaction of the X term - you were born in the United States, you are a biological human - is taken as ground for the satisfaction of the Y term. You are entitled to the rights of citizenship, you are entitled to human rights. But one way to read this last sentence is not as saying you are entitled to the existence of the rights, but rather, you are entitled to the recognition of rights that already exists.<sup>29</sup>

The solution to the apparent inconsistency is that (1) can be interpreted in two ways: We can either say that the universal right to free speech did not exist before the Enlightenment or we can say that the universal right to free speech did exist before the Enlightenment but was only recognized at this time. The latter interpretation is consistent with (2).

## **2.5. My critique of the response: It works only for tokens but not types and we need types**

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<sup>28</sup> Searle, *Making the Social World*, p. 182.

<sup>29</sup> *Ibid.*, p. 182.

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I think there are at least two problems with this solution. First, it does not capture the real disagreement between those who hold the position that human rights are dependent on our collective attitudes to exist, and those that do not, that is, the disagreement between conventional theories of human rights and non-conventional, or natural, theories of human rights. In other words, the two statements are indeed consistent on the above interpretation, but only in a trivial sense, since the inconsistency prevails at a fundamental level. I will come back to this point.

Second, the distinction between types of institutional facts and tokens is central to this debate. However, both Searle and Hindriks fails to make this distinction with the implication that Searle's response does not work, and that Hindriks's critique can be made even stronger.

Searle's parallel with citizenship rights does not hold since the proposed solution fails to make the distinction between constitutive rules of a general form and specific instances of those general rules. The example of a person losing his citizenship rights is an example of a specific instance of the constitutive rule of citizenship, and for these cases, it is reasonable either to say that he had his citizenship rights but they were not recognized, or that he did not have his citizenship rights. But citizenship as such, or as a constitutive rule, cannot exist without our collective belief in its existence. The same holds for human rights. The difficulty lies in the general form of the constitutive rule of human rights, and given the central tenets of the status function account, this general form cannot exist without our collective belief in it. This was further clarified in bringing out two related assumptions (i) and (ii) behind this central tenet. In other words, (1) and (2) are only consistent for specific instances of human rights and not for human rights as a kind. And the real and interesting disagreement concerns human rights as a kind. So, the proposed solution does not work which puts the status function account of human rights into question.

The upshot of the discussion so far is this: The distinction between existence and recognition can resolve the inconsistency relating to specific instances of the general rule, but not to the constitutive rule as such. In the example above, we have some unfortunate individuals (specific

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instances of the general rule) who either did not have their citizenship status recognized or were not citizens. But for kinds of things, such as citizenship or the right to free speech, it cannot be the case that either the right to free speech always existed (as a kind) without us being aware of it, given that we interpret human rights as status functions.

So, for Searle's solution to the puzzle to work, we need to say that the universal right to free speech (as a kind) can exist without being recognized, which is in conflict with (i) and (ii), and consequently, giving up a central tenet of the status function account. In other words, we need to give up the status function account of human rights and obligations in order to explain how a human right (as a kind) can exist without being recognized.<sup>30</sup>

If we want to solve the deeper puzzle and make (1) and (2) consistent on a fundamental level, we must answer the question: What does it mean to say that human rights, as a kind, exist even if not recognized?

Furthermore, Hindriks's passages and examples do not clearly distinguish between human rights as a type or a token, while the argument could be made even stronger if he clearly referred to the former, since Searle's proposed solution does not work for types. I would also like to add a different sense of "recognition" to this debate. In Hindriks's first sense of "recognition" (disagreement about the Y-term) and thus in his first example, people already have access to the concept of a human right; they believe that human beings have human rights but the content of the rights themselves are unclear or contested. In his second sense of "recognition" (disagreement about the X-term) and thus in his second example, people already have access to at least the concept of a right, but the disagreement concerns who is to count as human. In short, Hindriks's two relevant senses of "recognition" mean that people already have access to the concept of a human right, or at least access

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<sup>30</sup> Another possible interpretation is that we have always had human rights since we have them in virtue of our human nature, which has been the same or similar enough over time. But this interpretation runs contrary to the first person point of view, that institutional facts only exist from the point of view of the members of the society in question.

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to the concept of a right, implying that there are collective beliefs regarding human rights, or at least rights.

But what if there are no collective beliefs whatsoever about human rights as a kind, or about rights at all as a kind? For example, imagine a society where no one has any beliefs whatsoever about human rights. Or imagine the fictive society of Nowheresville in Joel Feinberg's famous thought experiment in which the inhabitants of Nowheresville do not have access to the concept of a right (and thus not a human right).<sup>31</sup> This is another and deeper sense of recognition, or rather non-recognition than Hindriks's brings up. It is helpful to think about sense of "recognition", or lack of recognition, in terms of "conceptual opacity". Amie Thomasson introduces this notion in an early critique of Searle's theory.<sup>32</sup> Thomasson argues that his theory cannot account for opaque kinds of social facts, roughly, kinds of social facts that members of a particular society do not know about, such as power structures and recessions. More precisely, she introduces the idea of conceptually and epistemically opaque kinds of social facts, defined as: "Call a kind F of social entities 'epistemically opaque' if things of that kind are capable of existing even if no one believes that anything of kind F exists, and 'conceptually opaque' if things of that kind are capable of existing even if no one has any F-regarding beliefs whatsoever."<sup>33</sup> And then she argues that Searle's theory cannot take epistemically and/or conceptually opaque kinds of social facts into account due to (i) and (ii):

But the idea that all social concepts are self-referential entails that there cannot be social facts of any kind whose existence members of that society do not know about – for if there are social facts of a given kind F, people must accept that certain things (or things of certain sorts) are F (and, since their collective acceptance makes it so, they must collectively be right about what things or sorts of things are F).<sup>34</sup>

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<sup>31</sup> Joel Feinberg, "The nature and value of rights", *Journal of Value Inquiry* 4 (4) (1970)

<sup>32</sup> Amie Thomasson, "Foundations for a social ontology", *ProtoSociology*, 2003.

<sup>33</sup> Thomasson, p. 275-276.

<sup>34</sup> Thomasson, p. 275.

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The same type of problem thus shows up for the status function account of human rights.<sup>35</sup> One might even go a step further than Thomasson. Her critique concerns opaque kinds of *social* facts, which are indirectly dependent on collective intentionality to exist (a recession cannot exist without the existence of money) while some people might want to say that human rights understood as moral claims are not dependent on collective beliefs at all. Call the first sense of conceptual opacity the "weak sense" and the second sense the "strong sense".

I think the fundamental disagreement between conventional theories and natural theories of human rights is better captured in terms of conceptual opacity than the three senses of recognition Hindriks's discusses.<sup>36</sup> In other words, the debate between natural rights theorists and conventional rights theorists is whether or not rights can exist even if they are conceptually opaque (in either the weak or the strong sense above). Furthermore, even if Searle's proposed solution to the asymmetry would have worked and hence his solution for making (1) and (2) consistent, one could argue that they would only be consistent in a rather uninteresting way, since the fundamental disagreement can be interpreted in terms of conceptual opacity: statement (1) could be interpreted as stating that rights (as a kind) cannot exist if they are conceptually opaque while (2) denies this.

In summary, this objection convincingly shows that one cannot hold a status function account of human rights if one still wish to be able to say that people can have human rights without collective beliefs in their existence.

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<sup>35</sup> Both Amie Thomasson and Frank Hindriks have criticized Searle's theory of the social world for failing to make a distinction between type and token or between the general constitute rule and specific instances of this rule, but it has not been applied to this context of human rights before.

<sup>36</sup> Hindriks might have this deeper sense of recognition in mind in his reply to G J Lobo: "Finally, insofar as human rights are concerned, I am convinced that Searle's theoretical framework can be used to generate a lot of valuable insights. Any satisfactory attempt at doing so, however, should address the intuition that *human rights are due to what we are and not to what we think, or to what we collectively accept*. An extreme view would deny this intuition altogether and claim that human rights are nothing more than social constructs. Searle's theory can be used to make this point. Searle, however, wants to save the intuition. All he does, however, is hand waving. He claims that "if you qualify as a human being, you are automatically guaranteed human rights" (Searle 2010, 181). But his theory does not have the means to account for this, at least not as it is.", in Frank Hindriks, "Deconstructing Searle's *Making the Social World*" Vol 45 (3) (2015) (My italics)

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Critics such as Raimo Tuomela, Nicholas Fotion, Frank Hindriks, and Gregory Lobo, have interpreted Searle's theory as a status function account of human rights.<sup>37</sup> However, in the next section I will show that other plausible interpretations are available which might also be able to answer the question – what does it mean to say that a human right (as a kind) exists even if it is not recognized? – in a more satisfactory way.

### **3. The argument from human nature and a conception of what is valuable**

This brings us to the second point, the argument from human nature, or the justification of the universal right to free speech. This argument can, on one interpretation, be seen as providing an answer to the above question. Searle notes that the right to free speech is only recognized in a few societies and offers a justification of this right by way of negative and positive argumentation. The negative argumentation consists in arguing against alternative and common accounts such as utilitarianism by arguing that it fails to recognize the deontic status of rights, that rights exist indecently of the consequences. The core of the positive argumentation is that human beings are speech-act performing animals, and that this central feature of our lives is valuable. Searle writes: *"the justification for human rights cannot be ethically neutral. It involves more than just a biological conception of what sorts of beings we are; it also involves a conception of what is valuable, actually or potentially, about our very existence."*<sup>38</sup>

What, if any, is the relation between the status function account of human rights and obligations and the argument from human nature? This chapter is rather brief and the relation between the two arguments is not clear. I now turn to discussing three interpretations of this relation and I will suggest an alternative solution called "the human nature interpretation".

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<sup>37</sup> See e.g. Raimo Tuomela, "Searle's new construction of social reality" and Nicholas Fotion, "Review: Searle on human rights", both in *Analysis*, Vol 71 (4) (2011) as well as Hindriks and Lobos debate in *Philosophy of the Social Sciences*, Vol 45 (3) (2015).

<sup>38</sup> Searle, *Making the Social World.*, p. 190 (italics in original text)

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- A. These are two completely separate arguments; one regarding ontology and the other regarding justification. Call this "the status function interpretation".
- B. The two arguments provide two different components - existence and justification - which are both needed for an adequate account of human rights. Call this "the combined interpretation".
- C. The status function account of human rights and obligations gives us the truth conditions for statement (1) while the argument from human nature gives us the truth conditions for statement (2). Call this "the human nature interpretation".

First, one might think that there is no connection at all between the two arguments. So, the status function account explains the existence of human rights and is a proposed solution to the puzzle, while the attempt to justify the right to free speech is a separate argument. Second, the existence of human rights is always a matter of status functions, and what the argument from human nature attempts to do is to make a distinction between justified or valid, and non-justified, or non-valid, human rights. So, the human right to free speech only exist if it is collectively accepted, and since this right is also given a justification in terms of human nature and a conception of what is valuable, it is a valid universal human right. And related, we can also use this justification to criticize when the right to free speech does not exist (as a status function), arguing that it *ought* to exist as a status function. Both these interpretations were shown to be a non-viable options.

Third, the truth-condition interpretation of the relation between the two arguments is that the status function account provides an explanation of the nature and existence of institutional rights and obligations, while the argument from human nature provides an explanation of the nature and existence of certain other types of rights, i.e. rights which can exist without collective acceptance of constitutive rules. So, the status function account gives us the truth conditions for statement (1) and the argument from human nature gives us the truth conditions for statement (2). This interpretation is in line with a familiar argumentative strategy regarding moral rights where the existence of a

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moral right is understood in terms of what rights we can justify.<sup>39</sup> So, the argument from human nature can be seen as providing an answer to the question of how a right can exist even if not recognized. In other words, the status functions account shows the truth of claim (1) taken literally while the argument from human nature shows the truth of claim (2) taken literally (and when "existence" is used univocally). So, this interpretation of Searle's account of human rights and obligations is that the argument from human nature is used to answer the question: what does it mean to say that a human right exist (as a kind) which is not recognized? If we were to accept the argument from human nature, we could say that rights which can be justified in this way also exists, without any collective beliefs in their existence. So, the argument from human nature gives the *conditions of existence* for the human right to free speech, while the status function account explains what it means for these status functions to be recognized, i.e. it provides the *conditions of recognition* for the human right to free speech.

The background of this interpretation is this: If we want to say that human rights (as a kind) did exist before a certain point in time, we need a different theoretical apparatus than status functions. And perhaps the argument from human nature should, or could, be taken to provide that? This interpretation is a way to question a central premise in the critics' argument including Hindriks's, and furthermore, it offers a way to preserve both the common sense intuition and the skeptics' intuition. However, this interpretation extends well beyond the theory of the social world and draws on two completely different theoretical frameworks. In the final section, I thus offer a sketch of how one might try to justify a certain sense of freedom starting from *within the social world*.

#### **4. Recognizing status functions presupposes the freedom to bind one's will**

I think there are important theoretical assets in Searle's framework – the insistence on *the deontic status of rights* and how the recognition of institutional rights and obligations give rise to *desire-*

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<sup>39</sup> Thanks to William Bülow for a helpful discussion on this point.

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*independent reasons for action* – which are not sufficiently emphasized in the current debate. This might explain why this kind of justification has been overlooked so far.

The core of my argument is this: the mere recognition of a status function implies a desire-independent reason for action on Searle's account. Hence, recognizing a status function means that one is under an obligation, i.e. that one has bound one's will to perform a specific action, and that certain other agents (to whom one has the obligation) have the right that one does so. This presupposes that one was free to bind one's will in this respect to begin with. Consequently, in all societies where agents recognize status functions, the presupposition is that agents are free to bind their wills in certain respects. This argument thus draws on the conceptual relation between status functions, deontic powers, and desire-independent reasons for action on Searle's account, and I will add, the presupposition that one is free to bind one's will in certain respects.

On Searle's account, institutional facts give rise to deontic powers, and society functions by rational agents recognizing these deontic powers, creating desire-independent reasons for action. That is, the recognition of the system of deontic power gives rise to agents having desire-independent reasons for action. The background of the claim that status functions give rise to deontic powers is that status functions serve the purpose of regulating behavior and expectations, and thereby make society possible. To do this, status functions need to have deontic powers tied to them. Society functions by us recognizing these deontic powers, and thereby us creating desire-independent reasons for action. This is the connection between *The Construction of Social Reality* and *Rationality in Action* where he develops an account of practical reason. *The connection is that the mere recognition of a status function as binding on you gives rise to a desire-independent reason for action.*

This connection makes the theory more general and powerful since it provides a link between the ontology of the social world and human action. The notion of a desire-independent reason for action is therefore crucial to the theory. Still, most commentators and critics have focused mainly on the ontology, leaving the connection to motivation and action aside. Given the

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importance of this notion in general and for our specific argument, what exactly is a desire-independent reason for action?

This notion can be clarified if we begin by contrasting it to desire-dependent reasons for action: In the case of desire-independent reasons for action, the reason is prior to the desire and the reason is the ground of the desire. In the case of desire-dependent reasons for action, the desire is prior to the reason and the desire is the ground of the reason.<sup>40</sup> For example, a promise creates a desire-independent reason for action, given Searle's analysis: "... promises are by definition creations of obligations; and obligations are by definition reasons for action."<sup>41</sup> Suppose an agent promises someone to perform act x. By making the promise, the agent has created an obligation to do x, since a promise to perform act x is the same as being under an obligation to perform act x. By creating the obligation, the agent has created a desire-independent reason for action, since the obligation means that the agent has bound her will to perform act x in the future regardless of whether or not she has a desire to perform act x in the future. Thus, the desire to fulfill the promise derives from the obligation, i.e. the reason comes prior to the desire and the reason is the ground of the desire. With this theoretical apparatus in place, let us apply it to a case concerning status functions:

*The professor.* There is a university policy in place stating that professors have the right to decide on teaching methods in the classroom (within reasonable limits) and that professors have an obligation to grade their students' exams within three weeks. This particular professor recognizes the rights and obligations that comes with her status function.

Her status function gives rise to positive and negative deontic powers such as the obligation to grade students' exams within three weeks. And recognizing her status function and the obligation which derives from it means that she has created a desire-independent reason for action for herself, which means that she has bound her will to perform this action, regardless of whether or not she

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<sup>40</sup> Searle, *Rationality in Action*, p. 170.

<sup>41</sup> Searle, *Speech Acts*, p. 93. (?)

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desires to do it. Similarly, if the students recognize their status functions and hence recognize the obligation to comply with the teaching methods, this means that they create desire-independent reasons for themselves and hence bind their wills in this respect. This presupposes that both the students and the professor were free to bind their wills in these respects to begin with.

Now consider a case where one of the parties would not fulfill their obligations. If one of the agents were to object on the ground that the other agent do not fulfill their obligations – e.g. the professor does not grade the exams within three weeks or a student does not comply with the classroom rules – this is seen as a reasonable objection to interfere with the other agent’s freedom in this respect, due to the special relationship which exists between them, given the recognition of the status functions as students and professors. Another person, not having the status function of being a student, would not be justified in requiring the professor to grade her paper, that is, it would not be seen as reasonable for this person to interfere with, or restrict, the professor’s freedom in this respect. Hence, recognizing status functions has as a presupposition that one is free to bind one’s will to begin with respect to this action. In other words, for the professor to be able to bind her will in the sense of creating a desire-independent reason for action for herself presupposes that she is free to bind her will in this respect to begin with. So, having the freedom to bind one’s will is a presupposition of recognizing status functions.

## **5. Concluding remarks**

I have argued that the status function account of human rights is mistaken by showing that Searle’s solution to the objection (human rights can exist without being recognized) only works for tokens but not types, while types is the relevant notion. Furthermore, I elaborated on Hindriks’s objection by emphasizing the distinction between types and tokens of human rights, as well as adding another sense of “recognition”, namely, that human rights can exist without being recognized in the sense of conceptual opacity, i.e. without any collective beliefs regarding human rights or rights at all.

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I offered three different interpretations of Searle's account of human rights, where the two first interpretations (the status function interpretation and the combined interpretation) both took the status functions account to provide the existence conditions for human rights. Both these interpretations were shown to be flawed due to not being able to adequately answer the objection. It is worth noting that critics have assumed the first or second interpretation, but this is not the only possibility. I offered a new interpretation, or reinterpretation; the status function account provides conditions of recognition and thus truth conditions for (1) taken literally, while the argument from human nature provides the conditions of existence and thus the truth conditions for (2) taken literally. Hence, on this interpretation, one is able to say that human rights can exist without being recognized (even in the deeper sense of recognition). So, this reinterpretation remains a viable option and is worth further investigation since it also clarifies the recognition of human rights. However, this reinterpretation draws on two fundamentally different theoretical frameworks.

Therefore, one might wonder if there is a simpler way to justify that individuals are free in some relevant sense, that still stays within the theory of the social world? That is, simpler in the sense of not relying on controversial assumptions regarding human nature and values, and not drawing on two completely different theoretical frameworks. I sketched such an idea by emphasizing the role of desire-independent reasons for action: When agents recognize status functions and their related institutional rights and obligations, this means that they have bound their wills to perform certain actions, regardless of whether they like to or not, i.e. they have created desire-independent reasons for actions for themselves. But this presupposes that the agents were free to bind their wills with respect to these actions to begin with. In other words, recognizing status functions is only intelligible given the background assumption that agents are free to bind their wills in this way.<sup>42</sup>

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<sup>42</sup> However, we do not get to *a right* to e.g. free speech, but, if this argument is correct, we get to agents being free in the above sense. And this is no small thing, given that we started from within the social world. Furthermore, it would be a new and different way of bridging the gap between the social and the moral than previous attempts in social ontology.

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