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The Law in Human Rights Theory

Introduction

This article pertains to meta-human rights theory and, more specifically, to the method of human rights theory. It argues that human rights theorists should take the legal dimension of human rights more seriously. They should start from some of the hard questions raised in current human rights law and practice, and not from ideal moral theorizing as most human rights theorists do, on the one hand, and then address them philosophically, and not only legally as human rights lawyers do, on the other. So doing, we should hope to bridge the gap between current theorizing of human rights by philosophers (even the most practical ones) and by lawyers: the former either see human rights law as a mere translation or enforcement of moral human rights (see Griffin 2008; Tasioulas 2010), or take it as a static and conservative reality that one can then morally reconstruct (see Rawls 1999; Beitz 2009), while the latter's dogmatic discussions of human rights law do not easily embark into normative theorizing or, paradoxically, only by reference to certain kinds of ideal moral theorizing (see Clapham 2006; Salomon 2008).

Of course, this suggestion may, at first, sound counter-intuitive to many moral and political philosophers who may expect to read a legal positive account of human rights and fear for the inherent morality of rights and theories of rights, on the one hand, and even banal to many legal philosophers who may expect to encounter yet another of the many attempts at systematically reconstructing the legal practice of human rights, on the other. The idea, however, is not to deny the moral nature of human rights, but to provide evidence of the normative function of the law of human

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rights for moral human rights themselves. Nor is my goal to reject the moral nature of human rights theory itself, but only to show how legal theory and jurisprudence[2] should constitute our primary resource when accounting morally for contemporary human rights practice.

Thinking about the nature of human rights theory is important for at least three reasons. First of all, so-doing it can situate itself within a broader set of theories, and in particular legal theory, democratic theory, or theories of justice, and can generate beneficial connections between them. Too often, human rights theorists fail to reveal those links, and the credibility of their theories is partly undermined by the artificial severance of those connections given the centrality of human rights to human social and political life. Secondly, thinking about the nature of theory requires a preliminary clarification of what it is a theory of and, therefore, of the nature of human rights.[3] Such preliminary considerations can prove very beneficial in fully identifying or at least delineating the object of one's theoretical endeavour. The answers to many of the important questions human rights theorists identify as being central to human rights theory, and, in particular, the existence, function, content, strength, scope, and justification of human rights, are indirectly and often involuntarily conditioned by theorists' original characterization of the nature of their theory and its object. Moreover, because they do not delineate the nature of human rights and hence of the object of their respective human rights theory, many human rights theorists actually argue at cross-purposes. For instance, whereas Charles Beitz and John Tasioulas claim to be disagreeing with each other, they do not actually refer to the same thing when they use the term 'human rights' and hence talk past each other (see Buchanan 2013a). Finally, some human rights theorists argue that human rights theorizing is part of human rights practice and of their object of study as a consequence.[4] This implies in turn that the nature of human rights theory should not escape their meta-theoretical attention, and that their account of human rights practice should be such that it can acknowledge the self-reflexive normative questioning and the moral critique that are immanent to legal practice.

Of all areas of international law, international human rights law is the most likely to trigger questions pertaining to the role of morality or ethics[5] in its practice, but

2 I am not distinguishing between 'legal theory', 'jurisprudence' and 'legal philosophy' in this article.

3 See Raz's reflections on the nature of legal theory and hence on the nature of law and of the concept of law, Raz 2009.

4 Traces of this Dworkinian approach to legal theory may be found in Beitz 2009: 8-9, 212 (contra 105, though).

5 I will use both terms interchangeably in this article.

also in its theorizing. This is because the content of international legal human rights and that of their moral correspondents are often taken to overlap. Or because their validity and justification is sometimes taken to transcend their legal enactment, at least on the face of international human rights instruments' preambles or judicial reasoning on those grounds (see Nickel/Reidy 2010; Besson 2014). Reacting too quickly to this moral dimension of legal human rights, however, recent human rights theories seem to be focusing almost exclusively on the moral nature of human rights and see their relationship to the law as going one-way only: the transposition and implementation ways (see e.g. Nickel 2007; Griffin 2008; Griffin 2010; Tasioulas 2009; Tasioulas 2010). Those few accounts that have distanced themselves from this form of abstract ethical theorizing about human rights refer to purely political practices, of which the law is just one instantiation or where the law is treated as a static and morally inert reality (see e.g. Rawls 1999; Beitz 2009; Raz 2010a; Raz 2010b). As a result, most recent human rights theories have not only neglected the specifically legal dimension of human rights and how the law contributes to the recognition and specification of human rights *qua* moral rights, but have also artificially severed the links between human rights theory *qua* moral theory, one the one hand, and legal theory, on the other.

Most contemporary human rights theorists[6] do not spend much time theorizing about the nature of their theory and, more specifically, about the legal dimensions of that theory.[7] This is surprising, as the concept of human rights itself is usually regarded as being a moral, a political, and a legal concept.[8] True, human rights theorists disagree about whether human rights theory should be (in part or exclusively) about conceptual analysis.[9] While one may understand why a moral philosopher or a political scientist

6 I will be focusing on recent Anglo-American human rights theories in this article and in particular on Buchanan 2004; Nickel 2007; Griffin 2008; Griffin 2010; Tasioulas 2009; Tasioulas 2009; Beitz 2009; Raz 2010a; and Raz 2010b.

7 In the German tradition, by contrast, important and influential legal or moral-legal theories of human rights were developed early on, and in particular: Alexy 1996; Habermas 1998a; Forst 1999, but those theories are theories of domestic human rights and those authors have found it difficult to transpose their theories to international human rights (see e.g. Habermas 1998a; Habermas 2004; and Cohen's critique: Cohen 2008: 599-600). There are a few exceptions to the absence of reference to law in recent Anglo-American theories of (international) human rights, and in particular: Buchanan 2004; Cali/Meckled-Garcia 2006a; Sen 2009a; Sen 2009b: chap. 17; Perry 2006; Letsas 2009; Cohen 2008; Forst 2010; Buchanan 2013a.

8 Raz 2010a: 336-7 focuses, for instance, on the use of the term 'human rights' in legal and political practice and discusses various conceptions. He claims, however, that he has not 'offered an analysis of the concept of a human right.' There is not enough discipline underpinning the use of the term 'human rights' to make it a useful analytical tool, he argues. According to him, '[t]he elucidation of its meaning does not illuminate significant ethical or political issues' (emphasis added; 336-7).

9 Following Raz 2009: 18, I understand concepts as intermediaries between the world, aspects of which they are concepts of, and terms which express them and are used to talk about those aspects of the world.

may not want to reduce human rights *qua* moral standards or political practice to legal rules and principles, understanding the legal dimension of those standards or practice and/or their interaction with the law on human rights would seem to be an important part of the elucidation of their broader moral and political nature.[10] Human rights constitute a complex normative practice that combines moral, political, and legal elements, and all three ought to be accounted for.

One explanation for the legal neglect in human rights theory may lie in a fundamental distinction made in all or most recent human rights theories: the opposition between the concrete practice of human rights and the abstract standards of human rights.[11] In fact, most human rights theorists identify that opposition as central to their account and situate the legal question in that opposition. They usually claim they are (also) writing about human rights as a legal and political practice and not (only) about human rights as abstract moral standards. Doing so, most of them want to distance themselves from a top-down approach and choose instead a practice-oriented or bottom-up approach (see e.g. Beitz 2009; Raz 2010a: 322-7), or what they sometimes refer to as a "middle-game" or "middle-level" approach (see e.g. Nickel 2007: 3; Beitz 2009: 127, 212). The problem with those "political" or practical theories, however, is that they usually fail to explain how they get to the moral stance from which they can then criticize their practical account. The other group of theorists does not fare much better, however. They have interestingly portrayed themselves as also writing from a bottom-up approach (see e.g. Griffin 2008: 29; Tasioulas 2009: 939). They are not regarded by their critiques as having succeeded to escape top-down theorizing, however, and are coined as "ethical" or traditional accounts of human rights (see the critiques by Beitz 2009: 7 fn. 12). When read carefully indeed, they refer to human rights practice at most as a test case (see Tasioulas 2009: 939; Tasioulas 2010) for their theoretical proposal or as something to criticize or guide from that perspective (see

10 This is why the explanation according to which human rights theorists may actually not be talking about the same thing as human rights lawyers and legal theorists of human rights fails: all human rights theorists factor in human rights practice at one place or the other in their account of human rights and see the law as part of that practice.

11 Other explanations may range from sheer ignorance or lack of interest about the law and legal theory, or scepticism about the legality of international law (including international human rights law); to strong views about the law's autonomy or non-autonomy from morality, or about legal rights' autonomy or non-autonomy from moral rights. While some or all those positions may be justifiable and apply depending on the author, spelling out their justifications would make ethical or political accounts of human rights more transparent and arguably more convincing overall.

Griffin 2008: 204, 209-11). As a result, neither of those two approaches succeeds in bridging the gap between human rights standards and human rights practice. The former fail to explain how they can construct a human rights account from legal practice and then criticize it from an abstract moral stance.[12] And the latter are unclear about how they can focus on abstract standards distinct from human rights practice and then be faithful to the legal practice on that basis.[13]

One of the reasons for human rights theorists' difficulties in bridging the gap between standard and practice lies, arguably, in their failure to take into account the inherently legal nature of human rights[14] or at least to understand it fully.[15] They actually assume they have taken the legal dimension of human rights into account by making the opposition between human rights practice and human rights standards a central part of their theoretical poise on human rights. But what they have done in fact is reduce law to one side of the equation by conflating it with one of the dimensions of human rights politics or practice. No wonder, in those conditions, that human rights law is regarded by those authors as playing a secondary role, if any at all, in human rights theory. It is important, however, not to confuse the relationship between abstract standards and concrete practice, on the one hand, with the relationship between human rights as ethical or moral standards and human rights as legal norms, on the other. It is true that human rights law can play a crucial role in the enforcement of human rights standards in practice by specifying human rights duties in concrete circumstances.[16] But it can also contribute to the identification and specification of those standards at an abstract level, either through the recognition of interests as sufficiently fundamental to give rise to human rights, or through the recognition of pre-existing moral rights. As a matter of fact, the difficulties that beset the opposition between bottom-up and top-down approaches, on the one hand, and the complex relationship between facts and norms in the legal practice, on the other, are well-known to legal theorists. They have long learned to explain the law *qua* normative practice and to live with the tension between social facts and moral norms.

12 This is one of the problems with the two-step approach used by Beitz 2008: 126-8.

13 This is one of the problems with the notion of 'fidelity' to human rights practice in Griffin 2008: 29; Tasioulas 2009: 939. Even a Dworkinian reading of that notion would not help here, as the two steps in Dworkin's conception of legal interpretation do not correspond to a divide between moral reasoning, on the one hand, and legal reasoning, on the other (see Waldron 2009a: 12; Dworkin 1986: 256).

14 See e.g. Griffin 2008: 191 who opposes 'philosophical theory' to 'legal practice'; Tasioulas 2007: 84-5; Nickel 2007: 32-3 who conflates the distinction between moral and legal rights with that between moral rights and enforced or enforceable rights; Sen 2009b: 364-6.

15 See e.g. Beitz 2009: 209-12. There have been recent moves in the right direction, however: see the discussions of the role of law in recognizing human rights in Raz 2010b; and Cohen 2008: 599-600.

16 The role of legal human rights in this respect is best captured by Nickel 2007: 45-8, 187-8.

It seems, therefore, that by not paying sufficient attention to the legal nature of human rights and by conflating the law of human rights too quickly with their politics or practice, current human rights theories miss on a central component of the normative practice of human rights, thus impoverishing their substantive moral account of human rights. Worse, they deprive themselves from essential theoretical insights about the nature of normative practices and, hence, of resources in their efforts to bridge the gap between human rights as critical moral standards and the political practice of human rights. Finally, they neglect the methodological experience and resources of jurisprudence and analytical legal philosophy. The point of this article then is to show how legal theory can provide a useful resource in the light of which many of our current discussions in human rights theory could be more fruitfully held.[17]

My argument will unfold in four steps. In a first section, I will start by explaining why we should take human rights practice as our starting point in human rights theory and not the abstract moral reality of human rights, and in particular why we should focus on the legal practice of human rights. I will then move on to mapping current ethical and political human rights theories, and assessing how the legal dimensions of human rights have been underestimated in most of them. In the third section, I will challenge that very divide between ethical and political accounts of human rights by reference to the legality of human rights. To bridge the gap between those accounts, I will argue for a moral-political account of the nature of human rights and, on that basis, explain the intrinsic relationship between moral and legal human rights. Finally, in the fourth section, I will explain what a legal theory of human rights should look like and what its methodological characteristics should be.

1. From Human Rights Practice to Human Rights Theory: Law as the Missing Link

A. HUMAN RIGHTS THEORY *QUA* THEORY OF A PRACTICE

Human rights theory aims at giving the best philosophical account of human rights. The general aims of human rights theory are, in particular, understanding the nature and function of human rights; determining the object, normative content, right-holders

17 Even though the present article proposes a legal theory of human rights as legal norms, it does not claim to artificially separate law from morality and from politics. On the contrary, it recognizes deep and diverse relationships between legal validity and legitimacy, on the one hand, and morality, on the other: see e.g. Raz 2003; Raz 2004. And this is clearly the case in the field of 'rights,' as we will see.

and duty-bearers of human rights; providing a justification of human rights and accounting for the legitimacy of international human rights law; and, more generally, providing critical normative guidance to human rights practice. What human rights theory should do therefore is account for the current human rights practice, but also criticize it at the same time. It follows that human rights theory implies focusing on the contemporary human rights practice as an object of philosophical enquiry.

Of course, some human rights theorists may prefer to focus on the moral reality of human rights independently from their practice. They may want to explain human rights by reference to moral interests and values and then to moral duties only. However, most of them do state that their philosophical endeavour aims at accounting for the contemporary human rights discourse.[18] It is the case, for instance, when they explain the content of international human rights law instruments or their legitimacy in the face of moral parochialism or exceptionalism. This is because few moral philosophers would relish in speculating over abstract moral reality without any relationship to our daily life. This is even more the case when their object is one that has an eminent role in our daily discourse and practice. This is particularly important for moral entities like rights that create a normative relationship between a right-holder and a duty-bearer. From the perspective of political philosophy, in any case, accounting for the moral features of politics without relationship to the practice and institutions of politics would be a pointless enterprise. At least, if one's aim is not ideal theorizing, but theorizing that aims at justifying, but also at fruitfully criticizing and guiding our political practises.

True, some authors escape this debate by insisting that their human rights theory pertains to elucidating the concept of human rights within our contemporary human rights practice. There are many difficulties with this approach. One of them is that there are presumably many concepts of human rights at play in human rights practice at any given time and across history. As such, conceptual analysis is unlikely to be an easy task and to reveal much about human rights. It is better therefore to focus on the use of the term 'human rights' in legal and political practice. Another difficulty is that focusing on the concept of human rights is a way for some human rights theorists to

18 See also Griffin 2008; Tasioulas 2010. To that extent, the divide between so-called "political" and "ethical" accounts of human rights is a substantive one (as I will explain in the next section), and does not pertain to the methodological divide between theories of the practice of human rights and theories of the moral concept or reality of human rights. Contra: Lafont 2012; Gilabert 2011; Valentini 2012 who all take the "political" approaches to human rights as endorsing a practical methodology and the "ethical" approaches as embarking in pure moral reasoning without reference to the human rights practice.

retreat back to the moral dimension of human rights at the exclusion of their other dimensions in practice and hence to fall back into abstract moral theorizing of human rights. Finally, those human rights theorists thereby assume a ready and perfect correspondence between the legal concept of human rights, provided one single one can be isolated, and the proposed moral one. That correspondence is not granted, however, and needs to be argued for.

In short, then, it is only by grasping the aims of contemporary human rights practice and by understanding its significance and distinctive functions that one gets to the interpretive material that will enable one to establish the nature of human rights. As Cristina Lafont explains, 'it is by understanding the *point* of the practice of human rights that we understand what human rights actually *are*' (see Lafont 2012). The crucial question, then, pertains to the identity of the human rights practice one ought to account for philosophically and to how one may get to the point of that practice.

B. HUMAN RIGHTS THEORY *QUA* THEORY OF A LEGAL PRACTICE

Curiously, few authors have provided a clear account of what they mean by human rights practice (see, Beitz 2009; Buchanan 2013a). It is usually described as a complex ensemble of political and legal practises. Some prefer referring to a discourse, but fail to explain what that discourse amounts to. Interestingly, legal theorists are used to the idea of practice and more specifically of normative practice. After all, the law is a normative practice where abstract moral ideas meet social facts and where both are in mutual tension and influence.

Of course, some may say, and rightly so, that the human rights practice cannot be reduced to human rights law. They refer, for instance, to the anti-slavery or the feminist movements whose human rights claims were not articulated in legal terms. One may quibble with those assertions, especially on historical grounds, however. The law was indeed always in the background of the claims made, at least as models for how to shape those claims. Moreover, even the idea of natural rights was articulated most effectively in practice at times at which it could also take a legal form, for instance through constitutional claims in the context of the American and French revolutions and even before. In any case, it suffices for my purpose here to be able to show that human rights law is central to the current human rights practice, even if it does not exhaust that practice today or throughout the history of human rights.

The centrality of law in the current human rights practice is easy to establish. Most human rights claims are articulated by reference to some legal basis in the Universal Declaration of Human Rights, an international human rights treaty or in the decisions

of an international institution such as the UN Human Rights Council, the Human Rights Committee or a regional human rights court such as the European Court of Human Rights. One may even observe a tendency to over-legalize human rights in the use of the idea of an international "bill of rights" when referring to the core international human rights instruments, i.e. the Universal Declaration of Human Rights and the two UN Covenants on Civil and Political Rights and on Social, Economic and Cultural Rights. Thus, from the use of the idea in our daily discourse, we know that human rights are both a moral idea and a legal one. The same be said of other related ideas such as dignity (see Waldron 2012), for instance, or responsibility.

As a result, there are two ways of approaching a notion like human rights as a philosopher: either through law and the normative practice of moral ideas in legally institutionalized circumstances, or as a pre-institutional moral idea constraining the law and the practice (even imperfectly so) (see Waldron 2012). While the second approach may seem right to those philosophers who regard the law and generally political practice as mere instantiations of morality, I would like to argue that the former is more correct: in most instances of ideas present in both law and morality, the law is not only constrained by moral ideas, but does also influence their normative scope and justification. The relationship between moral norms and their legal correspondents goes both ways, as a result: it is not merely a matter of translation, transposition or specification in the law (what one may coin the "one-way" view), but the law can also be a generator of moral norms and of moral normativity in social circumstances (the "two-way" view). In those cases, it is much more interesting and encompassing methodologically to start from legal norms and move back to moral ones than the reverse.

This approach is particularly promising in the case of human rights, I would like to argue. Human rights do not usually enter our ordinary conversations about interpersonal morality. And when they do, it is in relation to the law and to politics. For instance, human rights are usually explained in relation to social and political status, and status is a legal notion. They are also held to give rise to institutional duties, and this in turn implies a legal order. Thus, when human rights do enter our discussions in moral philosophy, this corresponds to little more than an appropriation of the idea by philosophers, for instance in order to make sense of other moral ideas such as justice, equality or democracy. If this is correct, the best philosophical approach is to start with human rights in the law, both domestic and international, and to account for them the way legal philosophers account for the law. This is what one may refer to as the jurisprudence or legal theory of human rights.

Of course, something may be a legal principle or right without corresponding to a moral principle or right. It may even be morally justified without having a moral correspondent (see e.g. Buchanan/Sreenisavan 2013; Buchanan 2013a). The danger then is that, by focusing only on the legal idea of human rights, one may miss our moral target. It is important to understand, however, that while legal human rights may be justified morally without reference to their corresponding moral rights, it is the mutual relationship between moral and legal rights in human rights that is most interesting morally. As I will argue later in this article, human rights are rights only when there is a correspondence between legal human rights and universal moral rights. The relationship between them goes both ways, as a result: human rights do not exist morally without being also legal, but so-called legal human rights cannot be regarded as human rights without a moral correspondent.

This is actually confirmed in practice: international human rights law refers to the moral grounding of legal human rights and therefore ties in legal human rights closely to moral rights or, at least, to morality (see also Buchanan 2013a; Gilabert 2011: 449). This is the case, for instance, of the Preamble to the Universal Declaration of Human Rights that refers to their derivation from human dignity. Interpretations of human rights by international human rights institutions are institutionalized forms of practical reasoning that serve moral values and channel moral disagreements. At the same time, however, the fact that human rights are said to be grounded in morality and interpreted as such does not make them exclusively moral in nature either, and their legal correspondents a mere transposition of moral rights.

The truth lies in the middle, as it were. To quote Jeremy Waldron, the law contains, envelops and constitutes normative justifications and grounding doctrines and principles: it does not just borrow them from morality (see Waldron 2012). Things that appear to be normatively "deeper" in the law are not necessarily purely moral: the law encompasses morality, and moulds and specifies it. The law is not morally inert and the normativity of law is a special kind of moral normativity: following Joseph Raz, one may say that the law has a double moral life to the extent that it may be both the object of a moral normative assessment and itself a source of moral norms (see Raz 2013). The law's pivotal role in the framework of moral normativity illuminates how human rights law may be both an object of moral assessment and, in turn, a source of new moral norms. It may be both an object of moral critique and a resource for moral reform, and all this internally to the legal practice.

Evidence for this in the human rights context abounds. One may mention, for instance, the ways in which international human rights law provides us with a cano-

nical version of human rights and of their right-holders and duty-bearers, that helps us reach an intermediary stage of agreement in our moral disagreements about the relative importance of objective individual interests and hence about their recognition as human rights in the first place, and thus to focus our moral debates. Institutionalized forms of deliberation about human rights are also provided by international human rights law, thus enhancing the epistemological quality of our access to the corresponding moral rights; one may think of the inclusive and egalitarian nature of those processes of deliberation, but also of their independent quality in many cases.

It follows that when we think philosophically about human rights law, we evaluate human rights law morally albeit by using its own immanent moral resources and standards (see Waldron 2012). As a result, accounting for our contemporary human rights practice requires neither purely abstract moral theorizing nor mere legal description, but what legal philosophers are used to do: theorizing the law in order to identify its immanent morality and hence the immanent critique within the law as a normative practice.

The time has come to turn to the implications for human rights theory *qua* legal theory and for human rights law as a normative practice where human rights law may be evaluated morally by using its own immanent human rights resources and standards. I will start with a critique of the role of law in current human rights theories, first, and then move to an argument about its centrality in our contemporary human rights practice, second. The implications for the method of human rights theory will then be unpacked in the final section of the article.

2. The Law in Existing Human Rights Theories

In this section, I would like to present the two main groups of human rights theories that have arisen in recent years.[19] Those theories have pigeon-holed each other as "ethical" and "political" theories of human rights.

When presenting the accounts that fall in either category, my aim is not to do so generally or exhaustively, but to identify how the legal dimension of human rights is addressed within each of them. Interestingly, both ethical and political theories of human rights share a similar neglect for the legal dimension of human rights. This is surprising, as it is precisely the concern for fidelity to the practice of human rights, including, presumably, their legal practice that is said to lie at the core of their division. And it is even more surprising as some of those human rights theorists have developed

19 The argument presented in this section is a summary of a lengthier argument developed in Besson 2011.

fully-fledged theories of law elsewhere, or even, in some cases, a full theory of legal rights.[20] Remedying the neglect of the legal dimension of human rights may actually help bridge the divide between those two groups of human rights theories, as I will argue in the third section.[21]

Because of the great variation of adjectives that have been used to describe and qualify the different theories of human rights currently in discussion, it may be useful to clarify how I will understand them here. The qualifications "ethical" and "political" have been used to oppose theories of human rights on three different issues: the nature of human rights, their function, and their justification.[22] While it may have been the case at first that the theories that fell into either of those two categories did indeed have opposed views on those three central issues, views which could be qualified either as political or ethical, it is no longer necessarily the case. There are examples of human rights theorists whose view of the function of human rights is political to the extent that they give rise to duties for institutional structures only and not for individuals, but whose account of their nature and justification is ethical, thus providing for a moral-political account of human rights.[23] Moreover, most authors realize now that the justification of human rights necessarily have to be both moral and political if it is to take the concern for public justifiability seriously, thus straddling a further line of divide between ethical and political accounts.

In what follows, I will use those two categories to capture a difference of views pertaining to the nature of human rights exclusively, and not their function or justification. It is precisely with respect to the nature of human rights that the realization of their legal dimension is most instructive; not only does it bridge the divide between the ethical and the political conceptions of human rights, but it sheds light on how human rights law can both implement and shape human rights standards in return and, hence, on how ethics and politics interact in this context. This, in turn, necessarily impacts on the function and justification of human rights.

A. ETHICAL THEORIES OF HUMAN RIGHTS AND THE LAW

Ethical theories of human rights understand human rights as ethical norms that may or may not be legalized within domestic or international law. For those theories,

20 This is the case in Raz 2010a. See, however, Raz 2010b.

21 Other authors have argued for a combination of both approaches (e.g. Valentini 2012; Gilabert 2011), but not based on a legal argument about the nature of human rights.

22 See on those uses, e.g. Tasioulas 2009; Tasioulas 2010; Forst 2010.

23 See e.g. Forst 2010, who describes his own account as being ethical-political.

human rights law is only a concern in a second stage, once the existence and content of human rights have been clarified and need to be either legally enacted or enforced. I will look more closely into one of the most influential ethical theory in this section: James Griffin's.

James Griffin's book *On Human Rights* conceives human rights as universal ethical norms. He mentions the legal dimension of human rights briefly in section 2.1 and addresses it again in chapter 11 of his book (Griffin 2008; also Griffin 2001; Griffin 2010). His argument is that there are discrepancies between the best philosophical (ethical) account of human rights (his) and international law's lists of human rights (Griffin 2008: 191-202). According to him, those discrepancies ought to be corrected by philosophers who can help international lawyers and judges, in particular, grasp the existence conditions of human rights, incorporate those rights into international positive law, or at least make their substantive meaning more determinate (Griffin 2008: 204, 209-11). As a result, even though Griffin seems to be claiming that his account is bottom-up and starts from human rights practice, it does not seem to differ so much from a top-down approach that aims at correcting how the notion of human rights is used in social life (see Griffin 2008: 29).[24]

Griffin's account of the legal dimension of human rights and his account of human rights in general may therefore be deemed incomplete. To start with, Griffin locates the law exclusively in the practice of human rights, and he sees that practice as having to be aligned with the best philosophical account of human rights. This explains why he devotes a single chapter to the legal question, and a chapter that is situated at the end of the book, once his philosophical account of human rights has been spelled out. Another difficulty with Griffin's account of legal human rights, and one that is actually difficult to reconcile with the idea of law as practice only, has to do with what one may refer to as his closet natural law theory.[25] It is not the applicability of natural law theory to human rights that is at issue here. Rather, the problem is the lack of argument for Griffin's take on one of the most difficult issues in legal theory: the relationship between legal validity and moral correctness, on the one hand, and between legal and moral reasoning, especially in the context of judicial reasoning about rights, on the other.[26] Reducing legal human rights to a blanket incorporation

24 See Beitz 2009: 7 fn. 12's critique to the same effect.

25 See Griffin 2008: 204, in which the author discusses the 'incorporation' of human rights, and 203, in which he discusses the 'rule of recognition' of international human rights law. He then goes on to discuss its 'bindingness' (205), but the legitimate authority of international human rights law is an altogether different question from that of their legal content and validity.

26 See e.g. the recent debate between Waldron 2009a; Sadurski 2009; and Waldron 2009b. See also Raz 2001, on the specific moral nature of legal reasoning.

of moral rights into the law (see Griffin 2008: 38), and judicial reasoning with rights to moral reasoning, is too quick and simplistic, and a move even contemporary natural lawyers would not endorse.[27]

A third difficulty with Griffin's understanding of the legal dimension of human rights pertains to his downplay of the rights-dimension of human rights.[28] Since he does not conceive of human rights as rights that generate duties, the legal questions that usually arise out of conflicts of rights (and duties) and their claimability do not appear in Griffin's account. A final difficulty with Griffin's account of the legal dimension of human rights has to do with his understanding of the legal practice of international human rights. The authors he quotes as international human rights lawyers are either philosophers, or realist international lawyers who by definition are sceptical as to both the legality of international law (and human rights law) and the role of ethics in international law (and human rights).[29] By obliterating the writings of mainstream human rights lawyers and international legal theorists, Griffin's line of argument comes close to a Philosopher King's argument.[30]

B. POLITICAL THEORIES OF HUMAN RIGHTS AND THE LAW

Political theories of human rights react to ethical accounts by understanding human rights not as universal moral norms – that would cover too many moral rights and fail the political reality test, they claim – but as politically adopted norms that constitute recognized limits on state sovereignty in current international relations. Despite their sobering practice-based reaction to ethical accounts and in spite of their success in accommodating contingent factors such as the legal enactment of human rights, political theories of human rights ultimately pay very little attention to the legal nature of human rights. The first political account of human rights of this kind was Rawls's in his *Law of Peoples* in 1999. It has since been criticized and refined. One of the most recent political accounts of human rights will be addressed in this section: Charles Beitz's.

Charles Beitz's recent book *The Idea of Human Rights* builds upon his previous

27 For instance, Dworkin's conception of legal interpretation does not correspond to a moral v. legal reasoning divide (see Waldron 2009a: 12; Dworkin 1986: 256).

28 See the critique by Tasioulas 2010.

29 See Griffin 2008: 309 fn. 18 (quoting Allen Buchanan on legitimate authority) and 19 (quoting Eric Posner on state interests).

30 See Griffin 2008: 209-10 about the 'solitary philosopher' and the responsibility of philosophers and political theorists.

work on human rights but also revises it to a certain extent (Beitz 2009, also Beitz 2001; Beitz 2003; Beitz 2004). The book defines itself as a theoretical examination of human rights *qua* central idea to the international or global political practice of human rights as it has gradually emerged as a legacy of World War II. According to Beitz, human rights are matters of international concern whose violation by governments can justify international protective and restorative action ranging from intervention to assistance. Beitz's political or practical account of human rights severs any link to morality and moral rights.

In this sense, Beitz's human rights theory differs from its main competitors: ethical or traditional theories of human rights as developed by James Griffin or John Tasioulas, on the one hand, and political or practical theories of human rights as put forward by John Rawls or Joseph Raz, on the other. It differs from the former in that the author does not regard human rights as a sub-set of universal moral rights, but as a *sui generis* normative practice that protect individuals' urgent interests against standard threats posed to them by their (state) governments, including failure by the latter to regulate the conduct of agents of which they are responsible (Beitz 2009: 109). Beitz does not, however, side with other political or practical accounts of human rights, despite sharing the same Rawlsian practical starting point. For him, human rights violations are not conceived as essentially triggers for international intervention, but only as a cause for international concern, which he understands as a broader protective and restorative notion (Beitz 2009: 109).

While one may be sympathetic to Beitz's practical approach and his definition of human rights as a normative concept to be grasped by understanding its role within the practice as opposed to an independent philosophical idea that would sit uneasily with the practice, one is left wanting more. More specifically, and although it is non-ethical and political, Beitz's concept of human rights curiously seems to be a non-legal one. Mentions to the legality of human rights are limited to historical references to legal human rights instruments and hence to positive human rights law in the book's second chapter. This is regrettable on more than one count.[31]

To start with, Beitz offers no detailed philosophical account of what he means by "normative practice" and legal theory may have helped in this respect. He describes human rights practice as being "both discursive and political" (Beitz 2009: 8) and, in a first approximation, defines it as "a set of norms for the regulation of the behaviour of states together with a set of modes or strategies of action for which violations of

31 The discussion that follows is borrowed from a review of Beitz's book: Besson 2010.

the norms may count as reasons" (ibid: 8). He also says that human rights are a normative concept that plays a normative role in practice by asking for some kinds of actions (ibid: 9). Beitz states, however, that he knows of no good systematic method of interpretation for social practices and therefore has to proceed informally (ibid: 107). This is surprising as the law has been famously and repeatedly described by many legal theorists as a normative practice. While Beitz is right not to equate human rights only with human rights law, the latter does constitute an important part of human rights practice and a part that is intimately connected to the other social and political dimensions of the practice.[32] One may have expected therefore to learn from Beitz how human rights differ from law as normative practice and/or how at least their legal dimension relates to their broader normative nature. True, Beitz mentions Ronald Dworkin's theory of legal interpretation in a footnote. There, he says that he does not believe that that method is entirely suited for the task at hand, but cannot discuss the reasons for his position (Beitz 2009: 107 fn. 19). Beitz's model of interpretation and his so-called "schema" are very similar to Dworkin's, however (Beitz 2009: 107-8 and 19). While Dworkin's theory may have deserved more than a footnote, there are many other elements in legal theory that pertain to the creation of norms through practice that may have come in handy in Beitz's methodological account.

More precisely, legal theory could also have helped Beitz define the nature of human rights by comparison to other kinds of normative practices and, in particular, in explaining whether they are rights at all. First of all, if human rights practice is normative in that it can provide reasons for action, but is neither purely moral nor purely legal, Beitz has to explain in what sense it may be said to be normative, even in a *sui generis* sense of normativity (Beitz 2009: 197). This is at least the case if human rights are understood as more than prudential considerations. One may indeed question the possibility of the existence of reasons for action outside of either law or morality. Beitz defines human rights as protecting urgent or important interests. Even though he explains in detail what those interests are (ibid: 110-1), he is evasive about how one gets from those interests to a specific kind of moral entity, i.e. rights. Maybe Beitz's human rights are not rights at all, but it would be interesting to know why it is the case and why they are referred to as rights. If they are rights, it would have been useful to distinguish them in more detail from moral and legal rights and

32 Some passages in ibid. (e.g. 40-2) seem to indicate the contrary, however. This is even more striking as the account of human rights Beitz puts forward (109) is largely geared towards the international legal regime of human rights, in terms of right-holders and duty-bearers and of their normative consequences in particular.

their complex relationship. Some answers to those questions could be found in Beitz's views on the duties corresponding to human rights. When discussing the supply side of human rights, however, Beitz is very cautious and refers either to responsibilities for first-level agents or to *pro tanto* reasons for second-level agents, and only very rarely to duties (ibid: 115-6, but note 117). He states earlier on in the book, however, that "[i]t is natural to think of international human rights as a type of moral rights, and of moral rights as grounds for the assignment of duties to particular agents" (ibid: 45). Clearly, if Beitz's human rights do not give rise to duties, or at least not in all cases in which they give rise to reasons for action, their nature as rights needs to be accounted for. Or else it is the concept of rights itself that needs to be fleshed out to accommodate those *sui generis* rights.

An explanation for Beitz's neglect of the legal dimension of human rights may be found in the last few pages of the book where he discusses human rights as background norms of the global normative order (ibid: 209-12). There his reasons for distrusting the law become clearer, although they may be contested.

To start with, Beitz seems to endorse Martti Koskenniemi's post-modern assessment of international law as "bent to the advantage of stronger powers" (ibid: 211). While one may share those concerns about power in international relations, disparaging the whole international legal enterprise in one paragraph on that basis may be too quick, especially in the human rights field. International law has built-in correctives for one, as I explained before by reference to the immanent normative critique in legal practice. This explains how the international human rights practice may evolve and is not static; one may think, for instance, of the development of the extra-territorial effect of human rights or of the possibility to hold international organizations under human rights duties and no longer states only. Beitz actually shows in the next paragraph that he is aware of those correctives and refers to them as international legal actors' "normative discipline." He quickly moves on to the human rights practice's internal normative discipline, however, claiming it is more inclusive, but without explaining how it may connect to the internal discipline of international human rights law itself. As a matter of fact, one may argue, following Allen Buchanan's interesting proposal in this respect, that international human rights' legal institutions may actually contribute to inclusive deliberation about human rights and hence to gradually weaken the bite of the cultural parochialism critique of human rights (Buchanan 2008).

Another explanation for Beitz's lack of interest for the legal dimension of human rights stems from his binary approach to both law and morality: he sees human rights as either moral or practical, and as either legal or practical. This approach underestimates

the complex nature of most of our normative practices today, and more specifically the hybrid normative nature of the legal practice itself. While it is true that the content of international legal human rights is not legally determinate and the justification for their authority is not only legal (Beitz 2009: 210), these are two characteristics of legal norms, and even more so of legal rights, that actually make them normatively rich and interesting. No one, not even an exclusive legal positivist, expects the law to be entirely determinate without references to morality and to generate duties to comply that are morally independent (see e.g. Raz 2003; Waldron 2009a). Furthermore, Beitz offers a skewed view of the law at times. For instance, he understands it as precluding disagreement and imposing clear-cut or uncontested inferences (Beitz 2009: 210-1). Again, modern legal theory has uncovered how the law channels disagreement and organizes agreements to disagree (Waldron 1999; Besson 2005). This is particularly the case with human rights that provide for intermediary agreements on the importance of certain interests, but at the same time leave many conflicts open and the specification of duties to further debate (see e.g. Raz 1984b: 208-9; Marmor 1997: 15-6; Besson 2005: chap. 12). One may even argue that the legal guarantees of human rights actually ensure that certain debates take place in society.

3. The Nature of Human Rights: Moral and Legal

Human rights can be understood, I will argue, as moral propositions, and more specifically as a subset of universal moral rights that ground moral duties. When the fundamental interests that found human rights are legally recognized, human rights ought also be described as legal rights. I will explain how those legal rights actually relate to the universal moral rights they recognize as human rights, but also modulate or even create.[33]

Importantly, the morality and the legality of human rights are separated for the sake of exposition, but, as it will become clear from the discussion of their legality, they are two indispensable sides of the same coin and their relationship is not one of unilateral transposition, but a mutual one.

A. THE MORALITY OF HUMAN RIGHTS

Human rights are a sub-set of universal moral rights (i) that protect fundamental and general human interests (ii) against the intervention, or, in some cases, non-intervention

33 The argument presented in this section is a summary of a lengthier argument developed in Besson 2011.

of (national, regional or international) public institutions (iii). Those three elements will be presented in turn.

First of all, a human right exists *qua* moral *right* when an interest is a sufficient ground or reason to hold someone else (the duty-bearer) under a duty to respect that interest against certain standard threats vis-à-vis the right-holder (Raz 1984b: 195). For a right to be recognized, a sufficient interest must be established and weighed against other interests and other considerations with which it might conflict in a particular social context (ibid: 200, 209). General vulnerability to certain standard or ordinary threats also has to be established in the given social circumstances. Once the abstract right is recognized, specific duties will be determined in each concrete case by reference to the specific circumstances and potential duty-bearers. Rights are, on this account, intermediaries between interests and duties (ibid: 208).

Turning to the second element in the definition, *human* rights are universal moral rights of a special intensity that belong to all human beings by virtue of their humanity. Human rights are universal moral rights because the interests they protect belong to all human beings. *Qua* general moral rights, they protect fundamental human interests that human beings have by virtue of their humanity and not of a given status or circumstance (unlike special rights). Human rights are universal and general rights that protect fundamental interests. Those interests constitute part of a person's well-being in an objective sense; they are the objective interests that, when guaranteed, make for a decent or minimally good individual life.

Of course, there has to be a threshold of importance at which a given interest is regarded as sufficiently fundamental in view of people's vulnerability to certain standard threats to give rise to duties and hence to a right. The fundamental nature of the protected interests has to be determined by reference to a context and time rather than established once and for all. What makes it the case, that a given individual interest is regarded as sufficiently fundamental or important to generate a duty and that, in other words, the threshold of importance and point of passage from a general and fundamental interest to a human right is reached, may be found in the normative status of each individual *qua* equal member of the moral-political community, i.e. their political equality or equal political status (see Forst 2010; Forst 1999: 48; Christiano 2008: 138, 156). Only those interests that are recognized as socio-comparatively important by members of the community can be recognized as sufficiently fundamental to give rise to duties and hence as human rights. A person's interests deserve equal respect in virtue of her status as member of the community and of her mutual relations to other members in the community. The recognition of human rights is done mutually and

not simply vertically and top-down, and as a result human rights are not externally promulgated but mutually granted by members of a given political community (see Cohen J. 2004: 197-8; Forst 2010; Baynes 2009: 382). This is particularly important as it allows for the mutual assessment of the standard threats on certain interests that deserve equal protection, on the one hand, and of the equal burdens and costs of the recognition of the corresponding rights and duties, on the other.

As a matter of fact, human rights are not merely a consequence of individuals' equal political status, but also a way of actually earning that equal status and consolidating it. Without human rights, political equality would remain an abstract guarantee; through mutual human rights, individuals become actors of their own equality and members of their political community (Cohen J. 2004: 197-8; Cohen 2008: 585-6). Human rights are power-mediators, in other words:[34] they enable political equality. Borrowing Arendt's words: 'we are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights (Arendt 1951: 147-82).' This is in line with the republican idea of the political community *qua* locus of rights (Cohen 2008: 604 fn. 47).

This brings me to the third element in the definition of human rights: human rights are entitlements against *public institutions* (national, regional or international). Human rights are rights individuals have against the political community, i.e. against themselves collectively. They generate duties on the part of public authorities not only to protect equal individual interests, but also individuals' political status *qua* equal political actors. Public institutions are necessary for collective endeavour and political self-determination, but may also endanger them. This is why one can say that human rights both are protected by public institutions and provide protection against them; they exist because of collective endeavour in order both to favour and constrain it. Of course, other individuals may violate the interests protected by human rights and ought to be prevented from doing so by public institutions and in particular through legal means. This ought to be the case whether those individuals' actions and omissions may be attributed to public authorities or not *qua de jure* or *de facto* organs. However, public institutions remain the primary addressees of human rights claims and hence their primary duty-bearers.[35]

34 For the original idea of mediating duties, see Shue 1988: 703. See also Reus-Smit 2009.

35 This normative argument actually corresponds to the state of international human rights law that only directly binds states and/or international organizations to date and no other subjects (e.g. individuals and groups of individuals). The universality of human rights obligations does not imply the generality of the duty-bearers of the corresponding duties, i.e. a personal scope that reaches beyond institutional agents whether domestic or international and outside a jurisdictional relationship to the right-holders

In short, the proposed account is moral in the justification it provides for human rights and political in the function it sees them vested with: they are indeed regarded both as shields against political authorities and as guarantees of political inclusion. In terms of justification, its moral-political dimension differs not only from accounts based on a purely ethical justification of human rights, but also from accounts that seek a political form of minimalist justification of human rights (Cohen J. 2004). In other words, the proposed moral-political account of human rights can salvage the political role of human rights without diluting their moral justification (see also Forst 2010; Forst 1999, 48-50).

B. THE LEGALITY OF HUMAN RIGHTS

It follows from the moral-political nature of human rights that the law is an important dimension of their recognition and existence. It is time to understand exactly how this is the case and to unpack the inherently legal nature of human rights.

Just as moral rights are moral propositions and sources of moral duties, legal rights are legal propositions and sources of legal duties. They are moral interests recognized by the law as sufficiently important to generate moral duties (see Raz 1984a: 12; Raz 2010b). The same may be said of legal human rights: legal human rights are fundamental and general moral interests recognized by the law as sufficiently important to generate moral duties.

Generally speaking, moral rights can exist independently from legal rights, but legal rights recognize, modify or even create moral rights by recognizing moral interests as sufficiently important to generate moral duties.[36] Of course, there may be ways of protecting moral interests or even independent moral rights legally without recognizing them as legal "rights". Conversely, some legal rights may not actually protect pre-existing moral rights or create moral rights, thus only bearing the name of "rights" and generating legal duties at the most.

The same cannot be said of human rights more specifically, however. True, universal moral interests and rights may be legally protected without being recognized as legal "rights". But, as we will see, human rights can only exist as moral rights *qua* legal rights. Conversely, one may imagine legal norms referred to as human rights that do not correspond to moral human rights. In such a case, the legal norms named "human

(contra: O'Neill 2005; Lafont 2010: 203). See also Besson 2012a on this question.

36 Legal recognition of human rights can therefore be taken to mean, depending on the context, both the legal recognition of an interest *qua* human right and the legal recognition of a pre-existing universal moral right as a human right.

rights" would only give rise to legal duties and not to moral (rights-based) duties. While this may be the case of many so-called human rights in practice, thus undermining the human rights-list's inflation critique (Buchanan 2013b), those legal rights only do not capture what is most characteristic of human rights law and human rights legal reasoning in practice. Legal human rights, in short, should only be regarded as rights *stricto sensu* when their corresponding duties are not only legal, but also moral.

First of all, then, it is true that not all universal moral rights have been or are legally recognized as legal human rights. Some are even expressly recognized as universal moral rights by the law even though they are not made into legal rights or modulated by the law.[37] A distinct question, however, is whether they ought to be legalized and hence protected by law. Respect for universal moral rights ought to be voluntary in priority, and this independently from any institutional involvement. However, the universal moral rights that will become human rights create moral duties for institutions, and hence for the law as well, to recognize and protect human rights (Raz 2010b). This is the only way for them to give them their central egalitarian dimension, and to assess, for instance, whether the interests and threats at stake are general socio-comparatively and to specify and allocate the corresponding duties in an egalitarian fashion. In other words, while being independently justified morally and having a universal and general scope, human rights *qua* subset of universal moral rights are also of an inherently legal nature. To quote Jürgen Habermas, "they are conceptually oriented towards positive enactment by legislative bodies" (Habermas 1998a: 183. See also Habermas 1998b: 310-2). Thus, while legal rights *stricto sensu* are necessarily moral in nature (*qua* rights), human rights (*qua* rights) are also necessarily legal and they are as a result both moral and legal rights.

Secondly, legal human rights may pre-exist as independent moral rights, but not necessarily. The law may specify and weigh moral human interests anew and hence recognize them as universal moral rights in the first place when recognizing them as legal human rights.[38] One may indeed imagine certain political interests whose moral-political significance may stem from the very moral-political circumstances of life in a polity. Thus, the inherently legal nature of human rights and the role the law plays in recognizing given interests as sufficiently important in a group as to generate duties and hence human rights, make it the case that the law either turns pre-existing universal moral rights into human rights and hence actually makes them human

37 One may think here of the moral rights mentioned by the 9th Amendment of the US Constitution.

38 The legalization of pre-existing moral rights is rarely a mere translation; it usually specifies and somehow changes the moral right. See Cali/Meckled-Garcia 2006a; Cali/Meckled-Garcia 2006b.

rights, or recognizes certain interests as sufficiently fundamental to give rise to human rights and to universal moral rights at the same time. In the moral-political account of human rights proposed here, the legal recognition of a fundamental human interest, in conditions of political equality, is part of the creation of a moral-political human right. As a result, human rights cannot pre-exist their legalization as independent moral human rights, but, at the most, only as independent universal moral rights. Of course, the protected interests are universal moral interests that pre-exist legal recognition, but the human rights themselves do not pre-exist as such.

Based on the moral-political account of human rights presented previously, the law provides the best and maybe the only way of mutually recognizing the socio-comparative importance of those interests in a political community of equals.[39] It enables the weighing of those interests against each other and the drawing of the political equality threshold or comparative line that is built into the relational nature of human rights. It also contributes to the evaluation of the standard threats against those interests in given socio-political circumstances. Moreover, the law and the institutions it constitutes allow for the specification and allocation of human rights duties and hence are part of the minimal conditions of abstract feasibility that apply to the recognition of human rights. Because, following Joseph Raz, one may consider that "there is no prescribed allocation [of responsibility, S.B.] independently of existing practices and expectations" (Raz 2013), there can be no abstract rights in the absence of a possible allocation of duties and hence of institutions and a legal framework to do so. Finally, the law also contributes to the public justification and hence to the democratic legitimacy of the individual rights it recognizes as human rights.

In short, the law makes universal moral rights human rights, either by recognizing them as legal rights or by creating them in recognizing certain fundamental interests as socio-comparatively important: it is an integral part of their institutional and relational nature. Its role cannot, as a result, merely be reduced to one among many means of enforcement of pre-existing universal moral rights. This understanding of the relationship between moral and legal human rights is one of mutuality. It goes beyond the traditional understanding of a unilateral relationship of translation-transposition-enforcement of moral rights through legal rights.

39 See e.g. Cohen 2008: 599-600; Forst 2010; Forst 1999: 48-50. See even Pogge 2005: 3 fn. 26, who concedes this point in the case of civil and political rights. It seems, however, that the egalitarian dimension of human rights and hence their inherently legal nature would apply even more to the case of social and economic rights.

4. Human Rights Theory *qua* Legal Theory

I argued in the first section that human rights theory ought to account for our contemporary human rights practice *qua* practice in which human rights law plays a central role. This point has been confirmed now that the moral-political and hence legal nature of human rights has been uncovered. It follows, I explained, that human rights theorizing should start from human rights law *qua* normative practice where the law entails the reflexive moral resources and standards for its own moral justification and critique. This in turn means that human rights theory is most at home within legal theory. The last step in the argument is to delve deeper into the method of human rights theory, and, more specifically, to explain how we should go about doing human rights theory *qua* legal theory.

In a nutshell, I would like to argue that the legal theory of human rights has the benefits of both "practical" and "ethical" human rights theorizing. On the one hand, it starts from the legal practice and is non-ideal, but because it focuses on the law in the practice, on the other, it is not blind to the moral dimension of human rights and is not static and conservative as a result. Taking the legal dimension of human rights seriously gets us past the sterile opposition between those two approaches and allows us to resort to the essential methodological resources of legal philosophy.

The method for the legal theorizing of human rights I propose draws from analytical legal philosophy and, more particularly, from theories of normative positivism and in particular from strands of both the legal philosophy of Joseph Raz on the normativity of law and legal rights (see e.g. Raz 2010b; Raz 2013) and that of Jeremy Waldron on legal interpretation (see e.g. Waldron 2012). The aim is to link those *acquis* in jurisprudence with the methodological proposals made by non-ideal and institutional political theorists like Allen Buchanan (see e.g. Buchanan 2008). This should help focus the latter institutional human rights theories even more on the law and help them work out the way in which human rights law provides its own human rights critique.[40]

The main characteristics of the proposed method are the following. First, human rights theory needs to start with the hard questions raised by the legal practice of human rights, and not with those identified by moral philosophers. This should bring to the fore some questions that have not been addressed by human rights theorists so

40 Buchanan 2013b's book project on the legality of human rights does not go far enough in this respect to the extent that it purports to provide a moral evaluation and justification of the international human rights legal system, and not to explain how that evaluation and justification is internal to the legal system itself. His project remains largely moral and external to the law, as a result.

far. One example is the issue of restrictions to human rights, not only in the context of conflicts of human rights, but also of those restrictions based on public interest and other moral considerations. Other examples are the issue of the cost of human rights and the allocation of human rights duties in practice, that of the stringency of human rights that is everywhere held to be specially strong by moral philosophers, but never found to be enforced as such in practice, or the question of vulnerability that is central to the structure of human rights in practice, but remains strangely undertheorized. A final instance is jurisdiction *qua* condition for the recognition of international human rights in practice (see e.g. Article 1 ECHR), and hence of their applicability to the relationship between a given right-holder and a given duty-bearer.

Second, human rights theory should not take human rights law only as a starting point, but also as an object of justification and a source of critique at the same time. Legal human rights theory does not take human rights practice at face value as a given, but also criticizes it albeit without disparaging it as soon it does not fit an *a priori* moral vision. This enables human rights theory to avoid the Charybda of conservatism one observes in many "political" accounts of human rights that are too faithful to the existing practice, on the one hand, and the Scylla of revisionism one notes in many "ethical" accounts that are too prone to distance themselves from the practice and suggest reforms from an Archimedean point of view, on the other. Of course, the balance is not easy to keep and the interpretive constraints difficult to identify with precision. The legal practice of human rights may not always be morally correct and moral disagreements are often patent within it, but the chosen routes may sometimes be legitimate even so due, for instance, to the epistemological or social constraints that were respected in the light of the existence of widespread and intractable moral disagreement. This is particularly the case of judicial reasoning over human rights: it ought not be conflated with moral reasoning over universal moral rights, and hence ought not be judged merely by those standards (see Waldron 2009a; Sadurski 2009; and Waldron 2009b, also Raz 2001). Such an approach would not pay sufficient attention to the social moral epistemological resources of legal institutions in the human rights interpretation and enforcement process (see e.g. Buchanan 2008). For instance, even though the way in which the judicial practice of human rights by and large settles human rights conflicts by balancing and, more particularly, by balancing interests and hence seems *prima facie* to falling prey to an utilitarian quantification, disparaging that practice and the proportionality principle out of hand merely on abstract moral grounds does not account for that practice's moral contribution and to the other moral considerations at play within the law to both criticize and potentially reform that process.

Besides taking the law seriously and drawing on the resources of analytical jurisprudence, the proposed legal theory of human rights has many advantages for our understanding of human rights when compared with other human rights theories currently available.

First of all, it is a better guide of the practice and a better resource for its potential reforms: it helps understand how the practice actually already has the resources to reform itself and can enable practitioners and philosophers alike to tap on them. Secondly, given the close relationship between legal theory and practice, legal human rights' theorizing places the theorist at the core of the human rights practice and helps understand its central role in the organization of the practice. Understanding the role of legal theory and one's philosophical approach to the law more generally prevents philosophers from giving too much weight to the views of some lawyers over others, for instance. Further, considering human rights theory as legal theory should also help distilling proposals much more effectively among lawyers and hence contributing to the outreach of human rights theorizing in the legal practice.

Thirdly, legal human rights theorizing may help connecting philosophical approaches to human rights to other disciplinary approaches such as human rights history in particular. The law contains its own intellectual and institutional history within its norms and is much more historical to that extent than morality. Legal human rights theorizing can therefore account for change and progress within human rights much better than abstract moral theorizing that cannot explain change (e.g. in moral interests that remain the same across time and history) (see Besson/Zysset 2012). Furthermore, a legal approach to human rights helps make a virtue out of the institutionalization and hence relative contingency of human rights rather than a defect. Human rights indeed require institutions for their duties to be specified and allocated and hence for the rights to be recognized in the first place, and this in turn implies recognizing their contingent and dynamic nature, something that accounts of human rights *qua* moral rights cannot grasp (see Lafont 2012). Finally, devising a legal theory of human rights can provide a welcome contribution to the methodological debate in human rights research more generally. Research about human rights has indeed been conducted without much self-reflection about method and ways of combining different methodological approaches. For instance, understanding human rights history as legal history may constitute a way of tying in human rights history more closely to normative human rights theorizing (see Besson/Zysset 2012).

Las but not least, the proposed legal theory of human rights ought to be distinguished from other existing legal theories of human rights, and in particular from Robert

Alexy's theory of fundamental rights, Carl Wellman's theory of human rights and Ronald Dworkin's human rights' account (see Alexy 2009; Wellman 2010; Dworkin 2011).

Besides being focused only on domestic human rights, Alexy's theory of fundamental rights, first of all, works very differently from the proposed one. It works as a systematic reconstruction of the practice, and in particular of the German constitutional practice. That systematic modellization of a practice is then generalized and regarded as re-exportable. There is no trace of a critique of the existing human rights practice in Alexy's theory, and even less of a discussion of the human rights law-immanent and self-reflexive critique. Carl Wellman's theory of human rights, secondly, starts from an observation totally opposite to mine: according to him, the moral underpinnings of legal human rights are not sufficiently explicit in recent human rights theorizing and need to be accounted for. Unlike the hereby proposed theory, Wellman's sees current human rights theorizing as under-moralized and aims at remedying this. His theory is not interested therefore in the ways in which the law includes moral doctrines and principles and affects moral normativity and hence is actually essential to the moral dimension of human rights, and not just an add-on to a set of moral human rights with an independent moral existence. In short, Wellman underestimates the reciprocity of the relationship between universal moral rights and legal human rights. Finally, the proposed legal theory of human rights comes close in its interpretive dimension to Ronald Dworkin's recent account of human rights. Where they differ, however, is in relation to international human rights law and its differences from domestic human rights law. Those differences hinder a mere transposition of one's theory of constitutional rights to human rights (see e.g. Letsas 2009). But, most importantly from a methodological perspective, our divergence lies in the non-positivist flavour of Dworkin's account and his heightened conflation of law and morality.

Conclusion

This article's concern has been primarily meta-theoretical, and its question was: what should be the nature of human rights theory? Curiously, human rights theorists have neglected this primary step and initial theoretical move of identifying and explaining what their theory is a theory of and what kind of theory it should be.

I have argued we should take the legal dimension of human rights more seriously. This has both a substantive advantage and a methodological one. First of all, understanding the legal dimension of human rights makes for a richer understanding of the nature of human rights themselves, and hence of all the other questions in

human rights theory, such as the justification of human rights in particular. A second benefit of taking the legal dimension of human rights seriously is that human rights theorizing can be done as legal theorizing and tap on the resources of jurisprudence and analytical legal philosophy.

This substantive and methodological proposal comes at the right time. Current human rights theorizing has locked itself in a dead-end through a self-imposed division between "political" and "ethical" accounts. That division has become largely sterile. Most recent commentators recommend combining the substantive and methodological strengths of both approaches. Seeing human rights as "legal" and human rights theory as "legal" does not only help in combining most effectively the benefits of political and ethical accounts of human rights. It also opens up new lines of questioning and enquiring about our contemporary human rights practice that go well beyond what political and moral theories of human rights can offer.

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