

Human Rights *qua* Normative Practice: *Sui Generis* or Legal?

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A review of Charles R Beitz, *The Idea of Human Rights* (Oxford University Press, 2009)
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Charles Beitz's recent book *The Idea of Human Rights* is an important new book in a field of growing academic interest: international human rights theory. Given the author's previous seminal work on the issue and the other important contributions published recently in human rights theory,¹ it has been a long-awaited book.

The book defines itself as 'a contribution to the political theory of human rights' (1). It is 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. It builds upon but also qualifies some of the author's earlier work on human rights (xii–xiii).² In this new book, Beitz understands human rights as matters of international concern whose violation by governments can justify international protective and

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1 Major human rights theory books published in Anglo-American philosophy in the past few years include: Henry Shue, *Basic Rights* (Princeton University Press, 2nd edn 1996); John Rawls, *The Law of Peoples* (Harvard University Press, 1999); Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press, 2004); Carol Gould, *Globalizing Democracy and Human Rights* (Cambridge University Press, 2004); James Nickel, *Making Sense of Human Rights* (Wiley-Blackwell, 2nd rev edn 2007); Michael Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press, 2007); Thomas Pogge, *World Poverty and Human Rights* (Polity, 2nd edn 2008); James Griffin, *On Human Rights* (Oxford University Press, 2008); Amartya Sen, *The Idea of Justice* (Harvard University Press, 2009). Those books have triggered and are still triggering debate. Recent reactions have been published in the form of book reviews, special issues of journals and edited volumes, eg the forthcoming issue of *Ethics* (2010) edited by Allen Buchanan on Griffin's book with essays by Allen Buchanan, John Tasioulas and Rainer Forst and a reply by James Griffin; and the collection edited by Charles Beitz and Richard Goodin, *Global Basic Rights* (Oxford University Press, 2009), assessing the impact of Shue's book 30 years after the publication of its first edition.

2 See eg Charles Beitz, 'Human Rights as a Common Concern' (2001) 95 *American Political Science Review* 269; Charles Beitz, 'What Human Rights Mean' (2003) 132 *Daedalus* 36; Charles Beitz, 'Human Rights and the Law of Peoples' in Deen Chatterjee (ed), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge University Press, 2004) 193.

restorative action ranging from intervention to assistance. The book's distinctive feature is the practical approach to human rights it takes in contrast to more conventional philosophical studies (7–8):³ human rights, he says, are 'not so much an abstract normative idea as an emergent political practice' (xii). In this sense, Beitz's human rights theory differs from its main competitors:⁴ ethical or traditional theories of human rights as developed by James Griffin⁵ or John Tasioulas⁶, on the one hand, and political or practical theories of human rights as put forward by John Rawls⁷ or Joseph Raz⁸, on the other.⁹ It differs from the former in that the author regards human rights not as a subset of universal moral rights, but as a *sui generis* normative practice that protects individuals' urgent interests against standard threats posed to them by their (state) governments, including failure by the latter to regulate the conduct of agents for which they are responsible (see 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 conceived not as essentially triggers for international intervention, but only as a cause for international concern understood as a broader protective and restorative notion (109).

The book is short and elegantly written, which makes it a nice read. It covers a lot of ground and draws from many of the disciplines that have dealt with international human

3 The approach to human rights as middle-level game was first articulated by Nickel (n 1) 3.

4 Of course, this difference also means that Beitz is sometimes talking at cross purposes with some of those authors, especially with Griffin, who does not write about the practice of human rights, whether domestic or international.

5 See Griffin (n 1); James Griffin, 'Human Rights and the Autonomy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 339.

6 See John Tasioulas, 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps' (2002) 10 *European Journal of Philosophy* 79; John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* (Oxford University Press, 2007) 75; John Tasioulas, 'Are Human Rights Essentially Triggers for Intervention?' (2009) 4 *Philosophical Compass* 938; John Tasioulas, 'Taking Rights out of Human Rights' (2010) *Ethics* forthcoming; John Tasioulas, 'The Legitimacy of International Law' in Besson and Tasioulas (n 5) 97. Tasioulas is also currently completing a book under contract with OUP: *The Idea of Human Rights—From Morality to Law* (2011 forthcoming).

7 See Rawls (n 1).

8 See Joseph Raz, 'Human Rights without Foundations' in Besson and Tasioulas (n 5) 321; in the present issue of *Transnational Legal Theory*, Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1(1) *Transnational Legal Theory* 38.

9 This opposition between ethical and political accounts is not perfect, however. On the one hand, as demonstrated by Rainer Forst ('The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) *Ethics* forthcoming), one may defend a political account of the function of human rights while providing a moral justification for human rights. On the other hand, some political accounts of human rights, such as Raz's, understand the nature of human rights as being primarily moral and not only political or legal. The opposition has been crafted and is being used by the main protagonists of the debate (see eg Raz (n 8); Griffin (n 5); Tasioulas (n 6)), however, and as a result it deserves to be mentioned in this context.

rights to date, including legal, social, political and moral scholarship,¹⁰ but without ever becoming arduous or loose. It is comprised of an introduction, six core chapters and a conclusion. In the introduction Beitz identifies various types of skepticism about human rights (Chapter 1); besides radical moral skepticism, he mentions skepticism about human rights enforceability or feasibility, about human nature, about human rights universalism, about human rights being instrumentalised, and about human rights' effectiveness (3–7). Beitz sees it as the task of a successful human rights theory to provide an explanation of the subject-matter that takes this kind of skepticism seriously. Chapter 2 sets the scene by identifying what the author understands as the object of the book: the human rights practice and its emergence since 1945. In that chapter, Beitz makes it clear that he understands human rights practice as including more than human rights law. In Chapters 3 and 4, the author very aptly describes and then criticises two competing accounts of human rights: theories he refers to as Naturalistic (Chapter 3) and Agreement theories (Chapter 4).¹¹ The former includes notably James Griffin's human rights theory, while the latter encompasses Joshua Cohen's in particular. While one may quibble about the definition of natural rights used by Beitz in Chapter 3 and hence with his resulting critique,¹² Chapter 4 is a real *tour de force* in the way it captures a common thread of many contemporary human rights accounts and criticises different categories of agreement theories, ranging from Abdullahi An-Na'im's intercultural agreement to Charles Taylor's unforced consensus, to Joshua Cohen's justificatory minimalism.

Beitz develops the core of his own theory in Chapters 5 and 6. He presents his account of the nature of human rights in Chapter 5 as a fresh start, building upon but also revising Rawls' political account of human rights and presenting his two-level model: human rights are primarily a responsibility of state governments and, in case of failure of these first-level agents, second-level agents in the international community bear *pro tanto* reasons for action. Beitz then turns to the normativity and substantive requirements of human rights in Chapter 6. In that chapter, he also offers an interesting discussion of the value of toleration and of the idea of human rights minimalism. Chapter 7 is devoted to three concrete controversial cases to which Beitz applies his account of human rights: anti-poverty rights, political rights and women's rights. Those concrete examples enable

10 The book's bibliography is very complete in this respect, and the only critique one might make is its unwitting focus on Anglo-American literature, which in a book on international human rights is regrettable; perhaps, though, it is inescapable. This parochial focus is particularly apparent in Beitz's account of the development of international human rights practice post-1945 in ch 2 (14–27).

11 While it is clear how those two groups of theories may differ from the account Beitz presents in the book, they do not differ from the latter with respect to the same dimensions: naturalistic theories concern the nature, function and justification of human rights, while agreement theories pertain mostly to their justification.

12 See the two meanings Beitz distinguishes (51–52). The accounts of new natural lawyers, especially John Finnis (who is mentioned only once in the book, precisely on p 52 in fn 9), would have provided opponents more difficult to defeat on the basis of the argument Beitz develops in ch 3.

him to broach, albeit only from this concrete perspective, the general issues of human rights theory that one would expect to find in such a book: the relationship between human rights and the allocation of corresponding responsibilities, between human rights and sovereignty, and between human rights and cultural parochialism. In the book's concluding chapter Beitz goes back to some of the kinds of skepticism he started with and stresses that their residues are largely theoretical (Chapter 8). He then points to some of the more practical concerns raised by the pathologies of human rights practice and argues that they can usefully be fought against within such practice.

It would be impossible to do justice to Beitz's rich and complex argument in such a short review.¹³ Given the little interest there has been in the legal aspects of international human rights in recent human rights theoretical accounts,¹⁴ I will focus on those aspects of Beitz's book. By reference to the two ways in which I argued Beitz's account differs from competing human rights theories, I will focus not so much on the second prong and the questions raised by the consequences triggered in the case of human rights violations in Beitz's theory (48–49), but on the first prong and the kind of normative practice he thinks human rights are and the types of reasons they give rise to.

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 seems curiously to be a non-legal one. Mentions of the legality of human rights are limited to historical references to legal human rights instruments and hence to positive human rights law in Chapter 2. This is regrettable on more than one count.

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' (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 the norms may count as reasons' (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 (9). Beitz states, however, that he knows of no good systematic method of interpretation for social practices and therefore has to proceed informally (107). This is surprising as the law has repeatedly been described by many legal theorists as a normative practice. While Beitz is right not to equate human rights with human rights law, the latter does constitute an important

¹³ For other critiques, see Tasioulas, 'Triggers' (n 6).

¹⁴ See, for this critique, Samantha Besson, 'Human Rights—Ethical, Political ... or Legal? First Steps in a Legal Theory of Human Rights' in Donald Childress (ed), *The Role of Ethics in International Law* (ASIL Legal Theory Series, Cambridge University Press, forthcoming 2010).

part of human rights practice and a part that is intimately connected to the other social and political dimensions of the practice.¹⁵ One may have expected therefore to learn from Beitz how human rights differ from law *qua* 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 suitable for the task at hand, but cannot discuss the reasons for his position (107 fn 19). Beitz's model of interpretation and his so-called 'schema' are very similar to Dworkin's, however (107–8, 199). While Dworkin's theory may have deserved more than a passing reference in 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.¹⁶ Of the many places in the book where this would have been the case, one may mention, for instance, his account of the ways to reconcile the practical and critical nature of human rights and to explain their middle ground position in practical reasoning (105–6).

More precisely, legal theory could also have given Beitz some help in defining the nature of human rights by comparison to other kinds of normative practice, 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 (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 law and morality. Beitz defines human rights as protecting urgent or important interests. Even though he explains in detail what those interests are (110–11), he is evasive about how one gets from those interests to a specific kind of moral entity, ie rights. Maybe Beitz's human rights are not rights at all, but it would be interesting to know why that 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 their complex relationship. Some of the answers to those questions may come from 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 (115–16, 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 right, and of moral rights as grounds for the assignment of duties to

¹⁵ Some passages in Beitz (eg 40–42) seem to indicate the contrary, however. This is even more striking as the account of human rights Beitz puts forward (109) is largely geared to the international legal regimes of human rights, in terms of right-holders and duty-bearers and of their normative consequences in particular.

¹⁶ For instance, Beitz's discussion of what a normative practice is and how to theorise it normatively and not descriptively at 104–5 is reminiscent of well-known legal theoretical debates about the nature of law and of legal theory.

particular agents' (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 (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 postmodern assessment of international law as 'bent to the advantage of stronger powers' (211). While one may share those legitimate 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. For one thing, international law has built-in correctives. Beitz actually shows in the next paragraph that he is aware of these 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 that it is more inclusive, but without explaining how it may connect to the internal discipline of international 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.¹⁷

Another explanation for Beitz's lack of interest in 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 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 purely legal (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.¹⁸ 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 (210–11). Again, modern legal theory has uncovered how the law channels disagreement and makes it productive by organising agreements to disagree.¹⁹ This is particularly the case with human rights

¹⁷ See Allen Buchanan, 'Human Rights and the Legitimacy of the International Order' (2008) 14 *Legal Theory* 39.

¹⁸ See eg Joseph Raz, 'About Morality and the Nature of Law' (2003) 48 *American Journal of Jurisprudence* 1; Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 *International Journal of Constitutional Law* 2.

¹⁹ See Jeremy Waldron, *Law and Disagreement* (Clarendon, 1999).

that provide for intermediary agreements on the importance of certain interests and the way to balance them, but which at the same time leave many conflicts open and the specification of duties to further debate.²⁰ One may even argue that the legal guarantees of human rights actually ensure that certain debates take place in a society.

The Idea of Human Rights makes a fundamental contribution to the foundations of human rights theory. These few remarks from a legal theorist's perspective do not take anything away from the book's merits. The modest point made in this review is that human rights theorists ought to be more sensitive to the legal dimension of human rights. With a little help from legal theorists, they may be able to bridge the seemingly insuperable gap between the practice of human rights, on the one hand, and the critical standards of human rights, on the other. This is how human rights theory could usefully stand within the practice of human rights and participate in shaping its discourse, thus contributing to Beitz's idea of making theory continuous with the practice (212).²¹

²⁰ See eg Joseph Raz, 'On the Nature of Rights' (1984) 93 *Mind* 194, 208–9; Andrei Marmor, 'On the Limits of Rights' (1997) 16 *Law & Philosophy* 1, 15–16; Samantha Besson, 'Conflicts of Constitutional Rights: Nature, Typology and Resolution' in *The Morality of Conflict: Reasonable Disagreement and the Law* (Hart Publishing, 2005) 423–4.

²¹ See also Ronald Dworkin, *Law's Empire* (Fontana, 1986) ch 1.