

- Prucha FT (1981) *The Great Father: The United States Government and the American Indians, 1789-1871*. Lincoln: University of Nebraska Press.
- Rose CL (1998) Property as the Keystone Right? *Notre Dame Law Review* 71: 329-369.
- Sohn LB and Baxter RR (1961) Responsibility of States for Injuries to the Economic Interests of Aliens. *American Journal of International Law* 55: 545-560.
- Sprankling JG (2013) The Global Right to Property. *Columbia Journal of Transnational Law* 52: 464-505.
- Sprankling JG (2014) *The International Law of Property*. Oxford: Oxford University Press.
- Upham FK (2018) *The Great Property Fallacy: Theory, Reality and Growth in Developing Countries*. Cambridge: Cambridge University Press.
- Vandavelde K (1998) Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties. *Columbia Journal of Transnational Law* 36: 501-527.
- Van Harten G (2007) *Investment Treaty Arbitration and Public Law*. New York: Oxford University Press.
- Waldron J (1990) *The Right to Private Property*. Oxford: Clarendon Press.
- Waldron J (2013) Is Dignity the Foundation of Human Rights? New York University Public Law and Legal Theory Working Papers. Paper, 374: 1-29.

### 3 In What Sense Are Economic Rights Human Rights?

#### Departing From Their Naturalistic Reading in International Human Rights Law

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#### 1. Introduction

International (universal and regional<sup>1</sup>) human rights law (IHRL) protects economic rights (and liberties<sup>2</sup>) (ER), such as the right to property or freedom of contract. What is striking, however, is that it is not the case in all international human rights treaties and regimes,<sup>3</sup> and that, even when it is, the kind of ER protected varies a lot across regimes<sup>4</sup> (see Donnelly, 2007). Interestingly, the same may be said about ER in domestic human rights law (DHRL) (see Daintith, 2004: 61 ff; O'Connell, 2011).

As a result, even an exemplary list of ER is difficult to establish.<sup>5</sup> ER are not as readily identifiable as "civil and political rights" or even as "social rights" (SR). As a matter of fact, the group of rights they are usually associated with are SR. One often speaks of "socio-economic rights" (SER) or "welfare rights" to refer to both ER and SR, for that matter, and, in common human rights language, the term "social rights" is mostly used to include ER, or even vice versa in some cases (e.g., Buchanan, 2013: 167-171).<sup>6</sup> This is, of course, because of the grouping of ER with SR in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) (Craven, 1995; Riedel et al., 2014). This association between SR and ER under the term SER dates back, however, to the recognition of labor rights in the 1920s (e.g., International Labour Organization (ILO) law),<sup>7</sup> but also to the discussions that ensued in the 1940s<sup>8</sup> and led to the adoption of the 1944 Declaration of Philadelphia and of the 1948 Universal Declaration of Human Rights (UDHR).<sup>9</sup>

Importantly, none of the most recent international human rights treaties have protected ER specifically, except for the right to property in international non-discrimination treaties.<sup>10</sup> The Millennium Development Goals (see Alston, 2005b) and their successors, the 2030 Sustainable Development Goals, do not include ER and hardly even mention SR (see Alston, 2016a, 2016b). As a matter of fact, international economic law (IEL) is the regime where the most specific protection of individual

economic rights has been introduced in recent years (e.g., World Trade Organization (WTO) law<sup>11</sup> and European Union (EU) law<sup>12</sup>) (see Alston, 2002: 821–823; Howse and Teitel, 2010).<sup>13</sup>

While indeterminacy about the nature and justification of a given human right or group of human rights is not unusual in IHRL, ER amount to a subset of international legal human rights (ILHR) whose existence, content and scope are the least self-evident in contemporary IHRL. This indeterminacy reveals, this chapter submits, a deeper controversy about the “moralization” or, more accurately, moral “naturalization” of the law of the market (Murphy, 2016), but also, more generally, about the details of the relationship between moral and legal human rights.

The uneasiness pertaining to ER in IHRL does not come as a surprise to those familiar with the controversial nature of contract and property rights in moral and legal philosophy (see Murphy, 2016) and, more broadly, in political theories of justice (see Waldron, 2010b). While some authors have considered them as “natural,” i.e., genuine or real,<sup>14</sup> moral rights (for this Lockean reading, see Nozick, 1974),<sup>15</sup> others have disparaged them as “false” rights that belong to market ordering (for this Rousseauian reading, see Marx, 1862), whereas yet another group understands them as “conventional” moral rights whose justification is instrumental to the value of the relevant social practice (for this Humean reading, see Murphy, 2016; Dagan and Dorfman, 2017). This debate notably pervades private law theory for it affects what the law’s normative take on those rights should be and especially how it should relate to their moral counterparts provided there are any (see Murphy, 2016; Scheffler, 2015). It has actually been reactivated by the recent opposition between neo-naturalist approaches to promising and contract (e.g., Bernstein, 2011) and the conventional approach that had become largely undisputed in the second part of the 20th century.

Curiously, however, that controversy about the moral nature and justification of contract and property rights has not yet reached current discussions of ER in human rights theory. This is surprising given the strong ideological debates about the relationship between the economy and social justice that pervaded the 1920s and 1940s.

True, some human rights theorists have discussed whether ER actually amount to “human rights.”<sup>16</sup> So doing, however, they have approached those rights mostly as “natural” or real moral rights (e.g., Nickel, 2007: 123; Hertel and Minkler, 2007: 7–9; Risse, 2009; Pogge, 2009; Mantouvalou, 2012, 2015; Gilibert, 2016; Queralt, 2017), for this is the kind of rights ILHR are usually held to be. Trapped into what one may refer to as a “naturalistic” reading or interpretation of IHRL (see, however, Buchanan, 2013: 162–164), those authors have faced a binary choice and quandary: either they justify ER as natural moral rights (e.g., Mantouvalou, 2012, 2015; Collins, 2015; Gilibert, 2016; Queralt, 2017) and thereby qualify them as “human rights” or, provided they argue against

such a direct grounding in human interests or values, they are reduced to justifying them as “moral goals” instead of rights (e.g., Nickel, 2013, 2015).

In fact, discussions of ER in human rights theory have mostly focused on other topics, and in particular on the differences between ER and “other” human rights and on ER’s complementarity to the latter. That focus actually mirrors the critical discussions of SER of the 1960s (e.g., Cranston, 1967). Lately, however, empowered by a bolder self-perception of the success of SER,<sup>17</sup> contemporary debates among international human rights lawyers have moved away from questions of feasibility, justiciability and universality.<sup>18</sup> Regrettably, the new directions chosen have not always been the best ones, and it is time therefore for their companion discussions in human rights theory to shift focus as well.

In this chapter, I would like to go back to the original question of the nature and justification of ER as ILHR, and link that discussion to current debates in private law theory. My aim is to clarify ER’s international legal normative regime and their ties to various kinds of moral rights, either real or conventional, but also to other moral principles such as social justice (see Waldron, 2010b; Supiot, 2016). I purport to explore the various relationships (of recognition, specification and/or creation) between the legal and moral norms that protect ER. The chapter proposes to nuance the standard “mirroring” (Tasioulas, 2017) approach to the relationship between moral and legal human rights, according to which the latter unidirectionally transpose or specify the former without retroaction on the moral rights themselves, and especially without distinction between whether the moral rights recognized, specified or created as legal rights are real or conventional moral rights.

Based on this more nuanced account of the normative structure of human rights, this chapter’s aim is to extract current interpretations of ER from the naturalistic moral reading that has become predominant among international human rights lawyers and theorists. As I will argue, that reading risks either corseting their interpretations of ER *qua* human rights into a neoliberal straightjacket, on the one hand, or, conversely, by depriving their understanding of SR from their co-constitutive relation to ER *qua* SER, to reducing the remaining SR into a desocializing program of assistance to the poor and the passive role they have been assigned in IHRL since the 1960s, on the other. Instead, the proposed conventional moral reading of ER in IHRL should help, on the one hand, channeling their legal interpretations towards the social and egalitarian considerations that fit their conventional moral quality and, on the other, revealing the crucial role the law, including IHRL, can and should play in specifying and enforcing them as active and relational rights.

Accordingly, the chapter’s argument is five-pronged. In a first section, it discusses the underpinnings of the naturalistic reading in the origins of ER, before arguing against it (1.). In a second section, and in a search

for an alternative non-naturalistic account of human rights, the chapter discusses the normative nature and layers of human rights in general, and explores the multiple and mutual relationships between moral and legal human rights and, more specifically, between real or conventional moral rights and legal human rights (2.). In the third step, the chapter turns to a normative qualification of ER, and argues that ER are best considered as conventional moral rights justified by reference to the value of the social and economic practice they are part of, but also as conventional moral-legal human rights (3.). In the fourth and final section, the chapter explores various implications of the proposed conventional moral reading of ER in DHRL and IHRL, and especially consequences for the egalitarian- and social justice-oriented interpretation of ER and for the development of international legal regulation of markets that could be better aligned with the social practice whose value justifies the protection of conventional ER in IHRL (4.).

For the purpose of this chapter, ER in IHRL may be understood to cover rights to have economic activities (that have to do with money or the market), i.e., rights to relate to others (i) in activities pertaining to economic goods (e.g., that may become the object of property or of contract), (ii) provided those activities, and the social practice they are part of, protect important human interests. Following Nickel's taxonomy, the proposed conception of ER includes three clusters of rights: "using and consuming" (consumption); "transacting and contracting" (contract); and "acquiring, holding and alienating" (property) (Nickel, 2007: 125). One may add a fourth one that does not amount to a right to a commodity, to quote the 1944 Declaration of Philadelphia: exchanging one's labor (work). In turn, those may be spelled out further to include four bundles of ER: rights to buy, sell, use and consume goods and services; to engage in independent economic activity; to hold both personal and productive property; and rights to sell one's labor (Nickel, 2007: 123). They encompass, in particular, and based on contemporary regimes of IHRL, the following rights and liberties: freedom of contract (e.g., Article 16 EUFRC. See Elster, 1994: 211), the right to property (e.g., Article 17 UDHR; Article 1 Protocol 1 ECHR; Article 17 EUFRC; Article 21 ACHR; Article 14 ACHPR; Article 16 CEDAW; Article 5 CERD; Article 15 CRPMW; Article 12 CRPD. See Waldron, 2013; Dagan and Dorfman, 2017) and the right to work (e.g., Articles 6–9 ICESCR; Article 15 EUFRC. See Gilibert, 2016; Mantoulavou, 2015; Collins, 2015).<sup>19</sup>

A final methodological *caveat* is in order. The present chapter amounts to an exercise in normative legal theory applied to IHRL (Besson, 2017): it interrogates and organizes the content of the international legal normative order of human rights, and ER in particular, from the point of view of moral rights. It assumes, indeed, that IHRL *qua* law amounts to a normative order within morality, but to one that is distinct from others. More specifically, it considers that legal reasoning about human rights, like legal reasoning in general, is (moral) reasoning of a special kind. The chapter

approaches IHRL, accordingly, as containing, enveloping and constituting normative justifications: it does not just borrow them from morality. Things that appear to be normatively "deeper" (e.g., Nickel, 2007: 126) about IHRL are not necessarily genuinely moral or "natural": the law *qua* normative social practice<sup>20</sup> encompasses both real and conventional morality<sup>21</sup> and may even mold the latter or add normative material of its own (see Waldron, 2012). The law's pivotal role in the framework of moral normativity (see Raz, 2012) illuminates in turn how IHRL may be both an object of moral critique and a resource for moral reform with respect to the international recognition and interpretation of ER.

## 2. Nature, Rights and the Economy: The Naturalism Trap

The naturalistic reading of ER, as this chapter understands it, amounts to interpreting them as legal human rights corresponding to natural or real moral rights. It has become predominant lately among international human rights lawyers and theorists alike (e.g., Mantoulavou, 2012, 2015; Nickel, 2015; Gilibert, 2016; Queral, 2017).

That reading traps human rights theorists into either excluding ER *qua* non-natural rights from the scope of human rights, and hence reducing the scope of SER to "subsistence" (e.g., Shue, 1996)<sup>22</sup> or "anti-poverty" (e.g., Beitz, 2009)<sup>23</sup> rights, on the one hand, or including ER *qua* natural rights within the scope of human rights, and hence turning moralized economics into human rights (e.g., Collins, 2015), on the other. The former leads to the pursuit of the *desocializing naturalism* that has plagued the recognition and development of SER in IHRL since the 1960s, to the extent that it approaches SER as rights "to be" (and receive) and not "to do." The latter, by contrast, threatens to undermine SER in IHRL by endorsing another kind of naturalism, i.e., the *individualistic naturalism* that is built into economic neoliberalism and that approaches features of individual economic behavior as natural moral ones (see Fouillée, 1899: 48).

As the second and third sections of this chapter will demonstrate, there is actually a third way to approach ER. It liberates human rights theorists from having to choose between the Charybdis and Scylla of naturalistic justifications of ER: ER should be considered, I will argue, as moral and legal rights that belong with SR to SER in IHRL, but their moral justification should not be approached as natural or real, but as conventional and instrumental to the value and, in particular, to the social justice of our economic practices, both local and global.

Of course, the threat arising from the naturalistic reading of ER is not new. Its first instantiation, i.e., desocializing naturalism, has led, since the 1960s, to the setting aside of SER from other human rights in IHRL. Contrary to a widespread view that this was a compromise—a view that actually reveals a deep misunderstanding of social justice and of the alleged interest of all states in promoting the latter—this movement was

supported by both Western and communist states alike (see Donnelly, 2007: 41–43; Moyn, 2014: 149, 155–156).

The former, dominated by the liberal ideology of the market and the corresponding approach to property and contract, resisted the idea that human rights could enter the economic sphere and that states could owe duties to individuals therein, except with respect to a basic natural minimum protected by the subsistence-approach to SR. They clearly rejected in particular the idea of protecting economic liberties against the market and other private actors, and hence the project of state regulation in order to protect the market against itself. Communist states also opposed the idea of states owing economic duties to individuals, albeit on different grounds. They rejected the project of protecting any individual economic liberties against State intervention in the market. Both sides contributed therefore equally, albeit for different reasons, to the undermining of SER soon after their recognition in the UDHR in 1948 and to cutting SER off from civil and political rights and by framing them into the different and less demanding regime of the ICESCR. Over time, this has led to reducing SER to a so-called core (e.g., Shue, 1996: 5; Hertel and Minkler, 2007: 3–4) of individual and passive SR, minimizing their corresponding positive duties and depriving them from their relational (and, actually, social) and active economic dimensions (see Supiot, 2016).

Some authors have argued that IHRL and economic liberalism actually worked hand in hand to that effect ever after. It is true that international human rights lawyers' distrust of, and even resistance to, the State has led them to undermine the power of the sole potential duty bearer of positive duties corresponding to SER. Over time, this has contributed to turning human rights into "powerless companions" (Moyn, 2014: 155–160) to economic liberalism, thereby paving the way for the empowerment of the market and private actors outside the reach of states' human rights' duties. It is difficult, however, to construct this as anything but a case of historical contingency.

Today, however, the juncture between the desocializing naturalism of IHRL and the individualistic naturalism of economic liberalism is no longer accidental. It is actually celebrated on both sides. True, for a long time, neoliberals had but very little interest in human rights law (e.g., Hayek, 1978), and social justice supporters avoided moralizing the realm of private law and market regulation. After a long stand-off between international trade lawyers wanting to absorb human rights (e.g., Drache and Jacobs, 2014) and international human rights lawyers resisting that move, however, the latter, and at least socio-economic rights lawyers, seem to have given in.<sup>24</sup>

Indeed, what is new in the second kind of naturalistic reading of ER currently at play, i.e., individualistic naturalism, is the neoliberal embrace of IHRL combined with the surrender of international human rights lawyers to the market. International investment lawyers, for instance, have

recently developed an arbitration practice around a strong international human right to property (e.g., Alvarez, 2018; Sprankling, 2014), and international social rights lawyers have, conversely, worked towards the economic standardization of social rights protection (e.g., Riedel et al., 2014: 37 ff, 44 ff; O'Connell, 2011: 552–553). That international moralization of the law of the market is unprecedented and difficult to resist to, especially when it is facilitated by IHRL and its own naturalistic moral language as it is the case with ER.

### 3. Human Rights as Legal-Moral Rights

Departing from the naturalistic reading of ER in IHRL requires exploring the normative nature and layers of human rights in general. To do so, this section addresses the relationship between moral (real or conventional) and legal rights (2.1.), and then turns, more specifically, to that between moral (real or conventional) and legal human rights (2.2.).

#### 3.1 *The Relation Between Moral and Legal 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 law as sufficiently important to generate (legal and moral) duties (see Raz, 1984: 12, 2010a).

Generally speaking, moral rights can and actually may exist independently from having counterparts in legal rights, but legal rights do not exist, at least if they are to be able to give rise to legitimate legal duties, without also amounting to moral rights and duties at the same time. As such, legal rights should always also amount to moral rights, whether by recognition (i) or specification (ii) of pre-existing moral rights, or even by creation (iii) of moral rights at the same time as legal rights (see Raz, 1984: 16–17).

To the extent that all law is normative, for it is a matter of rules, duties and rights, the exact nature of the relation between moral and legal rights may sound redundant. However, we do not in all cases see legal rights and duties as reflecting or "mirroring" (see the debate between Buchanan, 2013: 17–18; Tasioulas, 2017) independent underlying moral rights and duties. This differentiated normative layering within legal rights in turn affects the ways we can and should reason with them. Of course, in some cases, there will be mirroring of real moral rights, but not in others where there is creation of moral rights through legal ones. Even when there is "mirroring," moreover, the reflection will not always be perfect for the legal rights specify the corresponding moral ones. Finally, there may also be mutual transformations between moral and legal rights rather than a pure unilateral reflection or even specification, thereby making the "mirroring" analogy actually inexact in those cases.



Importantly, within moral normativity itself, some moral rights may be considered “natural,” genuine or real because they derive directly from some human interest, while others are “conventional” or instrumental to the value of the social practice they belong to, and in particular to the collective goods and human interests that that social practice promotes. An example of the former is the right to life whose justification is to be found in a direct human interest in living independently from any social practice, while an example of the latter may be, as I will argue in the third section, the right to individual property whose justification is instrumental to the value of the social practice of property over things, for instance the promotion of (the human interest in) autonomy through that practice. It is worth emphasizing that conventional moral rights are grounded in interests like any other moral rights, but the grounding in those interests is indirect and mediated through the appeal to the value of the social practice they are part of and to how that practice promotes those interests. Crucially, therefore, their not being “real” or “genuine” moral rights does not mean that they are “fake” or “artificial” rights, and of a lesser moral nature or quality than other moral rights, nor that they should be ranked second in moral priority or legal hierarchy.

That distinction between real and conventional moral rights has an impact on the corresponding legal rights. First of all, some legal rights recognize or specify real moral rights, while others recognize or specify conventional moral ones. In the latter case, since the law itself amounts to a social rule-based or normative practice, the legal rights that correspond to moral rights, whether real or conventional, are themselves inherently conventional. When legal rights recognize or specify conventional moral rights, therefore, two conventional normative orders meet and influence one another: one social and pre-legal and the other political and legal. Importantly, however, the two levels of normative ordering and rights are never redundant: they share the values they are promoting and that justify them, but do so in complementary ways.

Second, some legal rights (and hence also moral rights) may not actually recognize and/or specify any pre-existing (real or conventional) moral rights. Rather, they create (conventional) moral rights by themselves. This is the case of legal parking rights, for instance, that have no independent (conventional or real) moral existence before the law generates them by organizing the social practice that gives rise to the protection of the related moral interests as rights.

### 3.2 Human Rights as Legal Subset of Universal Moral Rights

*Qua* rights (that give rise to legitimate moral duties), legal human rights are best conceived as being at once moral and legal rights (Besson, 2011: 211–245, 2015, 2017). Like legal rights, legal human rights are (moral) interests recognized by the law as sufficiently important to generate (moral and legal) human rights duties.

Four elements may be identified from the practice of (international and domestic) human rights law to qualify the protected interest that should be sufficiently important to give rise not only to simple duties and hence to a simple right, on the one hand, but also to give rise to a human right and the kind of duties it grounds, on the other. Those four elements are the fundamental and general nature of the individual interest protected; the existence of standard or generalized threats against which it should be protected; the feasibility of the protection of the interest against standard threats; and the fairness of the burden placed on the duty bearer by the protection of the interest. In a nutshell, therefore, human rights amount to a subset of universal moral rights that protect fundamental interests (importance) (i) against standard threats (urgency) (ii) and which belong to all human beings (universality) (iii) merely on the basis of their humanity (generality) (iv) (Besson, 2013a).

By reference to the relationship between moral and legal rights discussed in the previous section, the first question to address is whether there is something inherently legal about human rights so defined, and hence a (moral) duty to legalize the universal moral rights that are then recognized, specified or created as legal human rights.

I have argued elsewhere that, unlike other moral rights that may not be recognized and/or specified as legal rights and should not always be, universal moral rights considered as moral human rights should also be legal at the same time (Besson, 2015, 2017). In short, and although scope precludes making a full argument here, this is, first of all, because the universal moral rights that will become human rights create moral duties for all of us and therefore primarily for our institutions, and hence for the law as well, to recognize and protect human rights (see Raz, 2010a, 2010b: 321–337). Second, and more fundamentally, the legalization of human rights is the only way to be true to their central egalitarian and hence democratic dimension. Human rights constitute our status of basic moral equality and that equality being relational calls for its public recognition as political and legal equality (Besson, 2013b).<sup>25</sup>

The second question to address is whether human rights *qua* legal and moral rights always correspond to independent universal moral rights recognized or specified, whether real or conventional, or whether they may also create the corresponding universal moral rights in some cases.

First of all, one should stress that most legal (and moral) human rights recognize or specify independent universal moral rights. The universal moral rights recognized or specified by human rights are not necessarily only real universal moral rights, and some may be conventional universal moral rights. Thus, the human right to life recognizes or specifies the real moral right to life, whereas the human right to property recognizes or specifies the conventional moral right to property.

Of course, this only applies provided those conventional moral rights recognized and/or specified by legal human rights fit the structural dimensions of (moral and legal) human rights, and in particular the universality

and generality of the interests protected and the equality of the threats weighing on them. Both conditions may be fulfilled by the universality and generality of the social practice they are part of, as we will see, and by the latter's universal instrumental justification through the promotion of universal human interests.

When legal (and moral) human rights correspond to conventional universal moral rights, they often do more than recognizing and/or specifying them. Their legalization could also have a retroactive impact on the conventional universal moral rights themselves. This is not only a consequence of their dual conventional nature as it is the case for conventional moral and legal rights in general. The legal conventionality of human rights, in this understanding, is not merely redundant to the moral one: it is about recognizing and enhancing the relational equality of participants in the relevant social practice.

Second, but exceptionally so, however, some legal (and moral) human rights may be created as such without having pre-existing (conventional or real) universal moral rights as counterparts. In the absence of an independent moral normative order and of a non-legal social practice in which those rights could exist, the corresponding conventional moral human rights are created as part of a legal social practice. As an example, one may mention the human right to democratic participation that cannot be justified by reference to an independent (real or even conventional) universal moral right to democracy outside of our political and legal practice of democracy, but whose moral justification may be said to lie in the instrumental value of existing democratic procedures themselves and in particular by appeal to how they promote the universal individual interest in equality.

It is more difficult, at first sight at least, but not impossible, as we will see, for such legal rights to fit the structural dimensions of (moral and legal) human rights. Provided they do, however, those rights are to be considered as legal (and moral) human rights, with all their categorical consequences in IHRL, and it would be wrong to reduce them to mere moral goals (see Nickel, 2015: 146) or principles (see Buchanan, 2015).

#### 4. Economic Rights as Conventional Human Rights

Departing from the naturalistic reading of ER requires re-qualifying them normatively. This section argues that economic rights are best considered not only as conventional moral rights (3.1.), but also as conventional legal (and moral) human rights (3.2.).

##### 4.1 *Economic Rights as Conventional Moral Rights*

While some authors have considered individual economic rights as "natural" or real moral rights, others have disparaged them as "false" rights

that belong to market ordering, while yet another group, with whom I side, has considered them as "conventional" moral rights whose justification is instrumental and based on the value of their relevant social practice and on how it promotes fundamental individual interests.

Scope precludes rehearsing this discussion in full in a chapter that pertains to the justification of ER *qua* human rights in IHRL in general (see, however, Murphy, 2016).<sup>26</sup> What I will do, however, is, first, debunk the idea that owning, promising, consuming and working are pre-social and pre-institutional human interests whose protection as rights is required independently from the value of the social practice they are part of, and, second, argue that there is a moral value in that social practice that may provide an instrumental justification *qua* conventional moral rights of the economic rights that are part of that practice.

First of all, there are no individual objective interests sufficiently fundamental to give rise alone and directly to real individual economic rights. The latter do not make sense in the same immediate way as other moral rights that clearly protect human interests outside of any social practice, such as the interest and right to life (see Murphy, 2016).

This argument is not particularly difficult to make for property rights or other consumption rights that pertain to things. There can, indeed, be no direct or pre-social human interests in things or natural ties to them. This is not to say, of course, that there are no objective human interests at stake in this context (e.g., self-preservation).<sup>27</sup> What is clear, however, is that, in the current and non-ideal social and political circumstances of human life, those are mediated as social interests (e.g., owning), and the latter ground rights to the social relations pertaining to those things (see also Waldron, 2010a: 10, 14). Of course, it has long been part of the liberal economic ideology to transform relations between people and things into relations among people (see Dumont, 1985).<sup>28</sup>

By contrast, the same thing is more difficult to argue with respect to other economic rights like contractual freedom or the right to work. Those rights pertain indeed to social relations among people and, as a result, the grounding in individual interests does not seem as indirect as in the case of rights to things. Moreover, consent and the right to consent with the duties it generates are usually invoked as examples of a direct human interest and of a natural or real moral right grounded in that interest. Still, direct human interests of that kind are more difficult to establish with respect to promises and other kinds of contractual relations: outside of the specific circumstances of consent (e.g., to an intervention in one's bodily integrity), it remains unclear indeed how human will alone can bring moral rights and duties into existence without reference to the social relation that vests that will with normative power. What is normative about promises stems from the moral value of the social practice of promising rather than from that of promising itself (see Raz, 2015). There is no human interest in promising, at least directly and

without reference to how the social relationship it is part of may benefit other human interests.<sup>29</sup>

Second, even if the rights in those economic relations are not directly or immediately grounded in objective interests,<sup>30</sup> there is actually some moral value in the social practices economic rights are part of.<sup>31</sup> Those social practices may protect other objective interests indirectly and in a mediated fashion, and this may therefore provide an instrumental moral justification to economic rights *qua* conventional moral rights.

Among potential candidates for such justifications, one may mention the contribution of economic rights, and the socio-economic practice they belong to (e.g., a property regime, a contractual practice, labor conditions), to fundamental individual interests such as individual autonomy (e.g., Raz, 2015), individual self-realization (e.g., Dagan and Dorfman, 2017; Nickel, 2007: 125–129, 2015: 140–141; Gilibert, 2016: 178; Collins, 2015: 32–37) or individual well-being (e.g., Queralt, 2017; Gilibert, 2016: 178). More generally, socio-economic practices, such as property, contract or labor, and the economic rights they entail, may be regarded as important instruments of social and economic justice (e.g., Scheffler, 2015; Waldron, 2010b) and even as collective goods.<sup>32</sup>

On the proposed conventional reading, economic rights are participatory rights: they are rights to participate in a given social relationship with other right-holders and to be included, respectively not excluded from it.<sup>33</sup> This is particularly clear for property rights (see Waldron, 2013: 10) or the right to work. Their collective dimension relates to the value or good protected, however, and not to the interests themselves, the subjects of the rights or their exercise that may all remain individual. To that extent, while they may be regarded as collective rights in that respect, their collective dimension does not prevent approaching them as individual moral rights grounded indirectly in the protection of individual interests through that collective practice.

Importantly, there is nothing utilitarian in this account of economic rights corresponding to conventional moral rights (contra: Buchanan, 2013: 171–172; Alston, 2002: 826; Collins, 2015: 19–20, 28–37). The value of the social practice they are part of and of how that practice promotes human interests is not itself a matter of economic efficiency (see Murphy, 2016; Raz, 2015).

Moreover, those instrumental justifications of economic conventional moral rights should not be conflated with two other kinds of instrumental moral “justification” of those rights. First of all, they should not be conflated with relations of mutual reinforcement between independently justified rights. Indeed, relations between basic and non-basic rights (Shue, 1996: 22–25), linkages (Nickel, 2007: 129–131) or, more generally, the indivisibility (Nickel, 2008) of rights in their implementation all rely on and build upon the pre-existing justification of the moral rights at stake and cannot replace it. Second, instrumental moral justifications for economic rights *qua* moral rights should be distinguished from the

instrumental moral justifications for the creation of conventional, including legal, so-called rights based on other moral principles or goals than (conventional or real) moral rights (Nickel, 2013). What is justified in such cases are not *stricto sensu* moral (and legal) rights, not even of a conventional kind. As a result, the justifications and reasoning pertaining to the latter are bound to be very different and unrelated to corresponding moral rights.

As any other conventional moral rights, individual economic rights may be recognized, specified or even created by legal rights. Most of them are actually legalized to the extent that the social-economic practices they are part of benefit from the formalization and stability that legal rights bring with them.

As I argued before, the dual conventionality of pre-legal economic moral rights recognized or specified as economic legal rights brings some further layers of complexity into their relations to economic legal rights. In some cases, indeed, the legal practice and rights will dominate the non-legal one and its corresponding rights so much that they become inseparable and their moral conventionality is masked. When it happens, it is important to keep moral and legal economic rights in alignment with one another (see Murphy, 2016). Any misalignment of one or the other practice may indeed undermine the ability of both of them to promote the values and interests that justify the conventional moral rights they comprise.

#### 4.2 Economic Rights as Conventional Moral and Legal Human Rights

ER are best approached as legal (and moral) human rights recognizing, specifying or creating the corresponding economic conventional universal moral rights, and hence as a subset of conventional universal moral rights rather than as a subset of real universal moral rights.

This reading differs from most existing theoretical accounts of ER. Some authors approach some ER *qua* legal human rights protecting moral goals instead of natural rights (Nickel, 2015: 146).<sup>34</sup> Others approach them *qua* legal human rights protecting liberal natural rights at a minimum, on the one hand, and complemented by external moral justifications in well-being or in equality, on the other (Buchanan, 2013: 167–171). Yet other authors approach ER, or at least some of them, entirely as natural rights (Gilibert, 2016: 178–180). All three accounts fall prey to the naturalistic trap I criticized in the first section. Of course, it is important for the conventionalist argument to succeed to establish that ER, indirectly or instrumentally grounded in this way, can actually fulfill the structural criteria of human rights.

First of all, the interests they protect albeit indirectly, such as autonomy, well-being or self-realization, are clearly fundamental enough to ground human rights (see Nickel, 2007: 145, 135–136, 2015: 139;



Queralt, 2017). Earning money through one's labor, being able to own and concluding contracts to sell and buy clearly promote those fundamental human interests. Second, those interests are shared generally in each society, independently of people's status and position in the market, and universally irrespectively of the prosperity of their country (see Nickel, 2007: 132–133; Gilibert, 2016: 177–178). Of course, to the extent that ER are conventional rights and hence part of a social practice in a given society, there may be more important national and regional variations among those social practices and the corresponding conventional moral rights than in the case of real moral rights. Those variations can be accommodated, however, by the fact that the content of ER in IHRL only has to be minimal.

Third, those fundamental human interests may be considered under general threat, be it by the State itself or, as it is more likely, by other private actors, and hence as equally vulnerable in all segments of the population, whether poor or rich, and across the globe (see Nickel, 2007: 145, 131–132, 2015: 139). Finally, the fairness and feasibility of the burden of protecting ER as rights are given (see Nickel, 2007: 148–152). The duties, negative or positive, that arise from ER may vary depending on the context and hence on the resources of every country, and they can and should therefore be adapted to the abilities of domestic authorities. Despite their name, ER *qua* human rights do not require from states that they provide jobs to all (contra: Nickel, 2015: 139–140, 144–146), complete property protection or full performance of contracts, but only, as we will see in section 5, that they regulate the market and, more broadly, economic practice so as to make it function and as to organize the respective rights and duties of other private participants in the practice.

Moving back to the first prong of the structure of human rights and to their moral-legal nature, ER also qualify as inherently legal and moral rights, and hence as equal human rights. The necessary institutional and egalitarian and hence legal dimension of human rights fits the conventional nature of economic moral rights particularly well. What characterizes economic (human) rights by comparison to other conventional legal and moral rights is, indeed, the greater interaction between the two levels of social practice, and how the promotion of the values of the non-legal social practice may only be met through legalizing the corresponding rights. It is the very egalitarian dimension of human rights that pleads in favor of including ER into IHRL (see also Dagan and Dorfman, 2017), and that distinguishes this kind of legal protection from that provided by other domestic and international legal regimes guaranteeing economic rights.

## 5. Implications for Economic Rights in International Human Rights Law

Protecting ER as full-fledged human rights that recognize and specify conventional moral rights has important legal implications in IHRL. First

of all, there are consequences for the implementation and interpretation of those rights by *domestic* authorities.

The first set of implications is *institutional*, and pertains to the existence and form of design and regulation of the market and economic relations in domestic law. It is one of the consequences of the conventional dimension of ER that, even before being recognized and specified as human rights by IHRL, they are conceived of as a pre-institutional social normative order and hence as inherently regulatory. Their instrumental justification implies, in other words, that they be practiced and regulated to promote a certain value and hence to arise as rights. What this means is that states are called to regulate more over ER than other human rights if they are to abide by their corresponding duties, either in order to protect the valuable socio-economic practice or, most likely, to specify it and formalize it further. Regulating ER generally requires adopting general legislation, but may also occur, depending on the circumstances, through adjudication. As a result, the conventional reading of ER turns the (“everyday”) libertarian concern about the regulation of economic rights and liberties on its head (see Murphy and Nagel, 2002: 15, 31–37). It disqualifies, for instance, resistances to alleged public law “expropriations” grounded in the idea of pre-legal natural property or to public law taxation based on the legitimacy of one’s pre-legal natural possessions.

Another important institutional feature of ER that stems from their conventional nature is the states’ positive duty to regulate the market so as to recognize and/or specify not only the rights, but also the duties of private actors related to the socio-economic practice regulated (e.g., property, contracts, labor). To that extent, ER do not only amount to vertical rights like all other human rights: they are meant to be mediated institutionally into horizontal rights and duties as well. This can take place through domestic private law, but also criminal law in some cases. Generating private duties for economic actors actually echoes the collective dimension of ER that amount to rights to participate in a social practice of economic exchange where participants do not only have rights, but also duties towards one another.

A second set of implications of the proposed conventional reading of ER is *substantive*, and pertains to the content of domestic law regulating the market and economic relations. The conventional reading of ER binds domestic authorities, including the legislature and judges, to interpret them in a way that takes into account the values that justify them in the first place, and in particular equality and social justice. This means, for instance, regulating the domestic property regime so as to accommodate social considerations that are part of the value of the socio-economic practice of property (see Dagan and Dorfman, 2017). This relational and egalitarian interpretation of domestic property rights has clear implications, for instance, for the social housing dimension in land planning.

As a matter of fact, the proposed egalitarian and social justice-oriented interpretation of ER goes hand in hand with the reverse



economic interpretation of SR, and both sets of rights are best applied together as indivisible rights (see Nickel, 2007: 139, 131–132). Bringing the two sides of the same coin back together could contribute to the re-socialization of SR by making them more active and less passive, on the one hand, and more relational and less individual, on the other. This regained interpretative complementarity between SR and ER could even alleviate the alleged contradictions between them (see Waldron, 2010b: 5; Nickel, 2007: ch. 8 and 9). For instance, the co-application of SR with ER could give rise to duties to secure equal access to education or equal access to the job market, and, conversely, to duties to organize self-help on the part of individual ER holders and their access to micro-credit.

Of course, under IHRL, ER *qua* human rights only give rise to minimal duties that correspond to a transnational consensus on ER. As a result, there is a broad margin of appreciation of states and scope for diversity in the regulatory organization of the economic social practice and the market domestically. For instance, individual property rights may be organized so as to co-exist with forms of collective or common property (see Waldron, 2013: 11 ff), rather than as competing with the latter, provided the core egalitarian dimension of human rights and social justice are respected.

Importantly, ER do not generate human rights duties only within the territorial jurisdiction of states. Extraterritorial duties may arise when states exercise jurisdiction abroad. Moreover, states also incur responsibilities for human rights' protection outside of their jurisdiction, and this includes assisting other states to respect, protect and fulfill ER. What this includes arguably are responsibilities to help other states to set up regimes of property, contract or labor law that abide by the egalitarian and social underpinnings of the corresponding protected economic practice. Those extraterritorial duties and responsibilities could help, for instance, fighting back current practices of land-grabbing by foreign private investors in the absence of indigenous property regimes (see de Schutter, 2011) or of production and export of land products in the absence of indigenous agricultural regimes (see Wenar, 2015).

Second, the proposed conception of ER in IHRL also has implications for the *international* regulation of the market. Importantly, abiding by ER duties does not mean merely including economic individual rights into international trade regimes such as WTO or EU law as it has long been done. It also means taking ER *qua* human rights seriously in the institutional design of international trade institutions and regulation. Besides their obligations to revisit international trade law's existing approach to ER and to resist the latter's absorption under individual market rights in IEL, states also incur duties under ER to regulate areas that have been left untouched to date by international law. After all, examples of successful global regulation of economic rights abound in IEL to protect the real or intellectual property rights of multinational corporations or

investors, and in areas as diverse as deep-sea minerals or satellite orbits. More active social regulation of ER in other areas of international trade law is not only feasible, therefore, but also required. One may think, for instance, of developing a new regime of international land (property) law to prevent property-regime voids and land-grabbing (see Wenar, 2015: 175–177; de Schutter, 2011) or of re-invigorating international labor law that has been left to erode since the 1920s (see Supiot, 2016).

Of course, given how important domestic private law and the duties of private actors are for the effective implementation of ER, the duties of states under IHRL also include drafting private international law instruments applicable to transnational circumstances (e.g., agricultural products' exports, labor migration). Domestic legal regimes pertaining to property or contract are bound to differ, indeed, and hence to compete with one another, thus inevitably leading to a race to the bottom. States are therefore, one may argue, under ER positive duties to develop private international law rules that restrain private law shopping in the fields of property law, contract law and labor law (see Wenar, 2015: 184–185).

## 6. Conclusion

The moralization and, more specifically, the moral naturalization of the private law of the market as a result of “everyday libertarianism” (Murphy, 2016) has recently been denounced by private law theorists. While such understandings had long been disparaged to the profit of conventional ones, property and contract rights are now predominantly approached again as “natural” or real moral rights mirrored by domestic private law. The return of this form of individualistic naturalism may be approached as the resurgence, in a new guise, of a now century-old phenomenon of combination of the natural laws of science with those of morality (see Supiot, 2009). Only this time, what is taking place is the marriage between the alleged natural laws of the economy with those of morality, with the complicity of positive human laws.

Interestingly, the same development may now be observed in the field of IHRL. One may coin it the moral naturalization of ER *qua* human rights. The difficulty is greater in this context, however, to the extent that human rights are usually held to be the epitome of “natural” or real moral rights. This makes the combination of both kinds of naturalistic readings even more irresistible. The problem is that the alliance of the individualistic naturalism of economic liberalism with the desocializing naturalism of most existing human rights theories constitute a great risk for social justice and the effective protection of SR. The latter rights have indeed progressively been reduced to passive and atomized subsistence and anti-poverty rights.

In response, this chapter has identified a third way for human rights theorists interested in supporting a reading of ER that can promote social

justice. The choice is not, unlike what the few human rights theorists discussing ER to date have argued, between either considering ER as natural or real moral rights, and hence recognizing individual market rights as human rights and entrenching some form of economic naturalism into IHRL, on the one hand, or approaching them as mere moral goals and not as proper human rights, and hence condemning social rights to the passive and individualized role they have been assigned since the 1960s, on the other. Human rights like ER may also be considered to recognize and/or specify universal moral rights that are not natural or real moral rights, but conventional moral rights whose justification is instrumental and grounded in the value of the social practice and normative order they are part of.

The proposed conventional reading of ER has important repercussions for human rights theory, more generally, because it provides a morally nuanced understanding of the relations between moral and legal rights in human rights law. It also bears on the future practice of SER both domestically and internationally and, with respect to the latter, in IEL as much as in IHRL. Interpreting ER in the proposed conventional way reunites ER with SR and approaches SER as the active and relational rights they were first conceived to be. In turn, this revives the hope of finally putting ER, and arguably IHRL, to the task of promoting social justice.

## Notes

- 1 The regional regimes discussed in this chapter are primarily the Convention on the Protection of Human Rights and Fundamental Freedoms (4 November 1950; 213 UNTS 221) (European Convention on Human Rights; ECHR), the European Social Charter (3 May 1996; ETS Nr 163) (ESC) and the Charter of Fundamental Rights of the European Union ([2012] OJ C326/391) (EUFRC).
- 2 In this chapter, ER include “economic liberties” (e.g., freedom of contract), but also other “economic rights” (e.g., the right to property). This is why it is the latter and most encompassing group, i.e., rights, that is discussed under the name of ER. Contra: Nickel, 2007: ch. 8 (who only refers to “economic liberties”); Buchanan, 2013: 167–171 (who refers to them as “economic liberties” and uses “economic rights” to refer to social rights); Waldron, 2010b.
- 3 Thus, while universal human rights law protects ER among SER in the Universal Declaration of Human Rights (10 December 1948; UNGA Res 217 A(III)) (UDHR) and, albeit in a different way, in the International Covenant on Economic, Social and Cultural Rights (16 December 1966; 993 UNTS 3) (ICESCR), regional human rights law does not always include them. For instance, the ECHR does not include any ER, except for the right to property and then only under Article 1 of its First Optional Protocol, notwithstanding, of course, their protection by the ESC. The American Convention of Human Rights (22 November 1969; 1144 UNTS 123) (ACHR) and the African Charter on Human and People's Rights (21 October 1986; 1520 UNTS 217) (ACHPR) only protect the right to property (Article 21 ACHR; Article 14 ACHPR).
- 4 For instance, the right to property that is protected in the UDHR (Article 17), and in the three regional human rights treaties mentioned before, is not

- protected in the ICESCR or anywhere in universal human rights law, even though, by contrast, the ICESCR protects more SR (Articles 6–9, 10–12 and 13–15) than the UDHR (Articles 23, 25 and 26), and the latter are not protected by regional human rights treaties either (except by the ESC). By contrast, the EUFRC, that is more recent, protects the freedom to exercise a profession, the freedom of enterprise and the right to property (Articles 15, 16 and 17 EUFRC).
- 5 The CESCR distinguishes, in its monitoring process of state reports, between three clusters of ESCR: Articles 6–9, Articles 10–12 and Articles 13–15. Some have argued the first cluster could be considered as ER, and the latter respectively as SR and CR: see Riedel et al., 2014: 8–10.
  - 6 In some traditions, “property rights” are used to include all ER: see Daintith, 2004: 59–61; Nickel, 2007: 125.
  - 7 See the ILO 1998 Declaration on Fundamental Principles and Rights at Work, 37 ILM 1233.
  - 8 See FD Roosevelt's *Economic Bill of Rights* 1944 speech ([www.fdrlibrary.marist.edu/archives/address\\_text.html](http://www.fdrlibrary.marist.edu/archives/address_text.html)): “necessitous men are not free men.” See also Sen, 2009 on “socio-economic unfreedoms.”
  - 9 On ER in Roosevelt's 6 January 1941 *Four Freedoms* (<http://docs.fdrlibrary.marist.edu/od4frees.html>) and 11 June 1944 *Economic Bill of Rights* speeches, in the 10 May 1944 *Declaration of Philadelphia* (ILO) ([http://blue.lim.ilo.org/cariblex/pdfs/ILO\\_dec\\_philadelphia.pdf](http://blue.lim.ilo.org/cariblex/pdfs/ILO_dec_philadelphia.pdf)) and in the 1948 UDHR, see Donnelly, 2007: 38–41; Supiot, 2016.
  - 10 See e.g., Article 16 Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979; 1249 UNTS 13) (CEDAW); Article 5 International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966; 660 UNTS 195) (CERD); Article 15 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1990; 2220 UNTS 3) (CRPMW); and Article 12 Convention on the Rights of Persons with Disabilities (13 December 2006; 2515 UNTS 3) (CRPD).
  - 11 This is the case of intellectual property rights under the Marrakesh Agreement establishing the WTO (15 April 1994; 1867 UNTS 3) (TRIPS).
  - 12 This is the case of the freedom to exercise a profession, the freedom of enterprise and the right to property in the EUFRC (Articles 15, 16 and 17), but also of two of the four EU fundamental freedoms, i.e., free movement of workers and free movement of service providers (Title IV of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU); [2012] OJ C326/47).
  - 13 This ambiguity is even heightened in the EU given the mere transformation of some EU fundamental (economic) freedoms into EU fundamental rights: see Weatherill, 2013.
  - 14 Because the present chapter argues against the naturalistic reading of ER, including on grounds of the many conflation of the invocation of “natural laws” (of morality, religion, science or the economy) give rise to (see Supiot, 2009: ch. 2), it is better not to refer to “genuine” or “real” moral rights as “natural” rights.
  - 15 For discussions about the Lockean origins of this position, see Waldron, 1990: 282–283, 2013.
  - 16 See Daintith, 2004; Waldron, 2010b; Nickel, 2007: ch. 8; Hertel and Minkler, 2007. Most of them, however, are specific to some ER, such as the *right to property* (see e.g., Dagan and Dorfman, 2017; Waldron, 1990, 2010a, 2013); the *right to work* (see e.g., Gilabert, 2016; Collins, 2015; Nickel, 2015; Mantouvalou, 2012, 2015; Risse, 2009; Pogge, 2009; Alston, 2005a; Elster, 1988; Nickel, 1978–79); or *entrepreneurial rights* (see e.g., Queralt, 2017).

- 17 For a critique of this self-confidence following the entry into force of the Optional Protocol to the ICESCR, see Alston, 2016b.
- 18 Contrast the 1990s and 2000s discussions (e.g., Craven, 1995) with recent ones (e.g., Riedel et al., 2014).
- 19 While Nickel, 2007 used to include the right to work among SR, Nickel, 2015 declassified it from human right to "moral goal" or "goalish right."
- 20 By "social practice," I mean any rule-governed social activity where the rules are generally complied with. See Murphy, 2016; Raz, 2012.
- 21 By "conventional morality," I mean the set of moral norms that is generally accepted in a society and which is typically realized in a social practice. See Murphy, 2016.
- 22 For a critique and on the complementarity between ER *qua* rights to self-help and SR *qua* rights to provision, see Nickel, 2007: 131–132; Alston, 2016b.
- 23 For a critique of this conflation between poverty and SER violations, see Alston, 2005b: 784 ff, 2016b.
- 24 See for an early warning about "marrying, almost symbiotically" trade and human rights, Alston, 2002: 818, 843–844.
- 25 Importantly, and contra Tasioulas, 2017's critique of Buchanan, 2013, the egalitarian dimension of (legal and moral) human rights should be conflated neither with a basic human right to equality or non-discrimination (non-discrimination rights exist as specific human rights in IHRL, because they protect specific interests to non-discrimination) nor with a ground of human rights themselves (equal moral status and human rights are mutually constitutive). See Besson, 2013b.
- 26 Unlike Murphy, 2016, my concern in this chapter is primarily with naturalism, and not necessarily only with "libertarian" naturalism. What one may argue in reaction to non-naturalist or conventionalist libertarian arguments for ER, however, is that the egalitarian dimension of human rights makes it a requirement of ER under IHRL that they be regulated over in domestic law and that thereby the mutual duties of private actors be specified by reference to social justice, as I explain in the final and fourth section of the chapter.
- 27 See e.g., Stilz, 2018 for a "hybrid" natural-conventional view of property rights. Unlike her, I think there are other (especially egalitarian) ways to justify states' territorial sovereignty and the corresponding "rights" (that need not actually be approached as proprietary in kind) than through the (even minimal) natural rights of first occupancy of their individual subjects.
- 28 On the "labour theory of property," see Locke, 1690. For a critical discussion, see Waldron, 1990: 171–177.
- 29 See Murphy, 2016 referring to Raz, 2015: "[t]he performance [of a promise] interest is a normative interest, not a real material interest. It would be question-begging to explain the duty to keep promises by saying that promisees have an interest that promises be kept, since promisees only have that interest if promisors have that duty."
- 30 Even if the first prong of the argument is rejected, the second prong may be taken to establish that the conventionalist account of ER is at least superior to the naturalist one for the reasons presented in the first and final sections of the chapter, but also in the remainder of this section.
- 31 Importantly, the instrumental justification of ER by reference to the value of the economic practice does not imply that those rights themselves are (solely) constitutive of the value of that practice.
- 32 See Raz, 1986: 247–248, 251–253: "the right to economic freedom, or the right to freedom of contract, does not exist in opposition to collective goods. Far from its purpose being to curtail the pursuit of collective goods, it presupposes and depends for its value on the existence of at least one collective good: the free market."

- 33 This does not imply a right to the setting up of the economic practice itself: it relies on a pre-existing social practice economic conventional moral rights are a part of.
- 34 See, however, Nickel, 2007: 126 for a dual justification for those rights *qua* human rights: both instrumental to the promotion of other values (126–29) and linkage-based (129–31).

## References

- Alston P (2002) Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann. *European Journal of International Law* 13(4): 815–844.
- Alston P (2005a) Labor Rights as Human Rights: The Not So Happy State of the Art. In: Alston P (ed) *Labour Rights as Human Rights*, 1st ed. Oxford: Oxford University Press, pp. 1–24.
- Alston P (2005b) Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals. *Human Rights Quarterly* 27(3): 755–859.
- Alston P (2016a) Phantom Rights: The Systemic Marginalization of Economic and Social Rights. Available at: [www.opendemocracy.net/openglobalrights/philip-alston/phantom-rights-systemic-marginalization-of-economic-and-social-rights](http://www.opendemocracy.net/openglobalrights/philip-alston/phantom-rights-systemic-marginalization-of-economic-and-social-rights) (accessed 6 October 2017).
- Alston P (2016b) Third Report of the Special Rapporteur on Extreme Poverty and Human Rights. A/HRC/32/31.
- Alvarez J (2018) The Human Right to Property. *New York University School of Law, Public Law Research Paper* No. 18–21.
- Beitz C (2009) *The Idea of Human Rights*. Oxford: Oxford University Press.
- Bernstein D (2011) *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform*. Chicago: The University of Chicago Press.
- Besson S (2011) Human Rights: Ethical, Political . . . or Legal? First Steps in a Legal Theory of Human Rights. In: Childress III D (ed) *The Role of Ethics in International Law*, 1st ed. Cambridge: Cambridge University Press, pp. 211–245.
- Besson S (2013a) Justifications of Human Rights. In: Moeckli D and Shah S (eds) *International Human Rights Law*, 2nd ed. Oxford: Oxford University Press, pp. 34–52.
- Besson S (2013b) The Egalitarian Dimension of Human Rights. *Archiv für Sozial- und Rechtsphilosophie Beiheft* 136: 19–52.
- Besson S (2015) Human Rights and Constitutional Law: Mutual Validation and Legitimation. In: Cruft R, Liao SM and Renzo M (eds) *Philosophical Foundations of Human Rights*, 1st ed. Oxford: Oxford University Press, pp. 279–299.
- Besson S (2017) Legal Human Rights Theory. In: Brownlee K, Lippert-Ramussen K and Coady D (eds) *A Companion to Applied Philosophy*, 1st ed. Chichester: Wiley Blackwell, pp. 328–341.
- Buchanan A (2013) *The Heart of Human Rights*. Oxford: Oxford University Press.
- Buchanan A (2015) Why International Legal Human Rights? In: Cruft R, Liao SM and Renzo M (eds) *Philosophical Foundations of Human Rights*, 1st ed. Oxford: Oxford University Press, pp. 244–262.



- Collins H (2015) Is There a Human Right to Work? In: Mantouvalou V (ed) *The Right to Work: Legal and Philosophical Perspectives*, 1st ed. Oxford and Portland, OR: Hart Publishing, pp. 17–38.
- Cranston M (1967) Human Rights, Real and Supposed. In: Raphael D (ed) *Political Theory and the Rights of Man*, 1st ed. London and Melbourne: Palgrave Macmillan, pp. 43–55.
- Craven M (1995) *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development*. Oxford: Clarendon Press.
- Dagan H and Dorfman A (2017) The Human Right to Private Property. *Theoretical Inquiries in Law* 18(2): 391–416.
- Daintith T (2004) The Constitutional Protection of Economic Rights. *International Journal of Constitutional Law* 2(1): 56–90.
- de Schutter O (2011) The Green Rush: The Global Race for Farmland and the Rights of Land Users. *Harvard International Law Journal* 52(2): 503–559.
- Donnelly J (2007) The West and Economic Rights. In: Hertel S and Minkler L (eds) *Economic Rights: Conceptual, Measurement and Policy Issues*, 1st ed. Cambridge: Cambridge University Press, pp. 37–55.
- Drache D and Jacobs L (eds) (2014) *Linking Global Trade and Human Rights*. Cambridge: Cambridge University Press.
- Dumont L (1985) *Homo aequalis I. Genèse et épanouissement de l'idéologie économique*, 2nd ed. Paris: Gallimard.
- Elster J (1988) Is There (or Should There Be) a Right to Work? In: Gutmann A (ed) *Democracy and the Welfare State*, 1st ed. Princeton: Princeton University Press, pp. 53–77.
- Elster J (1994) The Impact of Constitutions on Economic Performance. *The World Bank Economic Review* Supplementary Volume: 209–226.
- Fouillée A (1899) L'idée de justice sociale d'après les écoles contemporaines. *Revue des deux mondes* 152: 47–75.
- Gilbert P (2016) Labor Human Rights and Human Dignity. *Philosophy and Social Criticism* 42(2): 171–199.
- Hayek F (1978) *Law, Legislation, and Liberty*, Vol. 2: *The Mirage of Social Justice*. Chicago: The Chicago University Press.
- Hertel S and Minkler L (2007) Economic Rights: The Terrain. In: Hertel S and Minkler L (eds) *Economic Rights: Conceptual, Measurement and Policy Issues*. Cambridge: Cambridge University Press.
- Howse R and Teitel R (2010) Global Justice, Poverty and the International Economic Order. In: Besson S and Tasioulas J (eds) *The Philosophy of International Law*, 1st ed. Oxford: Oxford University Press, pp. 437–450.
- Locke J (first published in 1690; 2016) *Second Treatise of Government*. Oxford: Oxford University Press.
- Mantouvalou V (2012) Are Labour Rights Human Rights. *European Labour Law Journal* 3(2): 151–172.
- Mantoulavou V (2015) Introduction. In: Mantouvalou V (ed) *The Right to Work: Legal and Philosophical Perspectives*, 1st ed. Oxford and Portland, OR: Hart Publishing, pp. 1–10.
- Marx K (first published in 1862; 1972) *Theories of Surplus Value*. London: Lawrence and Wishart.
- Moyn S (2014) A Powerless Companion: Human Rights in the Age of Neoliberalism. *Law & Contemporary Problems* 77(4): 147–169.
- Murphy L (2016) *Private Law and Public Illusion*. Frankfurt Lectures. Unpublished manuscript, on file with author.
- Murphy L and Nagel T (2002) *The Myth of Ownership*. Oxford: Oxford University Press.
- Nickel J (1978–79) Is There a Human Right to Employment? *Philosophical Forum* 10(2): 158–170.
- Nickel J (2007) *Making Sense of Human Rights*, 2nd ed. Malden: Blackwell Publishing.
- Nickel J (2008) Rethinking Indivisibility: Towards a Theory of Support Relations Between Human Rights. *Human Rights Quarterly* 30(4): 984–1001.
- Nickel J (2013) Goals and Rights: Working Together? In: Langford M, Summer A and Yamin A (eds) *The Millennium Development Goals and Human Rights: Past, Present, and Future*, 1st ed. New York: Cambridge University Press, pp. 37–48.
- Nickel J (2015) Giving Up on the Right to Work. In: Mantouvalou V (ed) *The Right to Work: Legal and Philosophical Perspectives*, 1st ed. Oxford and Portland, OR: Hart Publishing, pp. 137–148.
- Nozick R (1974) *Anarchy, State and Utopia*. Oxford: Blackwell Publishing.
- O'Connell P (2011) The Death of Socio-Economic Rights. *Modern Law Review* 74(4): 532–554.
- Pogge T (2009) Comment on Mathias Risse: "A Right to Work? A Right to Leisure? Labour Rights as Human Rights." *Law & Ethics of Human Rights* 3(1): 40–47.
- Queralt J (2017) Protecting the Entrepreneurial Poor: A Human-Rights Approach. Unpublished manuscript, on file with author.
- Raz J (1984) Legal Rights. *Oxford Journal of Legal Studies* 4(1): 1–21.
- Raz J (1986) *The Morality of Freedom*. Oxford: Clarendon Press.
- Raz J (2010a) Human Rights in the Emerging World Order. *Transnational Legal Theory* 1: 31–47.
- Raz J (2010b) Human Rights Without Foundations. In: Besson S and Tasioulas J (eds) *The Philosophy of International Law*, 1st ed. Oxford: Oxford University Press, pp. 321–338.
- Raz J (2012) *Normative Variations*. Unpublished manuscript, on file with the author.
- Raz J (2015) Is There a Reason to Keep a Promise? In: Klass G, Letsas G and Saprai P (eds) *Philosophical Foundations of Contract Law*, 1st ed. Oxford: Oxford University Press, pp. 58–77.
- Riedel E, Giacca G and Golay C (2014) The Development of Economic, Social and Cultural Rights in International Law. In: Riedel E, Giacca G and Golay C (eds) *Economic, Social and Cultural Rights in International Law*, 1st ed. Oxford: Oxford University Press, pp. 3–50.
- Risse M (2009) A Right to Work? A Right to Leisure? Labour Rights as Human Rights. *Law & Ethics of Human Rights* 3(1): 1–39.
- Scheffler S (2015) Distributive Justice, the Basic Structure and the Place of Private Law. *Oxford Journal of Legal Studies* 35(2): 213–235.
- Sen A (2009) *The Idea of Justice*. Cambridge, MA: Harvard University Press.
- Shue H (1996) *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd ed. Princeton: Princeton University Press.
- Sprankling J (2014) A Global Right to Property. *Columbia Journal of Transnational Law* 52(2): 464–505.

- Stilz A (2018) Property Rights: Natural or Conventional? In: Brennan J, Schmidtz D and van der Vossen B (eds) *The Routledge Handbook of Libertarianism*. New York: Routledge, pp. 244–258.
- Supiot A (2009) *Homo Juridicus: Essai sur la fonction anthropologique du droit*. Paris: Seuil.
- Supiot A (2016) What International Social Justice in the Twenty-First Century? In: Blanpain R, Hendrickx F and du Toit D (eds) *Labour Law and Social Progress Holding the Line or Shifting the Boundaries?* 1st ed. Alphen aan den Rijn: Wolters Kluwer Law & Business.
- Tasioulas J (2017) Exiting the Hall of Mirrors: Morality and Law in Human Rights. In: Campbell T and Bourne K (eds) *Political and Legal Approaches to Human Rights*. London: Routledge, pp. 73–89.
- Waldron J (1990) *The Right to Private Property*. Oxford: Clarendon Press.
- Waldron J (2010a) Property Law. In: Patterson D (ed) *A Companion to Philosophy of Law and Legal Theory*, 2nd ed. Oxford: Wiley-Blackwell, pp. 9–28.
- Waldron J (2010b) Socioeconomic Rights and Theories of Justice. *New York University Public Law and Legal Theory Working Papers Paper* 245.
- Waldron J (2012) *Dignity, Rank and Rights*. Oxford: Oxford University Press.
- Waldron J (2013) To Bestow Stability upon Possession: Hume's Alternative to Locke. In: Penner J and Smith H (eds) *Philosophical Foundations of Property Law*, 1st ed. Oxford: Oxford University Press, pp. 1–12.
- Weatherill S (2013) From Economic Rights to Fundamental Rights. In: de Vries S, Bernitz U and Weatherill S (eds) *The Protection of Fundamental Rights in the EU After Lisbon*, 1st ed. Oxford: Hart Publishing, pp. 11–36.
- Wenar L (2015) Coercion in Cross-Border Property Rights. *Social Philosophy and Policy* 32(1): 171–191.

## 4 Property's Relation to Human Rights

Carol M. Rose

### 1. Introduction

Commentators on property typically take the perspective of a property owner, often citing the famous passage in William Blackstone's *Commentaries* that describes property as the "sole and despotic dominion" that the owner enjoys over things, to the exclusion of all others (Blackstone, 1765: 2:2). Blackstone himself immediately expressed grave doubts about this description, however, and particularly about the supposed origins of any such dominion (Rose, 1998: 604–605). Even if we put Blackstone's doubts to one side, however, we might observe that these famous lines concern not only the owner but the non-owners as well. Implicitly, property is a social institution in which individuals may play the role of owners but much more frequently play the role of non-owners, who must acknowledge and defer to the claims of others to control specific resources (Rose, 2013: 272).

What does this social institution do for us? Sometimes, nothing at all. There is no point in having property in things that are boundlessly available. But where resources are even somewhat scarce, the institution of property plays the very important role of deflecting conflict, instead encouraging forbearance and negotiation. Beyond that, property can serve a variety of important and to some degree overlapping functions: safeguarding a zone of autonomy for individuals (Claeys, 2006: 722); protecting their dignity and the signals of respect that they gain from others (Atuahene, 2016); creating a basis for undertaking projects in the world (Radin, 1982); diffusing political authority among many actors and thus deflecting concentration of power (Friedman, 1962: 7–21); maintaining individuals' independence and shielding them from subservience to others (Craig-Taylor, 1998). Perhaps best known, however, is the economic role of property. Especially when taken together with trade and commerce, property incentivizes the creation of wealth by rewarding an owner's effort, planning and careful management of resources (Bentham, 1891: 109–119; Blackstone, 1765: 2:7; Posner, 2014: 40). This economic role entails a recognition of the importance of self-interest in motivating