Chapter One

Introduction: Human Rights Theory and the Challenge of the ECHR

The ordinary discourse on human rights is premised on the claim that those rights are inherent to our condition of human beings. The "inherence view" [1] suggests that those rights capture something fundamentally binding, "dignity". In the words of Perry, "the inherent dignity has a normative force for us, in this sense: we should live our lives in accordance with the fact that every human being has inherent dignity". [2] At first sight, it seems as if "dignity" requires no theoretical defense. It is obvious. "Dignity" is used not only to *identify* human rights among others rights and values. It also allows us to *justify* them normatively. "Dignity" illuminates the binding force that human rights have upon us.

One implication of "dignity" as grounding concept for human rights immediately follows: if being human entails having dignity, then human rights are rights we owe to every single human being. As such, human rights matter to both *political* and *interpersonal* moralities. As Valentini puts it, "on this view, if Sarah gets mugged on her way home and is badly injured as a result, she can be said to have suffered a human-right violation". [3] Another implication follows from the premise of "dignity" *qua* grounding concept for human rights: if human rights bind us just because of our inherent "dignity", then human rights are independent for their existence from any conventional norm (social, political, legal). As Pogge puts it, they have a normative existence "whose validity is

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[1] This term is owed to Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press, 2010).

[2] Michael Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press, 2008), 5.

[3] Laura Valentini, 'In What Sense Are Human Rights Political? A Preliminary Exploration', *Political Studies* 60 (2012), 182.

independent of any political or legal authority". [4] In particular, *legal* recognition and/or enforcement may be one way of making those rights effective, but not necessary to their conditions of existence.

The inherence view of human rights has other attributes that may be captured intuitively. One is their *minimal* character. Human rights seem to differ from other moral kinds in that their provisions do not go beyond a core of basic entitlements. As Nickel explains, "human rights aim at avoiding the terrible rather than achieving the best. Their modality is "must do" rather than "would be good to do"". [5] This premise is also explicit in Shue's seminal account of "basic rights": "security" and "subsistence" are equally essential basic entitlements that secure the enjoyment of other, non-basic rights such as freedom of expression: "basic rights" are "the morality of the depths. They specify the line beneath which no one is to be allowed to sink". [6] Human rights are not elaborate moral goods such as *justice* or *virtue*. They capture a "core" of the values we ascribe to human life, those that are "fundamental" or "essential" to a "decent" human life.

In the same vein, human rights strike us with an idea of *urgency*. Human rights are not long-term social and political goals to contemplate. Given the stringency of "human dignity", it is urgent that human rights are respected. As Nussbaum suggests, human rights are conceived as "a list of urgent items that should be secured to people no matter what else we pursue" (…). We are doing wrong

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[4] Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity, 2008), 52.
[5] James Nickel, *Making Sense of Human Rights* (John Wiley & Sons, 2007), 36.
[6] See Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press, 1996), 18.

to people when we do not secure to them the capabilities on this list".[7] Human rights refer to a set of urgent, minimal and pre-institutional rights stemming from the "dignity" of human beings that should be given priority against other normative considerations. This intuitive characterization suggests that human rights are not just a semantic creation. They capture a fundamental moral category.

1.1. The need for determinacy

Pre-institutional, urgent, minimal. These are just intuitive attributes of the inherence view of human rights underlying the ordinary discourse. How do we move from this basic *concept* to a *conception*[8]? We may all understand the basic concept of human rights but strongly disagree about its underlying normative content. As Griffin puts it,

> "the term "human right" is nearly criterionless. There are unusually few criteria for determining when the term is used incorrectly and when incorrectly – and not just among politicians, but among philosophers, political theorists, and jurisprudents as well. The language of human rights has, in this way, becomes debased".[9]

[7] Martha Nussbaum, 'Capabilities and Human Rights', in *Global Justice and Transnational Justice*, ed. Ciaran Cronin and Pablo De Greiff (MIT Press, 2002), 143.

[8] This distinction used here is owed to Rawls' distinction between concept and conception of justice; the concept of justice refers to "the role of its principles in assigning rights and duties and in defining the appropriate division of social justice" while "a conception of justice is an interpretation of this role". In John Rawls, *A Theory of Justice* (Harvard University Press, 1971), 9.

[9] James Griffin, *On Human Rights* (Oxford University Press, 2008), 15.

This is also what Buchanan terms the "justificatory deficit"[10] of human rights. The grounding concept of "dignity" pervading lists of international human rights[11] is particularly concerned. We often hear worries about its ontological and epistemological status: is "dignity" an inalienable property of human beings? If so, how can we lose it and thereby have our rights infringed? Surely, the "fact" of human "dignity" cannot be understood as the regularity of behavioral patterns or dispositions. Its binding force lies somewhere in the *normative* realm. We may agree that it is a normative status entitling right-holders to be treated in certain ways independently of institutional relations.[12] But to what extent do human rights overlap with the broader Kantian concept of autonomy? A number of prominent legal and political theorists have also incorporated "dignity" into their concept of *rights*.[13] But to what extent does it overlap with "human" rights? On pain of infinite regress, such special moral status needs to be specified. We may also agree that "dignity" grounds our rights, while disagreeing about what such are rights are rights *to*. Rosen rightly notes that:

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[10] See Allen Buchanan, 'Human Rights and the Legitimacy of the International Order', *Legal Theory* 14 (2008), 39–70. See also Allen Buchanan, 'The Egalitarianism of Human Rights', *Ethics* 120 (2010), 679–710. The indeterminacy is not just troubling to "armchair" philosophers. In his thorough study of the legal and judicial practice of "human dignity", McCrudden concludes that "there is no common *conception* of dignity, although there seems to be an acceptance of the concept of *dignity*". In Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law* 19 (2008), 712.

[11] The Preamble of the UDHR says the following: "whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world (…)". The Declaration itself says the following: "whereas the people of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and have determined to promote (…)". Article 1, 22, 23(3) of the UDHR also mentions "human dignity". In his wide study of the status of dignity in international and constitutional law, McCrudden explains that "at the international level, dignity is now routinely incorporated in human rights charters, both general and specific". He also explains that by 1986, dignity has become the central guiding concept in the framing of new human rights instruments in international law. See McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', 668–670. The concept of dignity is also central in the post-45 European constitutional tradition as in the German Basic Law (Article 1 (1949)).

[12] As Perry notes, we may agree on the negative implications of human rights: "to say that every human being has inherent dignity is to say that the dignity of every human being has does not inhere in – it does not depend on – anything as particular as a human being's race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status. But to say that is not say what the human dignity of every human being depends on. What is the source, the ground, of this dignity – and of the normative force this dignity has for us?" In Perry, *Toward a Theory of Human Rights*, 5.

[13] See e.g. Alan Gewirth, 'Rights and Virtues', *The Review of Metaphysics* 38 (1985), 743. See also Allen Buchanan, 'Human Rights and the Legitimacy of the International Order', *Legal Theory* 14 (2008), 45–46.

"where John Paul II, for example, believes that dignity requires the inviolability of all human life from the moment of conception to the expiration of all vital functions, the well-known Swiss organization Dignitas is famous for assisting those who wish to "die with dignity" to end their own lives".[14]

The room for disagreement is exponential. It may arise in the middle of our ordinary right-claims: does the right against inhumane or cruel treatment prohibit corporal punishment in all its forms or only some? Should human rights lists include a right to free elections? As Letsas suggests, "we cannot inflate the concept of human rights so much that it covers the whole realm of justice. Human rights would then lose their distinctive moral force".[15] Furthermore, human rights are not just the rights of *human beings*. They are also *rights*. How do we understand the concept of rights within the concept of human rights? Are we justifying *rights* or just *values* or *interests*? As Nickel explains, "the fragment of intension we have – namely, a claim that we have on others simply in virtue of our being human – holds of moral claims in general and not all moral claims are rights-generated".[16] The concept of *rights* is expected to preserve a certain structure. Finally, one may draw on the history of ideas to fill the normative vacuum. However, the inherence view has a long and controversial history and may be justified by antagonistic conceptions of the deeper reasons for having and protecting rights.[17] Indeed, the concept of "dignity" may find a place in Christian theology, in early liberal thought or later in Kant.

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[14] Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012), 6–7.
[15] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2009), 129.
[16] James Nickel, *Making Sense of Human Rights* (John Wiley & Sons, 2007), 16.
[17] See Rosen, *Dignity*.

The philosophical task before us is significant. In this introductory chapter, I want to present two distinct and predominant ways in which this task has been envisioned in the recent literature in normative human rights theory: the *ethical* conception of James Griffin, on the one hand, and the *political* conception of Charles Beitz, on the other. To construct the distinction, I present how each of those theorists understands the role of normative facts and practices associated with human rights in the enterprise of normative theorizing. Roughly put, normative facts and practices are the actions that human rights give reasons for in the social world. I argue that this role radically differs in Griffin and Beitz: while the structure and content of human rights can be attained by moral reasoning in Griffin, that structure and content can be apprehended only through an interpretation of political facts and practices in Beitz. On the basis of that distinction, I suggest a way to move forward.

1.1.1   Griffin and the conception of personhood

In *On Human Rights*, James Griffin makes a seminal contribution to the field of normative human rights theory in arguing that human rights protect our status of normative agents. Griffin defends an account of human rights based on the value of "personhood"[18] understood as the inherent capacity for normative agency. This conception best captures the binding force of human rights and thereby *justifies* them. As Griffin explains, "anyone who has the capacity to identify the good, whatever the extent of the capacity and whatever its sources, has what I mean by "a conception of a worthwhile life; they have ideas, some of them reliable, about what makes

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[18] Griffin's account is detailed and critically examined in Chapter Four.

a life better or worse".[19] The value of personhood specifically aims to remedy the justificatory deficit of human rights.

The exercise of this distinctively human capacity for agency requires three things. First, an *autonomy* condition: one must "choose one's path through life – that is, not be dominated or controlled by someone else".[20] Second, a *minimum provision condition*: one must "at least have a certain minimum education and information. And, having chosen one's path, one must be then able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes".[21] Third, a *liberty condition*: "others must also not forcibly stop one from pursuing what one sees as a worthwhile life".[22] If those three conditions are fulfilled, the value of personhood is realized. Further, personhood helps to straightforwardly determine the duties and clean "most of the conventional lists of human rights"[23]: life, torture, security of person, political decision, free expression, assembly, free press, worship, education and minimum provision. The "generative capacities"[24] of personhood therefore constitute the *substantive* basis of Griffin's ethical account. It is a *substantive* account of human rights in that the evaluative content should help us distinguishing "human" rights among all sorts of rights and values and illuminate the inherence view outlined above.

1.1.2   The moral dimension of human rights

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[19] Griffin, *On Human Rights*, 46.
[20] Ibid., 33.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.

There is a more methodological way to distinguish Griffin's ethical conception. It lies in how Griffin's ethical account obtains independently from the legal and political practices that we routinely observe in association with (international) human rights. When we turn to the most salient practices and discourses connected to human rights, we may observe that the concept plays a more circumscribed role than what Griffin suggests. The concept seems appropriate to *describe* and *evaluate* some situations and not others. Most clearly, the concept is routinely employed as a normative standpoint to morally condemn states and governments that mistreat their subjects. The prototypical addressee of human rights remains the modern nation state and that normative relation is taken to be valid across states around the world. The *international* dimension of human rights is also relevant to the prototypical actions that those rights justify: human rights justify some forms of international action and actions but not others. Human rights justify the signing, ratifying and amending of international treaties. They justify a range of international interventions (from military attack against the state violator to the imposition of sanctions upon that state). But there are also actions that human rights do not justify. For instance, there is until today no human rights court on a global scale despite that those rights were first recognized in law. In others words, human rights generates some duties but not others.

While those features of the practice are addressed in Griffin's inquiry, they do not conduct to the structure and content of those rights. As Besson suggests (for ethical conceptions more generally), "when read carefully indeed, they refer to human rights practice at most as a test case for their theoretical proposal or as something to criticize or guide from that perspective".[25] This is because for Griffin human rights speak for a fundamental moral category that requires an

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[25] Samantha Besson, 'Human Rights: Ethical, Political...or Legal? First Steps in a Legal Theory of Human Rights', in *The Role of Ethics in International Law*, ed. Donald Earl Childress (Cambridge University Press, 2012), 216.

independent form of moral reasoning. "Personhood" fills a vacuum in our moral repertoire. Consequently, the form of justification developed by Griffin operates from a *first-person* perspective. As Valentini puts it, the personhood account "captures the sense in which human rights are fundamental moral claims whose validity is independent of contingent empirical facts".[26] This is also why Griffin almost exclusively focuses on the *interests* and *values* that those rights may protect. Those interests are sufficient to derive the rights enshrined in "most of the conventional lists of human rights"[27] such as life, torture, security of person, political decision, free expression, education or minimum provision.

The strongly moral dimension of "personhood" does not imply that Griffin's account is esoteric, however. Rather, Griffin simply assumes that the relevant standpoint to construction the concept is our ordinary life *qua* human beings. The need for abstracting from this practice is justified in the face of the persisting disagreement over the scope of those rights. The proliferation of rights[28] in human rights discourse reinforces the need for determinacy in this sense.[29] Indeed, human rights are not only becoming more recognized worldwide, they also proliferate in number. As Raz nicely puts it, "human rights practice is not only becoming more established, it is also

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[26] Valentini, 'Human Rights, Freedom, and Political Authority', 576.

[27] Griffin, *On Human Rights*, 33.

[28] Historically, social and economic rights were the first provisions to enlarge the scope of the human rights made them contingent upon economic and social conditions, moving the concept beyond the core of civil and political rights that were their primary concern. Some rights were rapidly targeted. It started with the right to work in the UDHR (Article 23.1). In the same vein, Article 7 (c) of the Additional Protocol of the American Convention (1969) asserts that there is a right of every worker to promotion or upward mobility on his employment. More significantly, the International Covenant on Economic, Social and Cultural Rights (1966) claims that we have a right to the highest attainable standard of physical and mental health.

[29] The two grounds should however be clearly distinguished. As Tasioulas points out, "whether a particular conception of human rights validates "too many" or "too few" human rights – and how that is to be decided – is a separate question from that of giving a determinate account of their identification, specification, and normative weight". In John Tasioulas, 'Taking Rights Out of Human Rights', *Ethics* 120 (2010), 648.

spreading its wings".[30] Beyond the continuously growing number of international treaties in which human rights are enshrined, an ever-growing number of rights are claimed to be human rights. It is for instance declared that all persons should have a right to a secure, healthy, and ecologically sound environment.[31] A pressing threshold is therefore needed to help us attain "the significance of a right's being a human right"[32] and the use of independent moral reasoning may respond to that need.

1.2. The need for practice-responsiveness

To adopt an independent moral standpoint *à la* Griffin may nonetheless come at a price. It may fail to explain the confinement of human rights claims and practices to particular contexts of use. As Tasioulas puts it, "it runs the risk of changing the subject by failing to engage adequately with the understanding of human rights that has emerged historically and which plays such a prominent role in contemporary political and legal life".[33] Human rights were primarily recognized in international law. From this standpoint, reconstructing the concept of human rights first requires addressing the factual and practical context in which those rights have been recognized and identifying what kind of action they give reasons for. The overarching role of human rights *qua* international legal norms is to specify the limits of what modern nation states can do to their citizens. As Letsas explains, "to assert, in the aftermath of the Second World War, that individuals have rights "by virtue of being human" was simply to assert that states have obligations by virtue of being members of the international community, with respect to how they

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[30] Joseph Raz, 'Human Rights without Foundations' in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010), 322.
[31] See http://www1.umn.edu/humanrts/instree/1994-dec.htm. Quoted in Ibid.
[32] Ibid., 323.
[33] Tasioulas, 'Taking Rights out of Human Rights', 649.

treat individuals within their jurisdiction".[34] It is therefore difficult, on this basis, to infer that human rights invest both political and interpersonal moralities with the same normative weight or that they refer to a fundamental moral category. Unlike the case of Sarah's mugging, "arbitrary expropriation or confinement on the part of the state intuitively strikes us as human-right violation".[35]

Similarly, it is difficult to hold that human rights *qua* international norms do not depend for their existence on any prior norm. The institution of international law, together with the post-45 international state system, remains a central premise. Beyond the UDHR, the American Convention of Human Rights (ACHR, adopted in 1968), the European Convention on Human Rights (ECHR, 1950), the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD, 1965), the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the Helsinki Final Act (1975), the African Charter on Human and People's Rights ("The Banjul Charter", "1981), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984) the Convention on the Rights of the Child (CRC, 1989) are the main conventions that have consolidated the international legal dimension of human rights in the second half of the 20th century. Those treaties have also established (quasi-)judicial organs in charge of the supervision of the implementation of human rights norms. In order to effectively shape the life of right-holders, those treaties need mechanisms of incorporation in national legal orders and this therefore requires addressing the status of international law in their jurisdictions. International law is a normative construct of its own, and so is human rights law.

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[34] Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 19.
[35] Valentini, 'In What Sense Are Human Rights Political?',182.

Is independent moral reasoning primary to reconstructing this practical dimension of human rights? It seems that such ordering puts the cart before the horse. Conceptualizing human rights along those lines is still *normative* but not in the same sense as the ethical conception. It appears as *sociological*, rather than *moral*, in that it first requires us to identify with the range of actors and structures involved in this circumscribed context and understand how human rights norms give those reasons for action. Those reasons may not be the ones that are authoritative from an independent and privileged moral standpoint. This is reminiscent of the circumstances in which founding treaties of human rights law were signed. As Buchanan explains, "the urgent priority was to get as much agreement as possible on a set of minimal standards for how states should treat their own peoples, and this appeared to require three things: a highly abstract set of rights, avoidance of potentially divisive debates about their foundations, and assurance that these "rights" were not enforceable against states".[36] From this practical standpoint, human rights do not seem as if they necessarily refer to a fundamental moral category.

1.2.1. Beitz and the rejection of moral reasoning

Charles Beitz is a prominent defender of the political approach to human rights. It must be clear that his approach does not simply require taking the practices of human rights more seriously. More importantly, Beitz argues that addressing and interpreting those practices directs us to the core content and structure of those rights: "human rights claims are supposed to be reasons-giving for various kinds of political actions which are open to a variety of agents. We understand

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[36] Buchanan, 'Human Rights and the Legitimacy of the International Order', 40–41.

the concept of human rights by asking for what kinds of reasons, in what kinds of circumstances, human rights claims may be understood to give reasons".[37] According to Beitz, therefore, the foundations that ethical theorists seek construct by moral reasoning should be found in an interpretation of the practices associated with those rights: human rights "do not appear as a fundamental moral category (…). Human rights operate at a middle level of practical reasoning, serving to organize these further considerations and bring them to bear on a certain range of choices".[38] The content of global human rights cannot derive from "a single, more basic value or interests such as those of human dignity, personhood, or membership. The reasons we have to care about them vary with the content of the right in question (…). Human rights protect a plurality of interests and require different kinds and degrees of commitment of different agents".[39] In sharp contrast to Griffin, therefore human rights do not constitute a distinctive moral category.

The same goes for their legal dimension. Beitz notices that the legal practice of human rights (on a global scale) is restricted to mechanisms of "consultation, reporting, and public censure".[40] Human rights have lacked until today anything close to a supranational judicial organ delivering authoritative decisions similar to the ones we have in constitutional regimes. Similarly, there is no legal sanction mechanism in case of non-compliance. This is typical of human rights *qua* international legal norms. As Besson and Tasioulas note, the only sanctions triggered by official coercion are "rare, diverse in character, and often non-systematically applied".[41] The existence of

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[37] Charles Beitz, *The Idea of Human Rights* (Oxford University Press, 2009), 8–9.
[38] Ibid., 127–128.
[39] Ibid., 128.
[40] Ibid., 32.
[41] Samantha Besson and John Tasioulas, 'The Emergence of the Philosophy of International Law', in *The Philosophy of International Law* (Oxford University Press, 2010), 12.

a court with general and compulsory jurisdiction is taken as a necessary condition of a legal system.[42] Consequently, for Beitz human rights are neither *legal* nor *moral* rights. In fact, Beitz even rules out the concept of *rights* to interpret the practice of human rights. A Razian interest-based approach, for instance, would frame human rights as intermediaries between the interests of some and the duties of others. Although human rights imply interests, Beitz does not draw on rights theory to account for the normativity of human rights. He knows "no good systematic method of interpretation for social practices (…)".[43] If human rights are neither moral, nor legal rights, nor rights *tout court*, what are they?

1.2.2. The political dimension of human rights

Surely, human rights do not stand in a normative vacuum. But their normativity is distinctively *political*, Beitz suggests. The typology of actions that human rights generate (their violation) goes from *coercive intervention* to *change a regime* and *assistance and pressure from civil society*. What do all those actions have in common? Beitz' concept of human rights modelled upon the practice has three main components. The first concerns the *interest* protected those rights. It must be "sufficiently important when reasonably regarded from the perspective of those protected that would be reasonable to consider its protection to be a political priority".[44] The model must accommodate the importance of the interest in such a way that it can "be recognized even by those who do not share it (e.g. "being able to follow one's religion")".[45] The second component concerns the advantageous protector of the interest, that is, the state. This element

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[42] See e.g. Joseph Raz, 'On the Nature of Law', *Archiv. für Rechts-und Sozialphilosophie* 82 (1996), 1–25.
[43] Beitz, *The Idea of Human Rights*, 107.
[44] Ibid., 137.
[45] Ibid., 138–139.

derives from "more-or-less substantial empirical generalizations about human social behavior and the capacities and dynamics of social institutions".[46] Finally, any plausible human rights "must be suitable objects of international concern".[47] This third component further constrains the set of possible interests that may count as global human rights: "whatever its importance regarded from the perspective of potential beneficiaries and however appropriate it would be as a requirement for domestic institutions, a protection cannot count as a human right of it fails to satisfy a requirement of this kind".[48] The third component remains the core of Beitz' idea: human rights violation provides a *pro tanto* reason for external actors to take action.

Now, one may think that capturing the salient practices of human rights is the task of the social sciences. It is the perspective of the *impartial observer* employed to retrieve the internal point of view. The best account would be the one that best resists falsification. However, Beitz makes clear that we cannot get to the very content and structure of human rights other than through a careful reconstruction of the political practices associated with human rights: "a practical approach does more than notice that a practice of human rights exist; it claims for the practice a certain authority in guiding and thinking about the nature of human rights".[49] This leads to the conclusion that the ethical conception of Griffin and the political conception of Beitz *mutually exclusive* as far as the role of normative facts and practices is concerned. On the one hand, ethical conceptions identify a stringent moral category (such as "personhood") through independent moral reasoning, which helps them navigate from the moral to the political and the legal dimensions of human rights (unidirectional). Not only does the personhood account

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[46] Ibid., 139.
[47] Ibid., 140.
[48] Ibid.
[49] Beitz, *The Idea of Human Rights*, 10.

determine the human rights we have, but it also pervades the very structure of rights in determining their correlated duties and serves as a standard of criticism to "clean" the conventional lists of human rights in international law. As Tasioulas puts it, "on the interest-based account, they are rights grounded in universal interests significant enough to generate duties on the part of others".[50] To this extent, the ethical conception is "practice-independent".

On the other hand, the political conception makes the nature, structure and content of human rights fully dependent upon the interpretation of global political practice as it contingently presents itself, that is, the "system" designed by the typical actors of the international scene (sovereign nation-states, IOs, NGOs, etc.). Implicit in this political practice is an international state system profoundly structured by the sovereign equality of states reluctant to intrusive judicial mechanisms of review. As Besson puts it, human rights are here conceived as "politically adopted norms that constitute recognized limits on state sovereignty in current international relations".[51] What drives normative theorizing here is the political dimension of human rights. The reconstruction of the concept is, as such, "practice-dependent".[52]

1.3. The main argument

Having identified the role of normative facts and practices as the distinguishing standard between the ethical and the political conceptions, I turn now to the preliminary claim of my investigation. To recall, both the ethical and political conceptions of human rights are *normative*

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[50] John Tasioulas, 'The Moral Reality of Human Rights', in *Freedom from Poverty as a Human Right*, ed. Thomas Pogge (Oxford University Press, 2003), 77.

[51] Besson, "Human Rights: Ethical, Political...or Legal? First Steps in a Legal Theory of Human Rights," 223.

[52] As we shall see later, this approach resembles the one adopted by John Rawls' *The Law of Peoples*. Rawls stresses that his account does not seek to derive human rights from a "theological, philosophical, or moral conception of the nature of the human person". In John Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited"* (Harvard University Press, 2001), 81.

conceptions. They serve the same objective of distinguishing "human" rights among all sorts of rights and values. Beitz does not rule out the normative purpose of human rights theorizing – but, as he explains, "we cannot think about this further question without first understanding the practice in which these claims are made and responded to".[53] Moreover, Beitz firmly argues that understanding this practice inevitably implies assigning human rights a thin moral content. In my investigation, I aim to contest this inference. The general and preliminary argument runs as follows: reconstructing their practical role does not necessarily exclude moral reasoning. The key to this reconciliation is to be found, I argue, in another characterization of human rights practice. By contrast to the political conception that captures the global political practice of human rights, I argue that human rights are better captured in *legal* and *judicial* terms in view of the reconciliation between the two conceptions. This other interpretation of the practice of human rights can avoid, I argue, the limitations of the two conceptions: the foundationalism of Griffin that ends up irresponsive to the practice of human rights and to the pervasive disagreement of ordinary modern politics, on the one hand, and the anti-foundationalism of Beitz denying them any basis in a moral layer of reasoning, on the other. Interpreting the practice in legal and judicial terms opens a conceptual space in which both conceptions become complementary. Four more specific claims can help us clarifying this argument.

1.3.1. Claim one

The first claim applies to the practice-dependent dimension of Beitz' account. I want first to argue that the *factual* premises that Beitz uses are not exhaustive. They result from a selection as

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[53] Beitz, *The Idea of Human Rights*, 105.

to what constitutes the relevant and meaningful practices of human rights. Surely, Beitz' conception aims to be as *inclusive* as possible. As Beitz explains, "the aim is to describe the most important features of this practice in a schematic and reasonably charitable way, if possible without prejudging the outcome of some interpretative and normative issues that arise when one thinks critically about it".[54] However, "global political life" is not the *only* standpoint one may take when one interprets the practice of human rights from an evaluatively neutral perspective. It is one thing to notice that the current practice of international human rights lacks anything close to a supranational and authoritative organ in charge for their recognition, specification and allocation and that human rights give reasons for a number of distinctively political actions. Yet it does not follow that human rights stand in a legal and judicial vacuum either. True, Beitz notices that the legal and judicial dimensions of human rights are restricted to mechanisms of "consultation, reporting, and public censure".[55] But he fails to account for the nature and scope of this practice such as the quasi-judicial practices of UN treaty bodies.[56] It is the absence of the *legal effects* in national legal orders of both the rights enshrined in treaties and the views and recommendations of UN treaty bodies that Beitz targets here, not the adjudication that is inherent to the quasi-judicial function of treaty bodies, regional human rights courts and to the national implementation of those norms. A limited number of states have indeed established special procedures to apply the decisions of the bodies. It is reported, however, that seventy per cent of the Views delivered by the Human Rights Committee (HRC) established by the ICCPR are not

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[54] Beitz, *The Idea of Human Rights*, 13.
[55] Ibid., 32.
[56] For a recent overview of this judcial practice, see Birgit Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies', in *Human Treaty Bodies: Law and Legitimacy*, ed. Helen Keller and Geir Ulfstein (Cambridge University Press, 2012).

implemented.[57]

It is therefore correct to point out that the *authority* of international human rights law is weak. In fact, the treaty bodies are not judicial organs *stricto sensu*. International human rights law lacks anything close to a central supranational judicial organ for authoritatively adjudicating state-individual disputes similar to the one we have in constitutional regimes. As far as the HRC is concerned,

> "the general perceptions of states that Views do not impose legal obligations on them has a substantial impact on decisions not to implement them (…). Even states that have proved generally respectful of the work of the treaty bodies do at times insist on their discretion to either implement or reject the outcome of individual communication procedures".[58]

However, it is incorrect to infer that international human rights stand in a normative vacuum *qua* legal norms. Since human rights are irremediably thick and abstract, judicial organs play a crucial role in specifying their normative content. This is true of both UN treaty bodies and, more importantly, of regional courts such as the ECtHR. A quick look at the case law of the ECtHR shows how the court needs to identify the interest(s) that the right serves, how it identifies right-holders whose contribution to the interest(s) underlying the right is central or how it accords a margin of appreciation to respondent State Parties depending on the circumstances. In addition,

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[57] For a recent analysis of the effects of the decisions of UN treaty bodies, see Rosanne Van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law', in *Human Treaty Bodies: Law and Legitimacy*, ed. Helen Keller and Geir Ulfstein (Cambridge University Press, 2012).
[58] Ibid., 372.

the *subsidiarity* of international human rights implies that their legal and judicial dimension is also and primarily to be found at the level of internal state practices independently of the international level. As Besson explains, "international human rights need to be contextualized and specified before they can be applied and interpreted. As a result, their interpretation cannot but be domestic in priority".[59] International human rights are frequently implemented at the level of domestic law only. Again, this applies to the reception of judgments and decisions of the ECtHR and, surprisingly, of UN treaty bodies. Some national courts have also given effect to the Views of the HRC in the absence of adopted legislation and may attach interpretive authority to treaty body decisions. As a result, one may wonder if the *global standpoint* is optimal to grasp the practice of human rights – in particular, its legal and judicial dimension.

Beitz' scrupulous analysis of the global political practices of human rights is not thereby ruled out. The point is that it falsely conveys the idea that this practice of human rights is all that there is to the practice of human rights and that the object of theorizing is *exhaustively* captured. When Beitz argues that human rights is a global concern in that it provides a *pro tanto* reason for external actors to take action (not necessarily military intervention) when a state violates them, only one pattern (Beitz uses the word "form"[60]) among others is captured. As a result, the thin moral content of Beitz' account is contingent upon the practice it aims to cover. This is not a direct attack on political approach as a conception and method for human rights theorizing, rather an invitation to apply and adjust it to another dimension the practice of human rights – the legal and judicial one.

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[59] Samantha Besson, 'The Erga Omnes Effect of the European Court of Human Rights', in *La Cour européenne des droits de l'homme après le Protocole 14: premier bilan et Perspectives / The European Court of Human Rights after Protocol 14: Preliminary Assessment and Perspectives*, ed. Samantha Besson (Schulthess, 2011), 174.
[60] Beitz, *The Idea of Human Rights*, 40.

1.3.2.   Claim two

In order to envision how to reconcile the ethical and political conceptions of human rights, I suggest continuing with a thought experiment. Let us imagine that human rights were the product of a firmer agreement on their normative foundations. Instead of "agreeing on disagreement", as Beitz and others insist, drafting states had a fruitful discussion and happened to agree on what human rights are. They did not have a very firm philosophical idea of what those foundations are. But imagine that the "reflecting equilibrium"[61], was sufficient to articulate, in broad terms, the purpose of the treaty. Let us also imagine that states did not just articulate and justify the those rights in an abstract manner, but managed to establish an impartial, efficient and reliable international judicial organ in charge of reviewing, on the basis of this international treaty, whether states parties respect those rights internally. Following the principle of subsidiarity, which regulates the allocation of the right to rule, those rights are primarily interpreted and enforced by states parties, so that the established world court would work as a supplementary organ.

Finally, imagine that states abided by the judgments of this court (not with great reluctance sometimes) and engaged with the necessary adjustments in their internal legal orders. This world court would have now worked for more than fifty years. In its ordinary judicial function, the world court would have expressed, specified and justified the duties correlative to human rights

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[61] I use the concept of "reflective equilibrium" in a descriptive sense. As Scanlon explains, "on the descriptive interpretation, the rationale is rather that those judgments are the most accurate representation of the "moral sensibility" of the person whose conception is being described". In T.M. Scanlon, 'Rawls on Justification', in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge University Press, 2003), 142.

within a sustainable institutional arena. In interpreting those rights, the imagined world court would have needed to appeal to the interests and values that those rights protect. Here is my second claim: if we were to apply the methodological framework of Beitz to this legal and judicial practice, we would naturally address the layer of reasons that operates in the judgments rendered by the court. This additional layer of reasons has the epistemic virtues that both Beitz and Griffin's objects of theorizing do not have. Since human rights are thick and abstract, the adjudication of those rights by the established world court specifies their normative content. In doing so, one does not take a definitive stand about the nature of law or the nature of human rights law as a social object. It simply suggests that the justificatory dimension inherent to the judicial practice of human rights – its reasons-giving nature – lends itself to moral evaluation because those rights refer to highly abstract properties of human beings. As such, the question of the normative legitimacy of international human rights is inextricably connected with the localized legal and judicial practice of human rights. I here follow Besson in her characterization of the relationship between human rights and the corresponding duties as "justificatory and dynamic".[62]

1.3.3. Claim three

My third claim is that the legal and judicial practice of the ECtHR exemplifies the model of the world court just outlined. As we know, there is no global judicial organ – no "world court" – for the review of human rights records on a global scale. Things are very different, however, at the European level. The ECHR, which was promulgated by the CoE in 1953 and which entered in to

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[62] Samantha Besson, 'The Human Right to Democracy - A Moral Defence with a Legal Nuance', 17.

force in 1959, protects the basic civil and political rights of more than eight hundred million people in forty-seven State Parties that have ratified the ECHR to date. The most distinctive feature of the ECHR "system" is clearly the ECtHR in Strasbourg (France) in charge for reviewing whether the rights enshrined in the ECHR are respected in the jurisdictions of forty-seven States Parties. Abstractly conceived, the ECtHR is an authoritative judicial organ in charge of determining what States Parties owe to individuals living under their jurisdictions as a matter of ECHR law. The ECtHR is a creation of the ECHR itself whose subsidiary review of ECHR rights is the sole legal function. For ECtHR to perform its subsidiary function, the right to individual application established in 1998 (Protocol 11) must be used. One can fill a case at the ECtHR *if and only if* one has exhausted internal remedies in one's domestic jurisdiction. As Besson explains, the result of this pre-eminence of the national level is that the "national judges remain the primary judges of the conformity of domestic law to the Convention. This has actually given rise a rich inter-judicial dialogue between national and ECtHR judges in the past".[63]

By contrast to the UN human rights treaties, therefore, the law of the ECHR is shaped by an accomplished, well-respected and quasi-constitutional judicial organ. The ECtHR does not have the power to strike down a piece of domestic legislation, but it holds the ultimate say over the interpretation, and therefore the content, of ECHR rights. As Letsas puts it, "the European Court has the final authority to rule on whether a state (through its statutory provisions, case law, or executive acts) violates abstract moral principles. What it rules on is inevitably an abstract issue

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[63] Besson, 'European Human Rights, Supranational Judicial Review and Democracy - Thinking Outside the Judicial Box', 107.

of principle which it then must apply to all Europeans".[64] True, the ECHR is formally an international human rights treaty that does not require States Parties to implement ECHR rights in a uniform fashion. The ECtHR's judgments are *declaratory* and leave to the State Party to select the appropriate measure to conform to the judgment. Moreover, states are bound only by the *decisional* content of the judgment. Yet the authority of the judgments of the European Court of Human Rights within the States Parties make the ECHR "system" closer to those of constitutional regimes. Indeed, national courts routinely give the rights of the ECHR and the judgments of the ECtHR *direct effect*. Direct effect means that the rights and the judgments are binding within national law and are invocable by individuals vis-à-vis all state institutions, whether legislative, executive or judicial. The authority of the ECHR remains exceptional in international human rights law to that extent at least. As Letsas rightly points out, "unlike the role of human rights in the work of international human rights bodies, the purpose of the ECHR is not to set acceptable political goals that all states have a reason to promote".[65] ECHR rights *qua* human rights are not, as Beitz argues, *pro tanto* reasons for action. Rather, in light of their authority in national legal orders, they are *conclusory* reasons for its subjects (public institutions) to take action.

Further, the "practice" of the ECHR cannot be reduced to its special status in national legal orders. In addition, one must fully address the adjudicatory function of the ECtHR. This function implies that the content of those rights is specified along the applications lodged by individuals from all throughout that Europe. The ECtHR not only has to specify the interest(s) that those abstract rights protect in light of the claims made by the applicant. The ECtHR also has to

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[64] Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 10.
[65] Ibid., 36.

balance them against normative considerations put forward by the respondent state. In the words of Waldron, a court is an "adversarial institution"[66], so that the balance of reasons defended by the court must be responsive to various kinds of argument provided by the parties. I want to suggest that this component offers the appropriate conditions to the ethical approach to human rights. This supranational judicial arena provides us with an additional layer of justificatory reasons *within* the practice and therefore an optimal "material of construction"[67] for normative theorizing.

1.3.4. Claim four

There is another premise that should be clarified before starting the investigation. The project of normatively theorizing the practice of the ECtHR supposes that one can address the specificities of an institution while maintaining that some form of normative objectivity may be reached in doing so. But if human rights are moral properties whose elucidation is conceptually prior to the specification of their duties, then one has to explain why we should address the legal and judicial practice of human rights in the first place. The objective status of the moral "ought" of human rights must therefore be properly accounted for if one wants to address the practice while leaving their normative force in the dark. My fourth claim is that the *constructivist* framework in moral and political theory has the resources to justify addressing the (legal and judicial) practices first. Two central features of constructivism may be mentioned as a matter of introduction. On the one hand, constructivism as a meta-ethical framework can adopt the premise that human rights is

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[66] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 2001), 23.
[67] Sharon Street, "Constructivism About Reasons," in *Oxford Studies in Metaethics*, ed. Russ Shafer-Landau, vol. 3 (Oxford University Press, 2008), 210.

primarily a political, legal and institutional construct that play a specific and contingent role in social and political (and therefore international) relations. This is because constructivists assign priority to justifying the practical role of public norms. As for Rawls' conception of justice, the primary role of human rights theory is *practical*, not theoretical. As Freeman puts it, "this contrasts with an epistemological point of view of the detached observer who seeks moral truth by inquiring into the way the world (or all possible worlds) really is or ought to be".[68] As such, the constructivist framework can account for the need to interpret and conceptualize an independent normative practice *pace* Beitz. In the case of the ECHR, this step notably implies capturing the status of the ECHR in domestic legal orders as this status reveals *how* the ECHR has been domesticated by the democratic process.

On the other hand, and as indicated above, the normativity of the ECHR cannot be reduced to its special status in national legal orders. In addition, one must fully address the adjudicatory function of the ECtHR as the content of those rights is specified along the applications lodged by individuals from all throughout Europe. This is because the adjudication of the ECtHR authoritatively supports the normative role that the ECHR plays domestically. Since constructivism conceives normative principles as the ones that would obtain if we were to engage in an "idealized process of deliberation"[69] from within our institutional practices[70], the

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[68] Samuel Freeman, 'Constructivism, Facts, and Moral Justification', in *Contemporary Debates in Political Philosophy*, ed. Thomas Christiano and John Christman (Wiley-Blackwell, 2009), 49.

[69] Carla Bagnoli, 'Constructivism in Metaethics', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Winter 2011, available at http://plato.stanford.edu/archives/win2011/entries/constructivism-metaethics/.

[70] Rawls famously defined an institution as "a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for a certain penalties and defenses, and so on, when violations occur. As examples of institutions, or more generally social practices, we may think of games and rituals, trials and parliaments, markets and systems of property. An institution may be thought of in two ways: first as an abstract object, that is, as a possible form of conduct expressed by a system of rules; and second, as the realization in the

reasoning of the ECtHR (its justificatory dimension) has to be selected as the relevant practical standpoint. But the ultimate aim of constructivism remains: to provide individuals with norms that they can find reasonably acceptable and that they can regularly comply with for genuinely moral reasons, that is, norms they would not endorse simply because it is the best compromise to pursue their own interests. Consequently, the attention devoted to concrete legal and judicial practices comprises the deeper aim of reconciling free and rational individuals with the institutions that govern their social relations – to "actualize" our freedoms within a given institutional legal and political ordering. As Song puts it, "the task of political philosophy is to help us see the way in which our political institutions are reasonable and rational, and when this is clear to us, we need not be simply resigned to them, but can embrace them as meeting our fundamental human needs".[71] In the case of the ECHR, this step requires examining how the ECtHR justifies the enlargement or the restriction of the scope of ECHR rights, and how this *legal* justification could be sustained by a *moral* justification acceptable to all. Legal and judicial practice provides us with a space of reasons – a practical standpoint that lends itself to moral reconstruction and evaluation in the constructivist sense.

If Rawls seminally developed constructivism in contemporary political theory, ethical theorists have more recently elaborated on the process of justification that constructivism relies on and how it may be used in other practical contexts. Following Sharon Street's account, constructivism does not just imply a hypothetical procedure to establish normative truths. It also implies that "the truth of a normative claim consists in that claim's being entailed from within

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thought and conduct of certain persons at a certain time and place of the actions specified by these rules". In Rawls, *A Theory of Justice*, 48.

[71] Edward Song, 'Rawls' Liberal Principle of Legitimacy', *The Philosophical Forum* 43 (2012), 171.

the practical point of view.[72] The very fact of making a normative claim – to take a sufficient reason to act – itself sets standards by which other reasons for action may be possibly endorsed from within a practical standpoint. Her account offers us a fruitful framework for reflecting normatively from *within* the space of reasons that judicial practice implies. Note that this constructivist project is independent from the theorization of human rights law as a social object – a theory that would account for the conditions of its existence *qua* law.[73] Human rights may be justified by moral reasoning without necessarily being themselves understood as moral values. As such, the ECtHR can be subject to moral exploration in the constructivist sense without assuming strong stands in analytic jurisprudence.

1.4. *The neglect of the ECHR in human rights theory*

Having introduced the object of investigation and the overall aim of justification in constructivist terms, I now return to the current standing of human rights theory and its limitations. Despite their contradictions, ethical and political conceptions of human rights share an under-noticed commonality: they are locked in a global perspective. True, human rights theorists engaging with practice acknowledge the diversity of "practices" and the resulting difficulty of delimiting their object. As Valentini puts it, "should we look at international covenants and charters? Should we take what activists think of as human rights as definitive of the concept? It immediately appears that what may legitimately be defined as a public culture of human rights is not an easy task".[74] Still, the core norms against which philosophical accounts are judged usually consist either of the lists of rights enshrined in global covenants (the UDHR, the UN Covenants) or of some salient

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[72] Sharon Street, 'What Is Constructivism in Ethics and Metaethics?', *Philosophy Compass* 5 (2010), 371.
[73] For the premises of such project, see Besson, 'Human Rights: Ethical, Political...or Legal? First Steps in a Legal Theory of Human Rights'. See also Samantha Besson, 'Human rights and democracy in a global context: decoupling and recoupling', *Ethics & Global Politics* 4 (2011).
[74] Valentini, 'In What Sense Are Human Rights Political?', 186.

overarching pattern – most prominently, coercive or soft external intervention (imposition of sanctions, military invasions, occupation by multilateral organizations or states, etc.). Beitz' "global political life" and the list of "paradigms of implementation" are a salient illustration of this tendency.[75] Beitz' contention that human rights are better understood as political rather than legal ("most international and transnational efforts to promote and defend human rights are more accurately understood as political rather than legal"[76]) irremediably tends to discard the search for an evaluatively rich account of their foundations. Otherwise put, this descriptive standpoint inevitably shapes the normative *desideratum* of human rights. Yet the normative content derived directly depends on the descriptive standpoint adopted and one may question the relevance of Beitz' model here too – that is, in the selection of facts and practices from which the concept of human rights is inducted.

Indeed, given the localized and dynamic character of human rights practice outlined above, the global standpoint is incomplete. This applies in particular to the legal and judicial dimension of human rights. The *subsidiary* nature of international human rights law implies that their normativity is found both at the national and supranational levels without any necessary connection. Indeed, "the enforcement of human rights is in principle a domestic responsibility and only subsidiarily an international one".[77] The regional regime of the ECHR is an instance of that localized and dynamic practice of human rights. Of course, the absence of necessary connection should not obfuscate the role of ultimate interpreter of the ECtHR. Yet subsidiarity is also found at this (supranational) level when the ECtHR allocates a margin of appreciation and

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[75] Beitz, *The Idea of Human Rights*, chapter 5.
[76] Ibid., 40.
[77] Besson, "The Human Right to Democracy - A Moral Defence with a Legal Nuance," 17.

leaves it to the "better placed" state to decide. Therefore, in order to capture the practice fully, the interaction between the two levels needs to be precisely debunked.

Regrettably, however, the practice of the ECtHR has so far been neglected in the normative theorizing of human rights. This is not to say that the ECHR "system" has never been subjected to normative theorizing. George Letsas has argued for a liberal defense of the interpretation of ECHR rights based on a Rawlsian framework with a view to revise the ECtHR's use of the margin of appreciation on Articles 8 – 11.[78] This is an internal debate as to how the ECtHR allocates the right to rule to States Parties in interpreting pan-European morality on sensible moral matters. As we shall see later, irrespective of the clarifications provided by Letsas and his fine analysis of the margin of application doctrine in the ECtHR's case law, a lot is needed to support that the ECtHR *should* apply moral standards identical to the ones we could expect from richer conceptions of liberal justice within the state. The other body of literature concentrates on the normative legitimacy of the ECtHR's judicial review. The argument is not new and was raised in the constitutional context. Waldron and others have raised the concern that judicial review – in the case of nation state primarily – conflicts in several ways with the morality of democracy and majoritarian voting.[79] It is difficult, however, to *a priori* identify the function of a (supranational) court as a constraint on internal democracy without an assessment of the localized reasons that the ECtHR gives for enlarging or restricting the scope of an ECHR right. Indeed, recent attempts to re-activate this argument do not reconstruct the reasoning of the

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[78] Letsas, *A Theory of Interpretation of the European Convention on Human Rights*.

[79] Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights', *Oxford Journal of Legal Studies* 13 (1993), 18–51. See also Jeremy Waldron, 'The Core of the Case Against Judicial Review', *The Yale Law Journal* 115 (2006), 1346–1406.

ECtHR in great detail.[80] The ECtHR is particularly concerned with democracy since "democratic necessity" is involved in its formal review of the arguments given by States Parties to justify the limitation of Articles 8 – 11, as we shall see in greater length later.

More importantly for us, there has been no attempt to place the practice of the ECtHR in human rights theory. Despite the proliferation of work of historical works on the ECHR, and their emphasis on how "the ECHR drastically improved on the limited declarative purpose of UN instruments"[81] and the assumption that "a muscular rights regime first emerged"[82] in Europe, the implications of this practice for the ethical/political debate remain under-studied. Besson suggests the following explanation:

> "one explanation for the legal neglect in human rights may lie in a fundamental distinction made in all or most human rights theories: the opposition between concrete practice of human rights and the abstract standards of human rights. In fact, most human rights theorists identify that opposition as central to their account and situate the legal question in that opposition. They usually claim that they are (also)

[80] See in particular Steven Wheatley, 'On the Legitimate Authority of International Human Rights Bodies', in *The Legitimacy of International Human Rights Regimes*, ed. Andreas Follesdal, Johan Karlsson Schaffer, and Geir Ulfstein (Cambridge University Press, 2013).

[81] Daniel G. Cohen, 'The Holocaust and the "Human Rights Revolution": A Reassessment', in *The Human Rights Revolution: An International History*, ed. Akira Iriye, Petra Goedde, and William I. Hitchcock (Oxford University Press, 2012), 63. See also the contributions in *The European Court of Human Rights Between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (Oxford University Press, 2011).

[82] Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press, 2009), 8.

about human rights as legal and political practice and not (only) about human rights as abstract moral standards".[83]

The driving thought here is that the legal and judicial practice of human rights asks for a novel balancing between the political and the ethical conceptions as philosophical resources for the normative theorizing of human rights. On the one hand, if human rights are *rights*, and not just interests or values, they have a dynamic character found in the judicial context where their duties are recognized, specified and allocated. I therefore assume that their conceptual structure *qua* rights should help us distinguishing the practice of ECHR rights. In this sense, I follow Raz and Besson's premise that "for a right to be recognized, a sufficient threshold must be established and weighed against other interests and other considerations with which it might conflict in particular social context".[84] On the other hand, I use the concept of rights as intermediary between interest and duty as a *heuristic device* only, that is, to distinguish the practice of ECHR rights among other forms of normative practice. True, the ECtHR uses the language of interests and duties in its routine of review. Yet I do not believe that such concept can account for the normative breadth of ECHR rights in their legal and judicial specification when it comes to the quest of moral justification in the constructivist sense. As Edmundson puts it, an interest theory "does not, by itself, identify or distinguish among interests. It does not tell us what interests are, or whether all are important enough to generate correlative duties".[85] When the ECtHR addresses the claims of litigants, identifies and specifies the interest(s) correlative to the right, it specifies the normative content of those highly abstract and indeterminate rights. Adjudication supposes

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[83] Besson, "Human Rights: Ethical, Political...or Legal? First Steps in a Legal Theory of Human Rights," 215.
[84] Samantha Besson, 'The Human Right to Democracy - A Moral Defence with a Legal Nuance', 8. For the seminal account, see Joseph Raz, 'Legal Rights', *Oxford Journal of Legal Studies* 4 (1984), 1–21. See also Joseph Raz, 'On the Nature of Rights', *Mind* 370 (1984),194.
[85] William A. Edmundson, *An Introduction to Rights* (Cambridge University Press, 2012), 98.

an elaboration, in justificatory terms, of the reasons why such or such right should be protected. In other words, examining the adjudication of the ECtHR opens the door for a characterization of the practice in non-functional terms.

1.5. The ECHR: ethical and political?

In abstracto, the ECHR "system" is no exception to the norm: ECHR rights play the typical role of standards of assessment and criticism of domestic institutions. This is the case when the ECtHR authoritatively interprets an ECHR right and when the respondent State Party executes the judgment, or when individuals invoke ECHR rights in national judicial proceedings. The ECtHR is a *subsidiary* instrument for the protection of basic civil and political rights enshrined in national constitutions. As a result, one could approach the ECHR via the resources of the political conception founded on the practical role that ECHR rights play: ECHR rights are entitlements against *public institutions* more generally (national, regional and international).[86] One difference, of course, is that here human rights are *rights*: the ECtHR recognizes, specifies and allocates their corresponding duties that State Parties fulfill.

But again, the normativity of the ECHR cannot be reduced to a functional account, albeit legal. Human rights are irremediably thick and their concretization in the case law implies that the ECtHR addresses and specifies their underlying interests in substantive terms. Judicial law specifies the normative content of human rights. As a result, the normative basis that serves the role that ECHR right play is already *within* the practice as a form of justificatory reasoning *qua* judicial reasoning. This is where we need another resource to account for the practice of ECHR

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86 Besson, 'The Egalitarian Dimension of Human Rights' 37–38.

rights – the ethical one – but it will have to be *legislated*, as the constructivists put it, by the standards found within the practice. As a result, the practice of ECHR rights leaves us with enough space to employ both the ethical and the political conceptions of human rights taken as philosophical resources. In other words, an institution is not just a system of assigned offices and roles. As Waldron puts it,

"an institution is not just a sociological construct; it is a human entity that confronts pleas, human claims, human proposal, and human petitions. And in that confrontation there is room for respect and dignity, for degradation insult, and neither of these may be ignored in our theoretical assessment of the institutions we have (…): we need a sophisticated philosophical understanding of the layers of values that are implicated in the assessment of our political institutions".[87]

Again, it does not follow that the conceptions of human rights we have do not have the basic conceptual and normative resources to account for the legal and judicial ECHR rights. Rather, we need to specify how those resources may be used to capture the legal and judicial practice of human rights before engaging with normative theorizing. I therefore fully agree with Besson that

"not paying sufficient attention to the legal nature of human rights and by conflating the law of human rights with their politics and practice, current human rights theories miss on a central component of the normative practice of human rights. Worse, they deprive themselves from essential theoretical insights about the nature of normative

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[87] Jeremy Waldron, 'Political Political Theory: An Inaugural Lecture', *Journal of Political Philosophy* 21 (2013), 13.

practices and, hence, of resources in their effort to bridge the gap between human rights as critical moral standards and the political practice of human rights".[88]

1.6. The justificatory deficit of human rights qua law

Human rights today, no one will argue, are in good shape. They are the "lingua franca"[89] of an increasingly interconnected political, legal and cultural era. They increasingly serve as a guiding set of norms not only for the proper conduct of political societies, but also as standards for monitoring the behavior of transnational companies, global institutions, and the like. In various contexts, they serve as an "aspirational and motivational resource".[90] In the ECHR "system", they authoritatively define the limits of what states can do to their subjects in forty-seven European legal and political orders. Beitz is right that human rights give reasons for different actions, but he does not circumscribe the post-national order(s) in which the legal and judicial dimension of human rights prevails. This legal and judicial practice stands in urgent need of legitimacy. The ECHR "system" presupposes institutions, national and international, and those institutions together shape the lives of millions of persons in virtue of the authority devoted to ECHR rights in national legal orders. The need for justification is therefore inextricably connected to issues of legal adjudication as a result. As Buchanan puts it,

"the rationale for avoiding the issue of justification is no longer cogent. The very success of the institutionalization of human rights makes the issue of legitimacy and hence of justification inescapable. The more seriously the international legal system

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[88] Besson, 'Human Rights: Ethical, Political...or Legal? First Steps in a Legal Theory of Human Rights', 217.
[89] Tasioulas, 'The Moral Reality of Human Rights', 75.
[90] Kenneth Baynes, 'Discourse Ethics and the Political Conception of Human Rights', *Ethics & Global Politics* 2 (2009): 17.

takes the protection of human rights and the more teeth this commitment is, the more problematic the lack of a credible public justification for human-rights norms become".[91]

To recall, the principled normative task is "discovering the conditions of legitimacy is traditionally conceived as finding a way to justify a political system to everyone who is required to live under it".[92] Rawls wrote something similar about his "basic structure" of society: "the basic structure of society and its public policies are to be justifiable to all citizens, as the principle of political legitimacy requires".[93] We should strive to find the best reasons, if any, to support and justify the institutional structures in which individuals find themselves to live. In my view, this forms the core of the exercise of normative political theory inherited from Rawls as it can apply to the ECHR: to reconcile our freedoms with the post-national institutional structures in which we find ourselves embedded. In taking the perspective of moral agents, the enterprise of justification is therefore an inherently *liberal* project that has to be assumed from the onset. Valentini put it,

> "liberals are committed to public justification; the requirement of public justification prompts us to design our normative theories on the basis of the values already implicit in our shared practices; but the move from the values

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[91] Buchanan, 'Human Rights and the Legitimacy of the International Order', 41.
[92] Thomas Nagel, *Equality and Partiality* (Oxford University Press, 1991), 33.
[93] John Rawls, *Political Liberalism* (Columbia University Press, 1993), 224.

underpinning our practices to the principles that should govern them requires first-order moral reasoning".[94]

This may explain why rights theorists like Raz tend to favour a political conception of human rights. Their limited objective of the conceptual analysis of human rights as the intermediary between interests and duties is foreign to the sense of justification endorsed by constructivists. As Raz explains in a past article, moral interests differ from rights: "there is no right to be loved, and none of the virtues can be understood in terms of rights. So, concern for the interests of individuals does not translate itself into principles of rights. At least it cannot be exhausted by them".[95] It will be therefore important to specify the sense of *justification* implied in Rawlsian constructivism along the way.

To conclude, there is no good reason to think that the legal and judicial dimension of human rights practice should be an exception to the burden of justification. As Buchanan emphasizes, "human rights are understood as requiring justification, and the justification appeals to basic human interests, to the idea that these basic interests ought to be protected, to assumptions about what threatens these interests (…)".[96] Because the concept of human rights is also specified within legal and judicial frameworks, the task of normative theorists is to find a way to render their normative basis responsive to the political and legal practice that modern human rights have generated and thereby realize the ideal of reconciliation just outlined.

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[94] Valentini, 'In What Sense Are Human Rights Political? ', 187.

[95] Joseph Raz, 'Rights and Politics', *Indiana Law Journal* 71 (1995), 31. On the Razian concept, see also Raz, "On the Nature of Rights." See also Raz, "Legal Rights."

[96] Allen Buchanan, 'Equality and Human Rights', *Politics, Philosophy & Economics* 4 (2005), 74.

1.7. The plan of the book

The book is divided in nine chapters (including this introductory chapter). In Chapter Two (*Ethical Theories and Their Practice-Independence*), I explore the moral/political debate in normative human rights theory in more depth and start by reconstructing James Griffin's account of personhood. By defining human rights theorizing as the identification of right-holders' interests, Griffin maintains what I call the *practice-independent* approach to human rights. I then survey a second ethical account, namely Rainer Forst's. Both Griffin and Forst aim to preserve an independent moral basis ("the right to justification", "human dignity", respectively). I take this point as distinctive of the ethical conception for my further investigation on the ECHR.

In Chapter Three *(Political Theories and Their Practice-Dependence)*, I turn to the political conception of human rights and analyze specifically Charles Beitz' account. I also address Joseph Raz' conception in a second wave, but since Raz' account is limited to two articles and overlaps with Beitz', I only shed light on how Raz differs from Beitz and how both relate to Rawls' original account. In harsh contrast to Griffin, Beitz argues that a deeper layer of morality is not necessary to construct the idea of human rights. I show that that this argument is contingent upon the kind of practices selected by Beitz. Beitz can eliminate the need for moral reasoning only by concentrating on the political dimension of human rights. The end result of Chapter Two and Three is a *mutual exclusion* pertaining to the status of facts and practices in the theorizing of human rights. The project of reconciliation through law is premised on this exclusion.

In Chapter Four (*Theorizing Human Rights: A Constructivist Proposal*), I show how a *constructivist* approach to moral and political norms can reconcile the Beitzian specification of human rights as tied to the international state system while preserving the core idea of Griffin shared by Forst that human rights are grounded in a layer of moral reasoning. On the one hand, Rawlsian constructivism takes institutions are the primary objects of justification. As such, it can account for the political and legal practice of human rights (hence their international dimension pace Beitz). On the other hand, constructivism can account for their special status as important moral rights through the public basis of justification that it is striving to find. I finally lay down three central methodological steps associated with the constructivist enterprise so construed and outline their application to human rights law.

In Chapter Five (*The ECHR in Historical Perspective*), I turn to the ECHR (and the ECtHR) specifically and introduce this legal institution in historical terms. For the sake of concision, I divide the chapter in four major historical segments. First, I examine the burgeoning social and political process in the late 1940's to the ECtHR's operational establishment in 1959. Second, I review more specifically the development of the ECtHR (1959-1969) as a judicial institution. The ECtHR's jurisdiction was confirmed in 1958 with the necessary eight acceptances. The third segment, which goes from the mid-1970's until the early 1990's, reveals the growing role of the ECHR in the legal and political life of the State Parties together with the increasing judicial autonomy of the ECtHR. Fourth, I examine the explosion of applications and need for structural reform (early 1990-today) partially addressed in the last protocols to the ECHR.

In Chapter Six (*The Normativity of ECHR Law*), I turn to the legal normativity of the ECHR. To capture this normativity, I first I introduce human rights law *qua* international law, that is, how this body of law is understood within the broader conceptual and terminological field of international law. I emphasize the dis-continuum of human rights law from the classical understanding of public international law. Second, I introduce the special normativity of the ECHR *qua* international treaty in the legal orders of State Parties by capturing their legal status in domestic law. The crucial point is that most of its forty-seven State parties have given ECHR rights and ECtHR's judgments *direct effect* in their respective legal order. In doing so, I present how the relation between the ECtHR and national courts articulates. Third, I address the ECtHR's limited judicial powers *qua* international judicial organ and finally I address the widely expressed claim that the ECtHR's role amounts to the one of a constitutional court.

In Chapter Seven (*Interpretation at the ECtHR: Setting the Stage*), I approach the adjudication of the ECtHR more closely through the canons of interpretation it has developed throughout the years. If the ECtHR is clearly dismissive of conventional doctrines of interpretation, it does not have a uniform methodology for making explicit the meaning of contested terms, but rather what I call *interpretative poles* in which the *teleological* and the *evolutive* prevail. In terms of *balancing*, the ECtHR has not made explicit the standard that can outweigh the ECHR right under scrutiny. The application of a formal three-pronged test to justify interference is fuzzy. Moreover, the conditions for the use of the *margin of appreciation* do not add to clarity. In other words, the set of formal rules, routinely applied by the ECtHR by reference to the wording of the restriction clauses, falls short of informing us on the reasons for protecting the rights and the

reasons for their restrictions. As a result, we need to conduct a right-based and case-based analysis, to which I turn in the next chapter.

In Chapter Eight (*Balancing and Justification at the ECtHR: The Pivotal Concept of "Democratic Necessity*), I turn to the balancing of the ECtHR on a specific range of provisions (Articles 8 – 11). If the *formal* design of the balancing is opaque, there is enough, I show, in the *substantive* reasoning of the ECtHR in the case law to capture a form a *practical reason* – a set of powerful reasons by which states' and individuals' actions are judged – that may be subject to normative exploration. More precisely, I show that the third step of "democratic society" plays a crucial normative role in informing the balancing. First, "democratic society" helps the ECtHR identifying the right-holders whose contribution to the realization of that society is particularly central. The prominence leads the ECtHR to review their claim(s) with a particular scrutiny and rigor. Conversely, it identifies right-holders that do not play such crucial role and that do not qualify for such treatment. Second, and correlatively, the more the alleged interference of the respondent State Party endangers the core interests that form the conception, the more the ECtHR restricts the *margin of appreciation* devoted to State parties. Third, the practical reason helps striking a balance in that prominent rights outweigh other rights in case of conflicts with other ECHR rights.

In Chapter Nine (*Conclusion: Constructing the Democratic Foundations*), I show how the "practical reason" of the ECtHR can be justified by the standards of democratic theory and therefore reconcile the apparent mutual exclusion of the ethical and political conceptions defined in Chapters Two and Three. Three analytical steps are distinguished in the reconciliation process.

First, I reconstruct the role of the ECHR as it results from the examination of the authority of the ECHR rights and ECtHR's judgments in domestic legal orders. Second, I turn to the "deeper layer of reasons" that operates in the balancing the ECtHR. Relying on Thomas Christiano's egalitarian argument for democracy, I argue that the reasoning of the ECtHR can be illuminated and justified in the constructivist sense by a unifying moral conception of democracy *qua* internal sovereignty. I distinguish two aspects of this conception: *equality in deliberation* and *sovereignty in representation*. Finally, I establish my core argument in bridging the two aspects: ECHR rights *qua* international human rights (with special reference to Articles 8 – 11 and Article 3 Protocol 1) consolidate democracy *qua* internal sovereignty and, by the same token, reinforce the commitment to our status of political equals in the legal and political orders of the State Parties.