9 Human Rights: Ethical, Political... or Legal?
First Steps in a Legal Theory of Human Rights

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INTRODUCTION

(International) human rights theory is en vogue. It has been the case for quite some years in Germany, and it is now also the case in

Many thanks to Eleonor Kleber Gallego for her help with the formal editing of the present chapter. Drafts of the chapter were presented at the Osgoode Hall Law School’s Nathanson Centre Seminar on Legal Philosophy between State and Transnationalism in Toronto on October 16, 2009, at a meeting of the ASIL International Legal Theory Group in Washington, D.C. on November 12, 2009, and at the Duke Law Faculty workshop on December 11, 2009. I thank Allen Buchanan, Troy Christensen, Michael Giudice, Larry Helfer, Sophia Reibetanz-Moreau, and Françoise Tanguay-Renaud for their comments and critical remarks. Last but not least, many thanks are due to two Cambridge University Press anonymous reviewers for their useful suggestions.

In the course of this chapter, it will become clear why in view of the interlocking human rights practice and in particular in view of the fact that subjects of international and national human rights are the same and that the locus of application of human rights is domestic in priority – see, e.g., Stephen Gardbaum, “Human Rights as International Constitutional Rights,” European Journal of International Law 16:4 (2005): 741–768 and Gerald Neumann, “Human Rights and Constitutional Rights,” Stanford Law Review 55 (2003): 1863–1900 – a theory of human rights has to be both a theory of domestic and international human rights. This is even more so in the case of a legal theory of human rights, assuming of course that international law can be regarded as law (see for that argument and refutation of different forms of scepticism relative to the legality of international law and to ethical thinking about international law, Samantha Besson and John Tasioulas, introduction to The Philosophy of International Law, ed. Samantha Besson and John Tasioulas, Oxford: Oxford, 2010, 1–17).

Anglo-American circles. One of the very first issues a human rights theorist is expected to address is the nature of human rights and, hence, of human rights theory. The nature of human rights theory is an important concern for at least two reasons. First of all, thinking about the nature of human rights theory situates it within a broader set of theories, in particular legal theory, democratic theory, or theories of justice, and can generate beneficial connections between them. Too often, human rights theorists fail to reveal those links, and the credibility of their theories is partly undermined by the artificial severance of those connections given the centrality of human rights to individual and social life. Second, thinking about the nature of theory requires a preliminary clarification of what it is a theory of and, therefore, of the nature of human rights. Such a preliminary consideration can prove very beneficial in fully identifying or at least delineating the object of one’s theoretical endeavor. The answers to many of the important questions that human rights theorists identify as being central to human rights theory, particularly the existence, function, content, weight, scope, and justification of human rights, are conditioned by the theorists’ original characterization of the nature of their theory and its object. Finally, some human rights theorists may even want to argue that human rights theorizing is part of human rights practice and of their object of study as a consequence. This implies in turn that the nature of human rights theory should not escape their meta-theoretical attention.

More specifically, it is the relationship between the law and the morality or ethics of human rights, and, hence, between the moral and legal theories of human rights, that I will be concerned with in this chapter. Of all areas of international law, international human rights law is the most likely to trigger questions pertaining to the role of ethics in the practice and theory of international law. This is because the content of international legal human rights and that of their moral correspondents are often taken to overlap — because their validity and justification is sometimes taken to transcend their legal enactment, at least on the face of international human rights instruments’ preambles or judicial reasoning on those grounds. As a matter of fact, recent human rights theories seem to be focusing almost exclusively on the moral nature of human rights. Those few accounts that have distanced themselves from this form of abstract ethical theorizing about human rights are grounded on purely political practices, of which the law is just one instantiation. As a result, most recent human rights theories have not only neglected the specifically legal dimension of human rights, but also have artifically severed the links between human rights theory and legal theory. Curiously, therefore, they


Traces of this Dworkinian approach to legal theory may be found in Beitz, The Idea of Human Rights, 8–9, 123 (contra 105, though).

I will use both terms interchangeably in this chapter.


seem to have turned the present volume’s topic on its head: It is not so much the role of ethics in international law, but the role of law itself in ethical and nonethic theories of international human rights that ought to be in question.

This legal gap in human rights theory should not come as a surprise given the current state of the philosophy of international law. Until recently, there has been little faith in the legality of international law and the role of normative theorizing about it. Very schematically, international law has been, alternatively and in a stark contrast, entirely assimilated either into ethics by international natural lawyers or into a sum of state interests by realist, postmodern, or voluntarist international lawyers. Human rights theory does not seem to have escaped this regrettable state of affairs. Assessing the reasons for this legal blind spot in current human rights theorizing and the ways to remedy it will be my concern in this chapter. Most contemporary human rights theorists do not spend much time theorizing about the nature of their theory and, more specifically, about the legal dimensions of that theory. This is surprising.

5 See Besson and Tasioulas, “Introduction.”


8 Raz, “Human Rights without Foundations,” 336–375 focuses, for instance, on the use of the term “human rights” in legal and political practice and discusses various conceptions. He claims, however, that he has not offered an analysis of the concept of a human right. There is not enough discipline underpinning the use of the term “human rights” to make it a useful analytical tool, he argues. According to him, “[t]he elucidation of its meaning does not illuminate significant ethical or political issues” (emphasis added).

9 Following Raz, “Can There be a Theory of Law?”, 85, I understand concepts as being intermediaries between the world, aspects of which they are concepts of, and terms that express them and are used to talk about those aspects of the world.

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

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

of human rights into account by making the opposition between human rights practice and human rights standards a central part of their theoretical poise on human rights. In fact, what they have done is reduce law to one side of the equation by conflating it with one of the dimensions of human rights politics or practice. No wonder, in those conditions, that human rights law is regarded by those authors as playing a secondary role, if at all, in human rights theory. It is important, however, not to confuse the relationship between abstract standards and concrete practice, on the one hand, with the relationship between human rights as ethical or moral standards and human rights as legal norms, on the other. It is true that human rights law can play a crucial role in the enforcement of human rights standards in practice by specifying human rights and duties. Nonetheless, it can also contribute to the identification and specification of those standards at an abstract level, either through the recognition of interests as sufficiently fundamental to give rise to rights and duties, or through the recognition of preexisting moral rights. The difficulties that beset the opposition between bottom-up and top-down approaches on the one hand and the complex relationship between facts and norms in the legal practice on the other are well known to legal theorists. They have long learned to explain the law qua normative practice.

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


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10 See the critiques by Beitz, The Idea of Human Rights, 7 fn. 12.


12 See Griffin, On Human Rights, 204, 209–211.

13 This is one of the problems with the two-step approach in Beitz, The Idea of Human Rights, 11, 103–106, 126–128.

14 This is one of the problems with the notion of “fidelity” to human rights practice in Griffin, On Human Rights, 29; Tasioulas, “Are Human Rights Essentially Triggers for Intervention?,” 939. Even a Dworkinian reading of that notion would not help here, as the two steps in Dworkin’s conception of legal interpretation do not correspond to a divide between moral reasoning on the one hand and legal reasoning on the other. See Jeremy Waldron, Judges as Moral Reasoners, International Journal of Constitutional Law 7 (2009): 2–24, 12; Ronald Dworkin, Law’s Empire (Cambridge, MA: Harvard, 1986), 226.


My argument unfolds in two steps. I start by mapping current ethical and political human rights theories and assessing how the legal dimensions of human rights are understood in each of them. In the second section, I challenge the divide between ethical and political accounts of human rights by reference to the legality of human rights. To bridge the gap between those accounts, I argue for a moral–political account of the nature of human rights and, on that basis, explain the intrinsic relationship between moral and legal human rights.

1. THE LAW IN EXISTING HUMAN RIGHTS THEORIES

Here I present the two main groups of human rights theories that have arisen in recent years. Those theories have pigeon-holed each other as "ethical" and "political" theories of human rights.

When presenting the accounts that fall in either category, my aim is not to do so generally or exhaustively, but to identify how the legal dimension of human rights is addressed within each of them. Interestingly, both ethical and political theories of human rights share a similar neglect for the legal dimension of human rights. This is surprising, because it is precisely the concern for fidelity to the practice of human rights, including, presumably, their legal practice that is said to lie at the core of their division. It is even more surprising because some of those human rights theorists have developed fully fledged theories of law elsewhere, or even, in some cases, a full theory of legal rights. Remediating the neglect of the legal dimension of human rights may actually help bridge the divide between those two groups of human rights theories, as I argue in the second section.

Because of the great variation of adjectives that have been used to describe and qualify the different theories of human rights currently in discussion, it may be useful to clarify how I understand them in this chapter. The qualifications "ethical" and "political" have been used to oppose theories of human rights on three different issues: the nature of human rights, their function, and their justification. Although it may have been the case at first that the theories that fell into either of those two categories did indeed have opposed views on those three central issues, views that could be qualified either as political or ethical, it is no longer necessarily the case. There are examples of human rights theorists whose view of the function of human rights is political but whose account of their justification is ethical, thus providing for a moral–political account of human rights. In what follows, I use those two categories to capture a difference of views pertaining to the nature of human rights exclusively, and not their function or justification. It is precisely with respect to the nature of human rights that the realization of their legal dimension is most instructive; not only does it bridge the divide between the ethical and the political conceptions of human rights, but it sheds light on how human rights law can both implement and mold human rights standards and, hence, on how ethics and politics interact in this context. This, in turn, necessarily impacts on the function and justification of human rights.

A. Ethical Theories of Human Rights and the Law

Ethical theories of human rights understand human rights as ethical norms that may or may not be legalized within domestic or international law. For those theories, human rights law is only a concern in a second stage, after the existence and content of human rights have been clarified and need to be either legally enacted or enforced. In this section I look more closely into two of the most influential ethical theories: those of James Griffin and John Tasioulas.

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

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39 This is the case in Raz, “Human Rights without Foundations.” See, however, Raz, “Human Rights in the Emerging World Order.”
42 See also Griffin, On Human Rights, 204, 209-211.
43 See Griffin, On Human Rights, 29. See the critique to the same effect in Beitz, The Idea of Human Rights, 7 fn. 12.
As a result, Griffin’s account of the legal dimension of human rights and his account of human rights in general can be deemed incomplete. To start with, Griffin locates the law exclusively in the practice of human rights, and he sees that practice as having to be aligned with the best philosophical account of human rights. This explains why he devotes a single chapter to the legal question, and a chapter that is situated at the end of the book, once his philosophical account of human rights has been spelled out. Another difficulty with Griffin’s account of legal human rights, and one that is actually difficult to reconcile with the idea of law as practice only, has to do with what one may refer to as his closet natural law theory. It is not the applicability of natural law theory to human rights that is at issue here. Rather, the problem is the lack of argument for Griffin’s take on one of the most difficult issues in legal theory: the relationship between legal validity and moral correctness on the one hand and between legal and moral reasoning, especially in the context of judicial reasoning about rights, on the other. Reducing legal human rights to a blanket incorporation of moral rights into the law, and judicial reasoning with rights to moral reasoning, is too quick and simplistic, and something contemporary natural lawyers would not endorse. A third difficulty with Griffin’s understanding of the legal dimension of human rights pertains to his downplay of the rights dimension of human rights. Because he does not conceive of human rights as rights that generate duties, the legal questions that usually arise out of conflicts of rights (and duties) and their claimability do not appear in Griffin’s account. A final difficulty with Griffin’s account of the legal dimension of human rights has to do with his understanding of the legal

37 See Griffin, *On Human Rights*, 204, in which the author discusses the “incorporation” of human rights, and 203, in which he discusses the “rule of recognition” of international human rights law. He then goes on to discuss its “bindingness” (205), but the legitimate authority of international human rights law is an altogether different question from that of their legal content and validity. See, e.g., Samantha Besson, “The Legitimate Authority of International Human Rights,” in Andreas Follesdal (ed.), *The Legitimacy of the International Human Rights System* (Cambridge: Cambridge, 2012), forthcoming.


40 For instance, Dworkin’s conception of legal interpretation does not correspond to a moral reasoning versus legal reasoning divide (see Waldron, “Judges as Moral Reasoners,” 12; Ronald Dworkin, *Law’s Empire*, 206).

41 See the critique by Tasioulas, “Taking Rights out of Human Rights.”

practice of international human rights. The authors he quotes as international human rights lawyers are either philosophers, or realist international lawyers who by definition are skeptical about both the legality of international law (and human rights) and the role of ethics in international law (and human rights). By obliterating the writings of mainstream human rights lawyers and international legal theorists, Griffin’s line of argument comes close to a Philosopher King’s argument.

John Tasioulas’s work on human rights was initially built on James Griffin’s. His account is an ethical or traditional one in the sense that he regards human rights as universal moral rights that belong to all human beings by virtue of their humanity and that may or may not be legalized within domestic or international law.

In recent papers, and in the course of his critique of political accounts proposed by Rawls, Raz, or Beitz, Tasioulas has gradually distanced himself from Griffin’s theory. In that context, he offers a potentially richer account of the legal dimension of human rights. One of his main critiques against Griffin is that he has taken rights out of human rights, thus losing touch with a solid body of research on moral rights. This presumably could be taken to mean that the work legal theorists have done on legal rights and their relationship to moral rights could also be fruitfully referred to when theorizing human rights. Regrettably, Tasioulas does not quote legal theorists’ work on rights, however, which is surprising given the more intimate connection there is between moral and legal rights than between other moral and legal concepts. Elsewhere, Tasioulas considers fidelity to post-1945 human rights culture as it has crystallized in major international human rights instruments as a criterion for the adequacy of any human rights theory. He quickly adds, however, that fidelity is a complex notion and that it would have to be compatible with adopting a critical perspective on human rights, so as not to rubber-stamp any human rights legal guarantees. Sadly, he does not provide more details as to

42 See Griffin, *On Human Rights*, 209 fn. 18 (quoting Allen Buchanan on legitimate authority) and 19 (quoting Eric Posner on state interests).

43 See Griffin, *On Human Rights*, 205–210 about the “solitary philosopher” and the responsibility of philosophers and political theorists.

44 See, e.g., Tasioulas, “Human Rights, Universality and the Values of Personhood: Retracting Griffin’s Steps.”


46 See Tasioulas, “Taking Rights out of Human Rights.”


how to get over this tension and therefore to reconcile fidelity with critique in the context of human rights theory.49

Tasioulas’s most explicit discussion of the legal dimension of human rights dates back to his paper *The Moral Reality of Human Rights.*50 There, he argues for the distinct moral existence of human rights independent from their legal recognition. He concedes that the law may in some cases contribute to specify human rights and play a vital role in their implementation, but understands their existence as determined by moral reasoning only.51 In the course of his argument, Tasioulas targets manifesto-rights objections, particularly Raymond Geuss’s enforceability critique and Onora O’Neill’s claimability objection. In that context, he discusses the legal dimension of human rights, but as part of human rights’ enforcement mechanisms or as part of the ways of making those rights claimable.52 The legal version of the claimability argument is famously reflected in Feinberg’s “there ought to be a law” theory of moral rights. According to that theory, “A has a moral right to do x” is to be understood as “A ought to have a legal right to x.”53 In response, Tasioulas rightly argues that legality is not a guarantee of enforcement in practice,54 and further that legality qua enforceability can be defeated by other (including human-rights-based) considerations such as the costs of legal enforcement in some cases, alternative modes of nonlegal enforcement, or legally condened human rights abuses.55

Tasioulas does not, however, consider the possibility for legal recognition to be a conceptual criterion of human rights’ existence independent from legal enforceability or claimability. His position regarding the conceptual role of law in human rights theory is conditioned by the objection he is addressing, namely legal enforcement or legal enforceability as condition of the existence of human rights.56 Once the legality of human rights is separated from their enforcement, the question becomes more interesting, but it remains unanswered by Tasioulas to date. One may venture, however, that his answer to the conceptual connection between human rights and the law would be negative. This seems to be the upshot of his discussion of the “ordinary discourse of moral rights”57 that is used well before a moral right becomes law and often against the law itself.58 Interestingly, Tasioulas moves imperceptibly from moral rights to moral human rights in the course of that discussion. As I will argue later on in this chapter, this is a crucial distinction; although it is true that not all universal moral rights correspond to legal rights and vice versa, one may argue differently in the context of human rights.

B. Political Theories of Human Rights and the Law

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

Joseph Raz’s provocative argument in *Human Rights without Foundations* is that (moral and universal) human rights have no foundations, or at least none of the kind proposed by ethical accounts à la Griffin or Tasioulas.59 There are universal moral rights that exist independently from their political one, however, and not a normative one; it ought not be conflated with Feinberg’s or, most recently, Raz’s (additional) normative argument about a duty to recognize or enforce human rights legally (Raz, “Human Rights in the Emerging World Order”). I will come back to this central question in Section II.B.

49 One way may be to interpret his fidelity criterion as one of the two steps in Dworkinian interpretation. The difficulty with this move, however, is that it requires either a blanket acceptance of Dworkin’s legal theory or a fully developed theory of interpretation of normative practices such as the human rights practice.


56 This is particularly clear when he quotes Habermas, “Die Legitimation durch Menschenrechte,” in connection to Feinberg’s moral right to have a legal right, explored in Feinberg, *Problems at the Roots of Law,* 45 (Tasioulas, “The Moral Reality of Human Rights,” 84). Habermas’ point when he argues for the inherently legal nature of human rights is a conceptual


recognition, but human rights are those universal moral rights that are also
recognized as constraints on national sovereignty by international institutions;
their violation justifies sanctions or other restrictions on state sovereignty, albeit
not necessarily an international intervention.

In his article, Raz is not very detailed about the role played by the law in
the institutional recognition of human rights as international constraints on
sovereignty. Its role is implicit and pervasive, however, given its central function
in international institutions and in the context of international sanctions
and intervention. The institutional recognition of human rights, which is a
condition of existence of human rights, is usually understood by Raz to be legal
as a result. Based on his previous work on the relationship between legal and
moral rights, the connection between the two is actually plausible and likely
to be transposable to the human rights context. In his most recent article
*Human Rights in the New World Order*, Raz clearly makes the connection by
making the legal recognition of human rights part of their moral nature and
existence as human rights. He goes even further as he now argues that human
rights are the universal moral rights that *ought* to be not only recognized by
law, but also (fairly, efficiently, and reliably) enforced by law. If they cannot
be enforced, as there cannot be an “ought” without a “can,” then the right
in question may still be regarded as a universal moral right, but it is not a
human right. Enforceability and legal enforceability more particularly have
therefore become conceptual conditions for the existence of a human right in
the Razian theory of human rights.

Among the critiques one may make to Raz’s most recent restatement of
his argument, one should start with the distinction between legal recognition
or enactment and legal enforcement. This is the same distinction I said was
missing in Tasioulas’s argument (for reasons pertaining to the position he was
arguing against). Here, however, one may have wished for a clearer justification
as to the conflation between the two, especially because the early Raz made
legal recognition only a condition of existence of human rights. Raz’s argument
is a normative one: The fact that human rights are a subset of universal moral
rights we have independently of the law explains why the law has the same
duty to recognize them as we all do individually independently from the
law. Obviously, legal enforceability implies legal enactment for Raz, but one
may question the additional requirement of enforceability once a human
right is legally enacted. Raz’s position regarding the normative requirement of
legal enforceability is reminiscent of the arguments made by Geuss, O’Neill,
and Feinberg. As a result, it can be subjected to the objections made by
Tasioulas regarding enforceability and legal enforceability in particular. The
main critique has to do with the normative side of human rights and, in
particular, with the specification of the corresponding duties. As a matter of
fact, Raz himself argues that ethical theories underestimate the normative side
of human rights. As we will see, however, human rights preexist logically to
the specification of their corresponding duties in given circumstances. This
is actually a consequence of Raz’s interest-based theory of rights. As a result,
making their existence and legal recognition depend on their enforcement
would be conceptually self-defeating. True, making it depend not on their
enforcement but on their enforceability, especially a fair, reliable, and efficient
one, would be less problematic from a conceptual perspective. Nonetheless,
it would still be largely indeterminate. This has to do both with the context
sensitivity of those duties and with the deep indeterminacy that stems from the
limited resources available, and the priorities that have to be made whenever a
right is applied and its specific duties are identified. Conditioning the existence
of human rights on their enforceability presupposes the determinacy of their
duties and therefore undermines the whole idea of a human right.

Of course, Raz may argue that legal enforcement is fairer, more efficient,
and more reliable overall than other social and political means of enforcement.
The normative pull for enforcement will be stronger if it derives from a legal
duty than from a mere moral one, and as a result the moral duty to recognize
and protect will be better respected through a duty of legal enforcement –
which itself would depend on legal enforceability given the “ought implies
can” argument. However, one may still object to Raz’s focus on international
law, knowing that human rights have to be enforced in priority at the domestic
level and then only subsidiarily by international institutions. This critique was
put to him regarding his previous account as putting the cart before the horse.
However, it has even more teeth now that legal enforceability itself and not
only legal recognition and enactment have become part of his conceptual
account of human rights. Raz’s failure to conceive of human rights as moral
and legal norms that bridge the national–international divide is puzzling from
a human rights lawyer’s perspective, given his resolution to provide a human
rights account that fits the practice of human rights.

Rights and Human Responsibilities,” in Andrew Kuper (ed.), *Global Responsibilities: Who
63 On the indeterminacy of human rights and duties, see Buchanan, *Justice, Legitimacy, and
64 See Forst, *The Justification of Human Rights.*
A final critique of Raz's requirement of legal enforceability pertains to the unilateral nature of the argument. Moral human rights only exist if they are legally enforceable. The impact of the legal recognition of one's interests qua human rights on the preexisting universal moral right is not discussed by Raz. It may, however, affect the interests protected, their balance, and the best way to enforce them in the future. Our moral interests and duties are not isolated from our social, political, and hence legal practices, especially when they pertain to our coexistence with other individuals. Although one may explain Raz's approach by reference to his political account of human rights and the fact that it is based on contingent factors in the human rights practice, it does not fit well with his previous work on the legal creation of certain moral rights. By fiat, he states that he is only concerned with legal rights that recognize preexisting moral rights and classifies human rights among them. He adds that this is what legal human rights are (rightly) considered to be. He does not, however, offer a normative argument for that choice, and for not considering how the law may not only recognize but also specify independent moral rights at the same time. This is regrettable, as one of Tasioulas's arguments against Raz's political account of human rights is precisely what Tasioulas refers to as the "parasitic" nature of the Razian account on traditional ethical theories of human rights. Raz cannot simply posit that human rights correspond to independent universal rights that ought to be legalized and not explain how that legalization relationship works.

Charles Beitz's recent book The Idea of Human Rights builds on his previous work on human rights but also revises it to a certain extent. The book defines itself as a theoretical examination of human rights qua central idea to the international or global political practice of human rights as it has gradually emerged as a legacy of World War II. According to Beitz, human rights are matters of international concern whose violation by governments can justify international protective and restorative action ranging from intervention to assistance. Beitz's political or practical account of human rights sever any link to morality and moral rights. In this sense, Beitz's human rights theory differs from its main competitors: ethical or traditional theories of human rights as developed by James Griffin or John Tasioulas on the one hand and political or practical theories of human rights as put forward by John Rawls or Joseph Raz on the other. It differs from the former in that the author does not regard human rights as a subset of universal moral rights, but as a sui generis normative practice that protect individuals' urgent interests against standard threats posed to them by their (state) governments, including failure by the latter to regulate the conduct of agents of which they are responsible. Beitz does not, however, side with other political or practical accounts of human rights, despite sharing the same Rawlsian practical starting point. For him, human rights violations are not conceived as essentially triggers for international intervention, but only as a cause for international concern, which he understands as a broader protective and restorative notion.

Although 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 nonethical and political, Beitz's concept of human rights curiously seems to be a nonlegal one. Mentions to the legality of human rights are limited to historical references to legal human rights instruments and hence to positive human rights law in the book's second chapter. This is regrettable on more than one count. 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" 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." He also says that human rights are a normative concept that plays a normative role in practice by asking for some kinds of actions. Beitz states, however, that he knows of no good systematic method of interpretation for social practices and therefore has to proceed informally. This is surprising, because the law has been famously and repeatedly described by many legal theorists as a normative practice. Although Beitz is right not to equate human rights only...
with human rights law, the latter does constitute an important part of human
rights practice and a part that is intimately connected to the other social and
political dimensions of the practice. Therefore, one may have expected to
learn from Beitz how human rights differ from law as normative practice 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 the method is entirely
suited for the task at hand, but he cannot discuss the reasons for his position. Beitz’s model of interpretation
and his “schema” are very similar to Dworkin’s, however. Although Dworkin’s theory may have deserved more than an excuse 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. 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.

More precisely, legal theory could also have helped Beitz define the nature
of human rights by comparison to other kinds of normative practices and, in
particular, in explaining whether they are rights at all. First of all, if human
rights practice is normative in that it can provide reasons for action but is
neither purely moral nor purely legal, then Beitz has to explain in what sense
it may be said to be normative, even in a sui generis sense of normativity.
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, he is evasive about how one gets from those interests
to a specific kind of moral entity, namely rights. Maybe Beitz’s human rights
are not rights at all, but it would be interesting to know why it is the case
and why they are referred to as rights. If they are rights, it would have been

useful to distinguish them in more detail from moral and legal rights and their
complex relationship. Some answers to these questions could be found in
Beitz’s views on the duties corresponding to human rights. When discussing
the supply side of human rights, however, Beitz is very cautious and refers
either to responsibilities for first-level agents or to pro tanto reasons for second-
level agents, and only very rarely to duties. 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
particular agents.” 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 has to be accounted for — or else it is the concept of rights itself
that has 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. There his reasons
for distorting 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.”
Although one may share those concerns about power in international relations,
disparaging the whole international legal enterprise in one paragraph on that
basis may be too quick, especially in the human rights field. International law
has built-in correctives, for one thing. Beitz actually shows in the next para-
graph that he is aware of those and refers to them as international legal actors’
“normative discipline.” He quickly moves on to the human rights practice’s
internal normative discipline, however, claiming it is more inclusive, but with-
out 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 institu-
tions may actually contribute to inclusive deliberation about human rights
and hence to gradually weaken the bite of the cultural parochialism critique
of human rights.

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

References


For instance, Beitz’s discussion of what a normative practice is and how to theorize it
nominatively and not descriptively on pp. 104–105 is reminiscent of well-known legal theoretical
debates about the nature of law and of legal theory.


See Allen Buchanan, “Human Rights and the Legitimacy of the International Order,” Legal
explain the role of human rights in domestic and international law at the same time. This, in turn, helps explain some issues in human rights theory that are difficult to resolve, such as human rights constraints on state sovereignty, for instance.89

I start by arguing that human rights can be understood as moral propositions, and more specifically as universal moral rights that ground moral duties (Section II.A). Then I explain how human rights can also be described as legal rights, once the fundamental interests that found human rights are legally recognized. I also explain how those legal rights relate to the moral rights they recognize, modulate, or create (Section II.B).

A. Moral Human Rights

Human rights are part of morality, just as reasons, values, duties, principles, or interests are. They ought not, however, be identified with any or all of the latter nor taken to exhaust morality. In particular, human rights are of value and can be justified on the basis of values, but they are not themselves values. In short, human rights are a subset of universal moral rights (a) that protect fundamental and general human interests against (b) the intervention, or in some cases nonintervention, of (c) national, regional, or international public institutions. I present these three elements in turn.

To start with, let us state that a human right exists qua moral right when an interest is a sufficient ground or reason to hold someone else (the duty bearer) under a (categorical and exclusionary) duty to respect that interest vis-à-vis the right holder.91 For a right to be recognized, a sufficient interest must be established and weighed against other interests and other considerations with which it might conflict in a particular social context.92 Rights are, in this conception, intermediaries between interests and duties.93 It follows, first of all, that a right may be recognized and protected before the duties that correspond to it are specified.94 Once a duty is specified, it will be correlative

89 Beitz, The Idea of Human Rights, 210-211.
to the (specific) right, but the right may preexist abstractly without its specific duties being identified. The relationship between rights and particular duties is therefore justificatory and not logical.97 As a result, the determination of the duty bearer(s) of a right and its claimability are not conditions of the existence of a moral right.98 Second, a right is a sufficient ground for holding other individuals under all the duties necessary to protect the interest rather than in terms of the details of these duties.99 It follows that a right might provide for the imposition of many duties and not only one. Rights actually have a dynamic nature; successive specific duties can be grounded on a given right, depending on the circumstances.100 This application indeterminacy of rights also implies that rights have to be localized to be fully effective; it is only in local circumstances that the allocation and specification of rights can take place.

Turning to the second element in the definition, let us state that human rights are moral rights of a special intensity, in that the interests protected are regarded as fundamental and general human interests that all human beings have by virtue of their humanity and not by virtue of a given status or circumstance. They include individual interests when these constitute part of a person’s well-being in an objective sense. That person need not believe that it is the case for her or his interest to require protection as a human right. Those interests also extend to others’ interests in the community and even to common goods in some cases.101 In certain circumstances, those external interests can actually help boost the importance of an individual interest and justify the recognition of that interest as a human right.102 The fundamental nature of the protected interests will have to be determined by reference to the context and time rather than established once and for all.103 This is particularly important not only from the perspective of value pluralism but also of social pluralism, because human rights may protect a variety of different interests whose specific orderings may vary, depending on the context.104

What makes it the case that a given individual interest is regarded as sufficiently fundamental or important to generate a duty and that, in other words, the threshold of importance and point of passage from a general and fundamental interest to a human right is reached, may be found in the normative status of each individual as an equal member of the moral–political community.105 A person’s interests merit equal respect in virtue of her or his status as member of the community; those interests are sociocomparatively recognized as important by members of the community and only then can they be recognized as human rights. This is done mutually and not simply vertically. As a result, human rights are not externally promulgated as such but mutually granted by members of a given political community.106 However, human rights are not merely a consequence of the equal status of individuals; they are also a way of actually earning that equal status and consolidating it. Without human rights, political equality would remain an abstract guarantee; through human rights, individuals become actors of their own equality and members of their political community.107 Therefore, human rights are power mediators.108 They both enable political equality and stem from it. Human rights and political equality are mutually interdependent, in other words. This relationship to political equality explains how human rights are intrinsically connected to democracy as well.109

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99 See Jeremy Waldron, introduction to Theories of Rights, 12–11.
101 See Buchanan, Justice, Legitimacy, and Self-Determination, 180–186.
103 See Nickell, Making Sense of Human Rights.
It is important to pause at this stage and clarify what is meant by political membership or inclusion into an organized political society. This will then enable me to clarify how it is neither a parochial nor an exclusive criterion, and how it can account for both the universality and the generality of human rights.

Political membership is a normative idea according to which a person’s interests are to be treated equally and taken into consideration in the decisions taken by a given political group. Human rights protect those interests tied to membership and whose disrespect would be tantamount to treating them as outsiders. Of course, some human rights are more closely tied to actual membership, whereas others such as the right to life, for instance, are closer to basic demands of humanity. Even the latter rights, however, constrain what equal membership can mean, if it is to be legitimate and the kind of interests it must protect. This is in line with the republican idea of the political community as locus of rights. It is a development of Hannah Arendt’s argument relative to the right to have rights; according to that argument, the first human right is the right to be an equal member of a community through which all other rights can be protected. By submitting individuals to genocide, torture, and other extreme forms of cruel treatment, a community excludes them and no longer treats them as equal members, thus violating the precondition of all human rights: political equality. The universality of human rights lies precisely in the universality of political membership in this normative sense. Their content and corresponding duties are institution dependent and in that sense contingent, but that is the result of the universality of political equality.

(11) The following argument is a development of the argument in Cohen, “Minimalism about Human Rights,” 197–198.
(12) The proposed account comes very close to Forst, in his “The Justification of Human Rights”; “The Basic Right to Justification,” 48–50; and Das Recht auf Rechtfertigung. My account differs, ultimately, because Forst’s account is based on a reflexive right to political justification, whereas my account is based on political equality and its mediation through human rights (see also Christians, The Constitution of Equality, 156). Both accounts, of course, rely on Habermas’ idea of co-originarity between democratic sovereignty and human rights. See Jürgen Habermas, Politische und Geltung, Beiträge zur Diskursanalyse des Rechts und des demokratischen Rechtsstaats (Frankfurt: Suhrkamp, 1992), Chapter III, although they provide different variations of that idea, notably by referring to an external right or value as foundation for their co-originarity. See Corey Bretschneider, Democratic Rights: The Substance of Self-Government (Princeton, NJ: Princeton, 2007), 35–38 for a similar use of Habermas’ co-originarity.


11 For a similar argument, see Forst, “The Basic Right to Justification,” 49.
12 This makes my account of moral human rights both transnational and international, in the sense that they are standards that apply in all domestic political communities but also among agents who are not members of a domestic political community – of course, they are to the extent that the international community can be considered a political community.
14 See Slim, Basic Rights, on the different types of negative and positive duties corresponding to a human right, including duties to prevent other agents from violating it.
15 This normative argument actually corresponds to the state of international human rights law that only directly binds states or international organizations to date and no other subjects.
In short, the proposed account of the nature of human rights follows a modified interest-based theory. It is modified by reference to considerations of equal moral-political status in a given community. Under a purely status-based or interest-based model, the Manichean opposition between the individual and the group, and between his or her private and public autonomy, would lead to unjustifiable conclusions. More specifically, the proposed account is moral in the independent justification it provides for human rights and political in the function it sees them vested with: They are indeed regarded both as shields against the state and as guarantees of political inclusion. In terms of justification, its moral-political dimension differs not only from accounts based on a purely ethical justification of human rights, but also from accounts that seek a political form of minimalist justification of human rights. In other words, the proposed moral-political account of human rights can salvage the political role of human rights without diluting their moral justification. This is what their moral-political nature captures.

B. Legal Human Rights

It follows from the moral-political nature of human rights that the law is an important dimension of their recognition and existence. To understand exactly how and to unpack the legal dimension of human rights, I first present their legality and then turn to their level of legalization, particularly to how one ought to understand their international legalization.

1. The Legality of Human Rights

Just as moral rights are moral propositions and sources of moral duties, legal rights are legal propositions and sources of legal duties. They are moral interests recognized by the law as sufficiently important to generate moral duties. The same may be said of legal human rights: Legal human rights are fundamental and general moral interests recognized by the law as sufficiently important to generate moral duties.

Moral rights can exist independently from legal rights, but legal rights recognize, modify, or create moral rights by recognizing moral interests as sufficiently important to generate moral duties. Of course, there may be ways of protecting moral interests or even independent moral rights legally without recognizing them as legal rights. Conversely, some legal rights may not actually protect preexisting moral rights or create moral rights, thus only bearing the name of "rights" and generating legal duties at the most. However, the same cannot be said of human rights. Universal moral interests and rights may be legally protected without being recognized as legal rights. But, as we will see, human rights stricto sensu can only exist as moral rights qua legal rights. Conversely, one may imagine legal norms referred to as human rights that do not correspond to moral human rights. In such a case, the legal norms named "human rights" would only give rise to legal duties and not to moral (rights-based) duties. Legal human rights, however, can only be regarded as rights stricto sensu when their corresponding duties are not only legal but also moral.

Two remarks on the relationship between moral and legal rights and the relationship between moral and legal human rights are in order. The differences between rights and human rights on the one hand and between their respective moral and legal dimensions on the other can be quite important, given the moral-political nature of human rights and what this implies in turn for their inherently moral and legal nature.

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124 Legal recognition of human rights can therefore be taken to mean, depending on the context, both the legal recognition of an interest as a human right and the legal recognition of a preexisting human right.

125 Note that this lack of perfect correspondence between legal and moral rights and duties ought not be confused with an inclusive legal positivist account of rights: It is not what makes the legal right "legal" and valid law that is relevant here, but what makes it a "right." See also Raz, "Human Rights in the Emerging World Order," who talks of the lack of "moral force" of legally created rights that do not correspond to moral rights. For a defense of exclusive legal positivism in view of the moral nature of legal reasoning and of the legal modulations or exclusions of morality, see, e.g., Raz, "About Morality and the Nature of Law"; and Raz, "Incorporation by Law."

126 Note that this duty is the primary moral duty to protect the interest that founds the legal human right, and not the secondary moral duty to obey the legal norm "human right": see Besson, "The Legitimate Authority of International Human Rights."
Not all moral rights are legally recognized as legal rights. There are many examples of moral rights that have not been recognized as legal rights. Nor should all moral rights be recognized and protected legally. Respect for them should be a matter of individual conscience in priority.

The same cannot be said about human rights, however. True, not all universal moral rights have been or are legally recognized as legal human rights. Some are even expressly recognized as universal moral rights by the law even though they are not made into legal rights or modulated by the law. A distinct question is whether they ought to be legalized and, hence, protected by law. Again, respect for universal moral rights ought to be voluntary in priority, and this independently from any institutional involvement. Nonetheless, universal moral rights create moral duties for institutions, and hence for the law as well, to recognize and protect human rights. This is an application of Feinberg’s “there ought to be a law” theory of moral rights, albeit restricted to the field of human rights only. According to that theory, “A has a moral right to do x” is to be understood as “A ought to have a legal right to x.” Furthermore, legalizing universal moral rights is often justified by other reasons such as reasons of security and clarity, intermediary agreement on a contested right or set of interests, effectiveness, sanctions, or publicity. Besides those normative arguments external to human rights themselves, one may make an internal normative or conceptual argument for the legal enactment of human rights. Based on the moral-political account of human rights presented previously, the law provides the best, and maybe the only, way of mutually recognizing the comparative importance of those interests in a political community of equals. It enables the weighing of those interests against each other and the

drawing of the political equality threshold or comparative line. In short, the law makes them human rights stricto sensu. As a result, in the moral-political account of human rights propounded here, the legal recognition of a fundamental human interest, in conditions of political equality, is part of the creation of a moral-political human right. In other words, while being independently justified morally and having a universal and general scope, human rights as subset of universal moral rights are also of an inherently legal nature. To quote Jürgen Habermas, “they are conceptually oriented towards positive enactment by legislative bodies.” Thus, although legal rights stricto sensu are necessarily moral in nature (as rights), human rights (as rights) are not only necessarily moral but also legal and they are as result both moral and legal rights.

Note that the legal enactment of human rights ought not be conflated with the requirement of legal enforcement or legal enforceability for the reasons discussed in the previous section. The institutionalization and enforcement of a human right are consequences of its recognition and not a condition of its existence. Duties still have to be specified once the human right is recognized, thus making their correlation depend on the justificatory priority of rights over duties. Legal human rights may be better enforced by other social and political means. Although legal enactment of human rights implies a further legal duty to enforce them legally and to institutionalize that enforcement, their moral and legal existence as human rights is not conditioned either by actual legal enforcement or by legal enforceability. It may be by the sheer feasibility of human-rights-correlative duties, provided their specific duties can be made determinate enough, but not by their legal enforceability.

Nor, in contrast, do legal rights necessarily always preexist as independent moral rights. Most do and are legally recognized moral rights, but others

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177 One may think here of the moral rights mentioned by the Ninth Amendment of the U.S. Constitution: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,” U.S. Const. Amend. IX.
179 See Feinberg, Problems at the Roots of Law, 45.
183 A further question would be that of the kind and level of legal enactment (e.g., more or less entrenched). On this question, see Waldron, Law and Disagreement, Chapter 13; Besson, “Conflicts of Constitutional Rights”; Waldron, “Refining the Question,” 72.
184 Nickel, Making Sense of Human Rights, 33.
188 The legaliztion of preexisting moral rights is rarely a mere translation; it usually specifies and somehow changes the moral right. See Saladin Meckled-Garcia and Başak Cali, “Lost
are legally created or legally specified moral rights. In some cases, law and politics may affect a person's interests, thus in a sense enhancing the moral interest or its moral-political significance that are necessary for that interest to be recognized as a source of duties and hence as a right. One may think of zoning rights in the context of land planning, for instance, or of government bondholders' rights.

The same cannot be said about legal human rights, however. All of them necessarily also preexist as independent universal moral rights. However, the law can specify and weigh moral human interests when recognizing them as legal human rights. One may imagine certain political interests whose moral-political significance may stem from the very moral-political circumstances of life in a polity. As a result, the law does not create universal moral rights, but it can modulate them when recognizing them. Furthermore, the inherently legal nature of human rights and the role the law plays in recognizing given interests as sufficiently important in a group as to generate duties and hence human rights make it the case that the law turns preexisting universal moral rights into human rights and hence actually makes them human rights. As a result, human rights cannot preexist their legalization as independent moral human rights *stricto sensu*, but only as independent universal moral rights.

2. The Level of Legalization of Human Rights

The legalization of human rights, that is, the legal recognition and modulation of universal moral rights qua human rights, can take place at the domestic or at the international level, namely through national or international legalization.

The locus of legalization of human rights ought to be domestic in priority. Given what was said about the interdependence between human rights and political equality, indeed, the political process through which their legalization takes place ought to be democratic and include all those whose rights are affected. As a result, using international law to recognize fundamental and general human interests as sufficiently important to generate state duties at the domestic level is delicate. Not only does international law making include many other states and subjects than those affected, but the democratic quality of its processes is not yet secured. The situation would be altogether different if the moral-political community bound by those legal human rights was an international one: The right holders and duty bearers would be the equal members, political actors, and law makers of that international community. The European Union constitutes an interesting example of supranational political community where human rights and political equality can develop hand in hand beyond the state. That, however, is not what is usually aimed at in the context of international human rights law: Most international human rights instruments existing to date bind national authorities exclusively.

What this means, in other words, is that so-called international human rights can at least be regarded as legally protected universal moral rights and most of the time as legal rights as well. However, unless they refer to and correspond to existing domestic (moral-political and legal) human rights, they cannot be regarded as human rights for lack of a moral-political community. The solution would be to regard them as rights to have rights, that is, as rights to equal membership in a moral-political community. According to Arendt, the "right to have rights" is the only international human right and all other

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43 Contra O'Neill, "The Dark Side of Human Rights," 425. I do not understand international human rights duties only as second-order duties to secure or ensure respect for human rights, but also as first-order duties corresponding to those rights. See Besson, "The Legitimate Authority of International Human Rights."


46 There is, in other words, a form of political parochialism or legal contingency of human rights that conditions their recognition as international legal human rights, well before parochialism arises as a problem for the scope of legitimacy of an existing legal human right. See also Raz, "Human Rights in the Emerging World Order;" and Buchanan, " Philosophical Theories of Human Rights" for a similar approach to human rights' conceptual contingency.
human rights have to be guaranteed within a political community. That right to have rights is a right to political equality and includes the right to all other human rights that make individuals equal members of the moral–political community. That right prohibits submitting individuals to genocide, torture, and other extreme forms of cruel treatment, through which a community excludes individuals and does not treat them as equal members.

As a result, human rights guarantees in international law are usually minimal; they rely on national guarantees to formulate a minimal threshold, which they reflect and entrench internationally. More importantly, they are usually abstract and are meant to be fleshed out at domestic level, not only in terms of the specific duties attached to the right but also in terms of the right itself. Both levels of protection are usually regarded as complementary and as serving different functions, therefore, rather than as providing competing guarantees. This complementarity between international recognition and domestic politics explains why the national reception of international human rights within domestic law is often favored or ordered by international human rights instruments or chosen by states in practice. Domestic human rights law does more than merely implement international human rights; it contextualizes and specifies them. One actually often talks of "reception" within the domestic legal order in that respect. Through domestic legal reception, national authorities determine democratically what the actual threshold of importance of various human interests is to be and what duties that human right will give rise to in practice. This explains why in the case in which domestic guarantees of the same human rights exist, international guarantees are usually subsumed to domestic ones in practice.

Of course, one may object that, in this minimal approach, international legal rights would be vacuous or at the most redundant. This, one may argue, fails to explain why states adopt international human rights catalogues. However, this objection ignores the great variety of prudential and nonprudential reasons states may have to legally commit to human rights internationally, some of which may have nothing to do with human rights themselves, on the one hand. On the other hand, the role played by the minimal threshold constituted by international human rights is not to be underestimated; states commit, through international human rights and duties, to keep the level of human rights protection they have achieved domestically and not to fall back below that minimal threshold. International human rights are guarantees against a leveling-down process, in other words. There is nothing vacuous as a result in international human rights minimalism. Quite the contrary: It corresponds not only to the current state of legality of international human rights but also to their moral reality.

This approach has the further benefit of explaining and coordinating the legal recognition of human rights at the domestic and the international levels. It puts international human rights law in context. State sovereignty and political self-determination are indeed one of the pillars of the international order, a pillar that is complemented and not replaced or restricted by international human rights law. In other words, the international legal order protects the interdependence between political equality and human rights alluded to before, by guaranteeing the basic conditions for political equality through state sovereignty and political self-determination on the one hand and the possibility to use them through human rights and the right to have rights on the other. This integrated or holistic account of the legality of human rights proposed in this chapter actually bridges a gap that has been

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46 See Arendt, "The Decline of the Nation-State." See also Cohen, "Rethinking Human Rights," 604 fn. 47; Posner, "The Justification of Human Rights."
48 This is confirmed by the way in which democratic states usually ratified human rights instruments and, hence, generate international human rights duties for themselves only once they have recognized minimal international human rights standards in domestic law (e.g., Switzerland and the European Convention on Human Rights in the 1970s, and currently in the context of the ratification of the additional Protocol to the European Convention on Human Rights in 1998).
49 It is important to note that the contextualization of human rights ought to take place through the form of domestic legal rights according to this chapter's moral–political argument. By contrast, indeed, some human rights anthropologists—such as Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (Chicago: University of Chicago, 2006); Sally Engle Merry and Mark Goodale (eds.), The Practice of Human Rights: Tracking Law between the Global and the Local (Cambridge: Cambridge, 2007)—argue that international human rights can sometimes be most effective if they are not translated into individual legal rights at the local level.
50 Some international human rights instruments express state parties' positive duties to implement international human rights through domestic law (whether through domestic rights or not): e.g., Article 4 U.N. Convention on the Rights of the Child.
53 There is an ingrained notion of progress in international human rights law, in other words.
54 Contra Raz, "Human Rights without Foundations," Section IV.
55 On conflicts between international and national human rights and the question of the legitimate authority and priority of the former over the latter, see Besson, "The Legitimate Authority of International Human Rights."
56 See, for a similar argument, Macklem, "What is International Human Rights Law?", 577; Cohen, "Rethinking Human Rights," 595–597.
left open by the few human rights theories that have accommodated the legal dimension of human rights to date: those of Joseph Raz and Jean Cohen. As alluded to before, Raz’s criterion of legal enforceability is restricted to international legal enforceability. This creates difficulties when one is confronted with the domestic locus of enforcement in human rights practice. Along the same lines, Jean Cohen’s proposal to transpose the Habermasian constitutional model to the international plane and to reconvene anew on international human rights curiously severs the very links to domestic politics her dualist account of international relations relies on. It introduces an artificial divide between the right to have rights that would be international and other human rights that would be domestic, a divide that is unknown to contemporary human rights practice.

CONCLUSION

Curiously, recent theories of human rights, whether on the ethical or the political side of the debate, have had very little to say about the legality of human rights. With a few exceptions, they have made the law part of the many ways in which human rights may be enforced after they have been ethically identified, or, on the contrary, part of the many ways in which human rights may be practically identified, but with no ethical moral significance. As a result, neither of them succeeds in bridging the gap between human rights as critical standards and human rights practice. This constitutes not only a gap in their accounts of the nature of human rights but also arguably an impoverishment for human rights theory.

After exploring different reasons for this legal neglect in human rights theory in the introduction, the chapter proceeded with a two-pronged argument. It started by assessing the legal dimension of the four main ethical and political human rights theories in the first section. In the second section, the chapter identified a middle way between those ethical and political theories of human rights and argued that the legal dimension of human rights could straddle both sides of the argument in a moral-political account of human rights.

158 See Cohen, “Rethinking Human Rights,” 599–600, based on Forst, “The Basic Right to Justification,” 48–50; Forst, “The Justification of Human Rights” and Habermas, “Die Legitimation durch Menschenrechte,” 183. Note that Forst, in “The Basic Right to Justification,” 50 et seq. and “The Justification of Human Rights” (more cautious, though), seems to be defending an integrated approach to human rights, but he draws no clear line between the domestic and the international legalization of human rights and certainly does not provide a way to disentangle the domestic from the international political communities and their respective human rights guarantees.

proposed account of the nature of human rights draws both from a republican theory of political membership and a legal theory of rights. On the basis of that account, I have argued, on the one hand, that human rights are inherently moral and legal: The law cannot create universal moral rights but it can recognize or even modulate them, and turn them into human rights stricte sensu. On the other, by virtue of human rights’ close relationship to political equality, I ventured that the legalization of human rights ought to take place at a domestic level in priority. International human rights norms can only be regarded as human rights if they match, in a minimal way, an existing set of domestic human rights. In the absence of such a set of domestic human rights, the only international legal human rights there can be stricte sensu are rights to have rights, that is, rights to political equality and membership with all the human rights those rights require for their realization in a given political community.

Although one may be legitimately concerned about the little attention devoted to ethics in the theory of international law to date, human rights theory seems to suffer from the reverse neglect: It is overly “ethicized” and has by and large underestimated the role played by the law both conceptually and normatively in human rights practice. The time has come to develop a legal theory of human rights that can account for the law’s pivotal role in the recognition, specification, and legitimation of human rights.