

Political and Naturalistic Conceptions of Human Rights: A False Polemic?

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Abstract

What are human rights? According to one longstanding account, the Naturalistic Conception of human rights, human rights are those that we have simply in virtue of being human. In recent years, however, a new and purportedly alternative conception of human rights has become increasingly popular. This is the so-called Political Conception of human rights, the proponents of which include John Rawls, Charles Beitz, and Joseph Raz. In this paper we argue for three claims. First, we demonstrate that Naturalistic Conceptions of human rights can accommodate two of the most salient concerns that proponents of the Political Conception have raised about them. Second, we argue that the theoretical distance between Naturalistic and Political Conceptions is not as great as it has been made out to be. Finally, we argue that a Political Conception of human rights, on its own, lacks the resources necessary to determine the substantive content of human rights. If we are right, not only should the Naturalistic Conception not be rejected, the Political Conception is in fact incomplete without the theoretical resources that a Naturalistic Conception characteristically provides. These three claims, in tandem, provide a fresh and largely conciliatory perspective on the ongoing debate between proponents of Political and Naturalistic Conceptions of human rights.

Keywords

Human rights; philosophical foundation; political conception; practical conception; naturalistic conception; orthodox conception; Charles Beitz; Joseph Raz; John Rawls; James Griffin; John Tasioulas

I. Introduction

What are human rights? What makes them different from other kinds of rights? One intuitive and longstanding response to these questions is that, unlike other kinds of rights, human rights are those that we have simply in virtue of being human. For example, John Simmons writes,

“Human rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity.”¹ Following Charles Beitz, we shall call this the Naturalistic Conception of human rights.² In recent years, however, a new and purportedly alternative conception of human rights has become increasingly popular. This is the so-called Political Conception of human rights, one of the first statements of which can be found in John Rawls’s theory of international justice, *The Law of Peoples*.³ Since the appearance of that work, other prominent political philosophers, including Joseph Raz and Beitz himself, have also defended the Political Conception.⁴

According to the Political Conception of human rights, the distinctive nature of human rights is to be understood in light of their role or function in modern international political practice. As Beitz puts it:

Questions like What are human rights?, What human rights do we have?, and Who has duties to act when human rights are violated? are understood to refer to objects of the sort called ‘human rights’ in contemporary international life, however these are best understood.⁵

Moreover, proponents of the Political Conception believe that the Naturalistic Conception of human rights should be rejected in favor of its Political counterpart. According to Beitz, Naturalistic Conceptions “tend to distort rather than illuminate international human rights practice.”⁶ Similarly, Raz argues that Naturalistic Conceptions “fail either to illuminate or to criticise the existing human rights practice.”⁷

In this paper we argue for three claims. First, we demonstrate that Naturalistic Conceptions of human rights can accommodate two of the most salient concerns that proponents

of the Political Conception have raised about them (Sections III and IV). Second, we argue that the theoretical distance between Naturalistic and Political Conceptions is not as great as it has been made out to be, and that in fact the two conceptions can in principle agree on a host of important philosophical and practical matters (Section V). Finally, we argue that a Political Conception of human rights, on its own, lacks the resources necessary to determine the substantive content of human rights (Section VI). If we are right, *pace* proponents of the Political Conception, not only should the Naturalistic Conception not be rejected, the Political Conception is in fact incomplete without the theoretical resources that a Naturalistic Conception characteristically provides. These three claims, in tandem, provide a fresh and largely conciliatory perspective on the ongoing debate between proponents of Political and Naturalistic Conceptions of human rights.

To start, we shall provide an overview of different ways of understanding the Political Conception.

II. Political Conceptions of Human Rights

As mentioned above, the Political Conception is committed to understanding the distinctive nature of human rights in light of their role or function in modern international political practice. Those who take up the Political Conception have offered different accounts of what this role or function consists in.

According to Rawls, “Human rights are a class of rights that play a special role in a reasonable Law of Peoples; they restrict the justifying reasons for war and its conduct, and they specify limits to a regime’s internal autonomy.”⁸ More specifically, a society’s observance of

human rights is necessary for the society to be a member “in good standing in a reasonably just Society of People” and is “sufficient to exclude justified and forceful intervention by other peoples.”⁹ Human rights, Rawls tells us, are “Necessary conditions of any system of social cooperation. When they are regularly violated, we have command by force, a slave system, and no cooperation of any kind.”¹⁰ Moreover, if a society fails to observe human rights, then, according to Rawls, it cannot complain if external agents interfere in its internal affairs, e.g., by means of economic or political sanction, or even coercive intervention.¹¹

Raz agrees with Rawls’s idea that human rights characteristically set limits to a society’s internal autonomy.¹² But Raz’s account differs from Rawls’s in two main respects. First, Raz argues that while human rights are primarily rights against states, human rights can be held against international agents and organizations of all sorts, including individuals, groups, corporations, and other potential violating domestic institutions.¹³ Second, Raz argues that Rawls fails to distinguish between the limits of sovereignty and the limits of legitimate authority.¹⁴ Rawls holds that human rights are necessary conditions of any system of social cooperation, and he believes that conditions of social cooperation can determine the limits of sovereignty. But Raz argues that not every action that exceeds a state’s legitimate authority can be a reason for interference by other states. For instance, a state can sometimes be protected from external interference even if it lacks internal legitimacy (e.g., if the external agents are themselves biased and corrupt). If so, the conditions of social cooperation alone cannot determine the limits of sovereignty.

Beitz argues that the current role of human rights in international political practice extends beyond that of the (*pro tanto*) justification of foreign interference or intervention.¹⁵ In

particular, it encompasses the broader role of guiding practical judgments about international responsibility or concern. For instance, there is a broad range of non-coercive political and economic measures that states and international organizations can use to influence the internal affairs of societies where human rights are threatened, measures that are better classified as assistance than interference. Moreover, Beitz observes that human rights are also justifications for individuals and nongovernmental organizations to engage in reform-oriented political action. In short, Beitz believes that from the perspective of a theory's attempting to explain the current international practice of human rights, it would be better to take a broader view of the international role of human rights than Rawls's narrower view.

III. Concerns about the Naturalistic Conception

Proponents of the Political Conception have expressed a number of concerns regarding the Naturalistic Conception. It is useful to distinguish between (a) concerns about the Naturalistic Conception *as such* and (b) concerns about versions of the Naturalistic Conception (e.g., Griffin's agency account). We shall restrict our discussion to (a) and discuss two salient concerns of this kind.

i. The Concern about Ordinary Moral Reasoning

One concern can be found in Rawls's writings in particular, and can be called the concern about Ordinary Moral Reasoning. Rawls notices that Naturalistic Conceptions seem to employ ordinary moral reasoning, or what Rawls calls comprehensive doctrines, to generate the content of human

rights. As Rawls says, Naturalistic Conceptions seem to base human rights on “a theological, philosophical or moral conception of the human person.”¹⁶ However, in Rawls’s view, one should not use such forms of moral reasoning to ground human rights. Rawls’s argument for this is as follows: He aims to establish a law of peoples, that is, a set of principles and norms including human rights, to which “well-ordered peoples” from different religious, philosophical, and moral background can freely agree as the basis for governing their behavior towards one another, thereby establishing a mutually respectful peace.¹⁷ The class of well-ordered peoples includes liberal peoples as well as non-liberal but decent peoples. The latter category of peoples includes, in particular, “hierarchical” peoples, who, among other things, are not aggressive, respect human rights, have a common-good idea of justice, and have a procedure for legislation, which, although not democratic, allows members of society to make their voices heard.¹⁸ According to Rawls, if the law of peoples were justified by ordinary forms of moral reasoning, whether religious, philosophical, or moral, this may render the law of peoples unacceptable from the point of view of some well-ordered peoples who hold incompatible religious, philosophical, and moral views.¹⁹ For instance, if the law of peoples’ doctrine of human rights were grounded in the religious claim that God has decreed that there are such rights, then this may impede secular liberal societies from accepting that doctrine; or, vice versa, if a doctrine of human rights were explicitly secular, then this may impede decent hierarchical societies from freely accepting such a doctrine.

Moreover, Rawls argues that liberal peoples should not impose their moral views on non-liberal but decent peoples because, while liberal peoples may not believe that the views of decent peoples are fully reasonable, they should nevertheless admit that the views of decent peoples may at least not be fully unreasonable.²⁰ Given this, Rawls believes that liberal peoples should be

respectful of, and tolerate, the views of decent peoples.²¹ If they do not, Rawls warns that liberal peoples could rightly be accused of being ethnocentric. In other words, for Rawls, the law of peoples should not be “liberal or democratic, or in some way distinctive of the Western political tradition and prejudicial to other cultures.”²² For these reasons, Rawls believes that an account of human rights should not be based on ordinary forms of moral reasoning.

Rawls’s alternative proposal is that liberal and decent peoples should appeal to what he calls *public reason*. Public reason, Rawls explains, is the reason of free and equal peoples, and its principles are not derived from any particular moral, religious, or philosophical view; instead they are grounded in values and ideas that can be shared by liberal and decent peoples.²³ For Rawls, at the international level, such principles include the idea that peoples are free and independent; that their freedom and independence are to be respected by other peoples; that peoples are to observe a duty of non-intervention; that peoples have the right of self-defence but no right to instigate wars other than self-defence; that peoples are to honor human rights, and so on.²⁴ Moreover, in the case of human rights (and here we draw on a discussion by Beitz), Rawls seems to suggest that although well-ordered peoples may disagree about the content of human rights, they may nevertheless agree about the role that human rights play in international practice, i.e., to restrict the justifying reasons for war and its conduct, and to specify limits to a regime’s internal autonomy.²⁵ In support of Rawls’s idea that one should not base an account of human rights on ordinary moral reasoning, it has been noted that members of the United Nations agreed to the *Universal Declaration* of 1948 in the absence of any common or single justification for its list of human rights.²⁶

ii. The Concern about Timelessness

The second concern raised by proponents of the Political Conception against the Naturalistic Conception is what might be called the concern about Timelessness. Beitz and others have observed that, on a Naturalistic Conception, human rights seem to be “timeless – all human beings at all times and places would be justified in claiming them.”²⁷ However, they argue that it is not the case that all human beings at all times and places would be justified in claiming the human rights currently recognized by international practice. For example, consider the right to education, in Article 26 (1) of the Universal Declaration of Human Rights, which states that:

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

Raz points out that if people have a right to education simply in virtue of their humanity, “it follows that cave dwellers in the Stone Age had that right. Does that make sense? . . . The very distinctions between elementary, technical, professional and higher education would have made no sense at that, and at many other times.”²⁸ Similarly, Beitz says that “It is reasonably clear from examples like [the right to social security and to free elementary education] that its framers could not have intended the doctrine to apply, for example, to the ancient Greeks or to China in the Ch’in dynasty or to European societies in the Middle Ages.”²⁹

Beitz argues further that international human rights are intended to play a role in a certain range of societies:

Roughly speaking, these are societies that have at least some of the defining features of modernization: for example, a minimal legal system (including a capability for enforcement), an economy that includes some form of wage labor for at least some workers, some participation in global cultural and economic life, and a public institutional capacity to raise revenue and provide essential collective goods.³⁰

Echoing this sentiment, Raz argues that human rights are “synchronically universal,” by which he means that all people alive today have them.³¹ If it is essential to Naturalistic Conceptions that human rights are timeless, but if it is the case that human rights as found in international practice are not timeless, then this seems to call into question the plausibility and validity of the Naturalistic Conception of human rights.

IV. Accommodating These Two Concerns

We shall now demonstrate that Naturalistic Conceptions of human rights can accommodate these two concerns.

i. Ordinary Moral Reasoning May Be Shareable

According to the concern about Ordinary Moral Reasoning, Naturalistic Conceptions appeal to ordinary forms of moral reasoning that ought to be avoided when determining the content of human rights. Given the vast amount of literature on Rawls’s idea of public reason, its justification, requirements, and its role in his international theory of justice, we shall not pretend to fully address this concern here. Nevertheless, we believe that four remarks are in order.

First, it is important to note that not all adherents of the Political Conception seem to agree that ordinary moral reasoning ought to be avoided when developing an account of human rights. For instance, while Raz agrees with Rawls that human rights set limits to state sovereignty, Raz also says that “I do not deny that there may be universal human rights which people have in virtue of their humanity alone.”³² Nor does Raz commit himself to the strictures of public reason in discussing the grounds of human rights. This suggests that Raz is not averse to using ordinary moral reasoning when developing an account of human rights even though he is an adherent of the Political Conception.

Second, on the point that the framers of the Universal Declaration deliberately refrained from providing any common justification for its content, a plausible explanation regarding their motivation is that they refrained on pragmatic grounds, and not because they believed that ordinary moral reasoning/justification was not necessary theoretically. As Griffin argues, this “sensible silence” on the part of the UN members is akin to the silence of the law on the justification of many of its norms.³³ Indeed, Griffin observes that in criminal law, members of a society also have no trouble agreeing on a list of major crimes, while disagreeing about what makes them crimes. This suggests that proponents of the Naturalistic Conception can appreciate the pragmatic importance of offering a shareable or abstemious account of the grounds of human rights in the international political domain, even if they remain committed to forms of ordinary moral reasoning in developing what they consider to be the best philosophical account of human rights. Equally important, it is worth remembering that the framers did not completely refrain from appealing to ordinary moral considerations. For instance, they specifically declared that “Whereas the peoples of the United Nations have in the Charter reaffirmed their faith . . . in *the*

dignity and worth of the human person” (our italics). Arguably, the dignity and worth of the human person are ordinary moral considerations.

Third, Rawls is surely right that if an account of human rights grounds itself in a religious conception of the person, a controversial philosophical conception of the person, or a particular moral theory, then it will be less likely to gain adherents in the international political domain or to be acceptable from both a liberal and decent point of view. Nevertheless, his blanket rejection of any attempt to justify the content of human rights in light of philosophical, moral, or religious ideals seems too strong. After all, while some forms of moral reasoning may not be readily shareable (e.g., religious reasoning), some philosophical forms of moral reasoning may in fact be quite shareable. As we have seen, philosophical notions such as human dignity and worth are found in many prominent declarations as well as national constitutions and have been central to the reception of human rights across cultures. Arguably, Griffin’s related notion of agency is also more shareable than religious reasoning. More pluralistic notions may be even more shareable and may stand an even greater chance of attracting persons of different cultural and moral points of view since they are more likely to include values that people from various cultures already recognize and endorse.³⁴ To be sure, there will be disagreements about the importance and content of these notions. However, given that these notions are quite minimalist and that they stem from attempts to locate morally significant characteristics common to all human beings,³⁵ disagreements regarding them seem different from disagreements about comprehensive religious or moral world-views. The former kind of disagreement need not straightforwardly lead to the worry of ethnocentrism in the way that the latter kind of disagreement might.

Finally, as we have seen, Rawls believes that a doctrine of human rights grounded in public reason is one in which liberal and decent peoples would agree that the roles of human rights are to restrict the justifying reasons for war and its conduct and to specify limits to a regime's internal autonomy. However, as we shall see later (Section VI), the political roles of human rights tend to provide us with only a formal account of human rights. A substantive account would still be needed to generate the content of human rights. And Rawls's attempt to provide a public reason-based account via the notion of social cooperation, if it could even be interpreted as such, is as we shall see fraught with difficulty.

ii. Dissolving the Problem about Timelessness

According to the concern about Timelessness, a genuinely naturalistic conception of human rights will consider such rights to be timeless: that is, it will affirm that, for any given human right, all human beings at all times and places would be justified in claiming that right. However, some internationally recognized human rights (e.g., the right to elementary education) do not seem to be timeless. And this, so the argument goes, is an indication that Naturalistic Conceptions misinterpret the nature of human rights as we find them in international political practice.

In response to this concern, some proponents of the Naturalistic Conception have been conciliatory. For instance, Griffin proposes that the claim that human rights are timeless can be glossed as the claim that human rights are "rights that we all have simply in virtue of being *human agents in society*."³⁶ This seems to concede that human rights are not rights that all human beings at all times and places would be justified in claiming; instead, human beings must

be in some kind of a society in order to claim human rights. John Tasioulas makes an even greater concession and argues for a “temporally relativized” view, according to which, when speaking about the rights possessed by all humans simply as human, one should “impose, explicitly or implicitly, constraints on the historical period to which reference is being made.”³⁷ For instance, when interpreting the human rights referred to by contemporary human rights practice, Tasioulas argues that “the relevant historical period should normally be taken to be that of modernity.”³⁸ Tasioulas explains that this does not mean that medieval serfs lacked human rights, because “on a number of eligible and illuminating specifications of the relevant historical period” they did not lack such rights.³⁹

Proponents of the Naturalistic Conception may not have to be so conciliatory. First, it seems that at least some of the rights that can be found in the Universal Declaration are indeed timeless. For example, consider the human right against torture. There seems to be good reasons to believe that even cavemen had a human right not to be tortured. The same can be said regarding the rights not to be murdered, enslaved, and so on.

Adherents of the Political Conception might respond that they need not deny this. For instance, Beitz has said that ‘it is hard to see how *some* of the rights of the declaration could qualify [as being timeless] (our italics).’ Although Beitz is denying here the timelessness of some of the rights in the declaration, he could also say that he has not claimed that *none* of the rights of the declaration are timeless. However, if Beitz does accept that cavemen had a human right not to be tortured, this would put pressure on his claim that human rights are intended to play a role only in *modern* societies.

Second, recall that when Beitz says that international human rights are intended to play a certain role in modern societies, he takes this to mean societies that have a minimal legal system (including a capability for enforcement), an economy that includes some form of wage labor for at least some workers, some participation in global cultural and economic life, and a public institutional capacity to raise revenue and provide essential collective goods. However, there are over a hundred un-contacted tribes in the world today, that is, tribes that have no contact with the outside world.⁴⁰ It seems doubtful that all of these tribes have the defining features of modernization that Beitz speaks of, such as ‘some participation in global cultural and economic life.’ Should we draw the conclusion that members of these tribes do not have human rights? Such a conclusion seems dubious. If so, why should we not accept that human rights can also apply to past societies that similarly lacked features of modernization?

The same point can be made against one of Raz’s reasons for rejecting the idea that human rights are timeless. Raz argues that since many of the most uncontroversial human rights appeal to institutions and make use of distinctions (e.g., the distinction between elementary, technical, professional, and higher education) that could not possibly apply in Stone Age societies, it is senseless to think of such rights as timeless. But such institutions and distinctions also fail to apply in the case of present-day un-contacted tribes. And so, by his own reasoning, Raz would have to admit that members of these tribes do not have, say, the human right to elementary education. But if Raz accepts that members of un-contacted tribes do not have some human rights, it seems that he would have to abandon his claim that human rights are synchronically universal, by which he means that *all* people alive today have them.

Third, there are plausible ways of explaining how there could be contemporary human rights such as the right to elementary education without abandoning the claim that human rights are timeless. For instance, Griffin distinguishes between basic rights and derived rights:

Rights may be expressed at different levels of abstraction. The highest level would emerge when we articulate the values that we attach to agency: as I listed them earlier, autonomy, minimum provision, and liberty. Then less abstract characterizations would come about as a result of the application of these highest-level considerations with increasing attention to circumstances.⁴¹

Griffin argues that we should only claim that human rights are timeless at the higher levels of abstraction. As an example, Griffin suggests that freedom of the press is derived, in certain social circumstances, from freedom of expression, and freedom of expression is derived from autonomy and liberty; and that we should only claim that human rights are timeless at the level of freedom of expression and/or autonomy and liberty.⁴²

Elsewhere, one of us has also made a similar distinction between the aim and the object of a right.⁴³ The aim of a human right is the goal or end of the human right, and the object of a human right is the means to achieving that goal or end. The proposal is that the aims of human rights are timeless while the objects of human rights may vary across time, location, and society. As long as we are clear that when we say that human rights are timeless, we are referring to the aims of human rights, then the puzzle articulated above should be resolved.

To illustrate, consider the human right to free elementary education. It is true that it would seem odd to claim that cavemen had a human right to free elementary education. Cavemen of course lacked the social practices and understandings necessary for the

creation of 'elementary schools.' But this still leaves open the possibility that the right to free elementary education is a modern right that is nevertheless derived from a more basic right that does apply timelessly. The relevant basic human right may be that of acquiring the knowledge necessary to be an adequately functioning individual in one's circumstances, or, perhaps even more basic than that, the right to effective agency. Alternatively, using the aim/object distinction, we could say that free elementary education is the object of a right. As such, it makes sense only at a specific time, in a specific location, and in a specific society. By contrast, the aim of the right to free elementary education is to ensure that human beings acquire the knowledge necessary to be adequately functioning individuals in their circumstances, and it does not seem odd to say such an aim was relevant, important, and applied in the context of cavemen. In other words, while cavemen would not have had a right to free elementary school education, it does not seem odd to think that the *aim* of that right did have normative force in their circumstances, and that it would have generated a different, but similar, object of right for cavemen, e.g., the right to be educated (in a basic way) about how to hunt and gather, assuming that such instruction could feasibly be provided to them. Hence, as long as we are clear that when we say that human rights are timeless, we are referring to basic human rights, or to the aims of human rights, then the puzzle should disappear.

Using the distinction between basic and derived rights to respond to the concern about Timelessness is not uncontroversial and has been criticized by Tasioulas, Raz, and Beitz. It is worth examining their criticisms. Tasioulas argues that for this strategy to work, "the higher-level universal rights must genuinely be rights and not just universal human interests."⁴⁴ According to Tasioulas, "It is hardly obvious that this condition can be met such that, in a sufficient number of cases, the lower-level rights are plausibly construed as derivations

from the selfsame universal basic right.”⁴⁵ Using the right to freedom of expression as an example, Tasioulas argues that if there were such a selfsame universal basic right, it would need to have “broadly equivalent high-level deontic implications across human history.”⁴⁶ In particular, Tasioulas argues that “roughly the equivalent *level* of expressive freedom” would need to be secured in each period of human history.⁴⁷ But Tasioulas believes that it would be difficult to show, for example, that the free expression rights of, e.g., a medieval serf “involve more specific determinations of the same high-level duties as the free expression rights of members of modern-day societies.”⁴⁸ And so he concludes that the strategy proposed above is unworkable.

Tasioulas appears to be expressing two concerns:

- (A) The higher-level rights must genuinely be rights and not just universal human interests.
- (B) In a sufficient number of cases, it may not be plausible to construe the lower-level rights as derived from the selfsame universal basic right.

Regarding (A), Griffin has responded that he does not hold that any universal human interest would ground human rights.⁴⁹ For Griffin, the interests that would ground human rights are ones that are relevant to protecting or promoting one’s status as a normative agent. This seems to delineate a set of interests that is narrower than the set of all universal human interests.

Regarding (B), aside from suggesting that the high-level deontic implications of the right to freedom of expression would differ across human history, Tasioulas has not provided evidence that this would be so. More importantly, it seems that the issue is not whether the high-level deontic implications *would* differ, but whether they *ought* to differ. From a normative

perspective, it does not seem implausible to hold that just as we should respect each other's right to freedom of expression to a certain degree, people in medieval times should also respect a medieval serf's right to freedom of expression to that *same* degree.

Raz argues that the strategy of using the distinction between basic and derived rights is misguided because it assumes that "moral rights can be established only by reference to other moral rights."⁵⁰ According to Raz, "Typically rights are established by arguments about the value of having them. Their existence depends on there being interests whose existence warrants holding others subject to duties to protect and promote them."⁵¹

However, why think that those who employ the distinction between basic and derived rights must assume something as strong as the idea that moral rights can be established only by reference to other moral rights? Griffin, for example, would not claim that *basic* rights can only be established by reference to other moral rights. Raz's point may instead be that those who employ this distinction must assume that (derived) moral rights can be established only by reference to other (basic) moral rights. In such a case, it is not clear that those who employ this distinction would regard this as a problem.

In any case, Raz's criticism seems to have less force against the distinction between the aim and the object of a right. On this distinction, human rights are established in the way that Raz believes they ought to be established, namely, by arguments about the value of having them. For example, consider again the right to free elementary education. A plausible reason why human beings have this right is because of the importance of ensuring that human beings acquire the knowledge necessary to be adequately functioning individuals in their circumstances (the aim of the right). Given this aim, objects that can help to promote this aim in certain

circumstances, such as free elementary education, would be objects of human rights. For our purposes, the right to free elementary education is established by arguments about the value of having the knowledge necessary to be adequately functioning individuals in one's circumstances; the value in this case, as we have seen, is the aim of this right.⁵²

Finally, Beitz also discusses a distinction like the one between basic and derived rights – what he calls first order and second order rights. According to Beitz, first order rights “should be conceivable in a state of nature (because we should be able to understand their basis as independent of social and institutional contingencies)” and second order rights should be “conceivable only within an institutional setting.”⁵³ Beitz argues that adherents of such a proposal face a dilemma: on one horn of the dilemma, in order to have an account of first order rights with a basis that does not depend on social or institutional contingencies, adherents of such a theory must restrict the range of the normative content. However, so argues Beitz, the more restricted the core content, the less extensive becomes the catalog of second order (institutional) rights that can be derived from that core content. On the other horn of the dilemma, Beitz argues that to have a catalog of second order rights that approximates that of the contemporary doctrine of human rights, adherents of such a theory would need to broaden the core content itself. However, Beitz argues that “any such strategy threatens to exceed the scope of what the underlying idea of “naturalness” will bear.”⁵⁴

Beitz assumes that if an account of human rights cannot approximate the content of the contemporary doctrine of human rights, then this counts against such an account of human rights. However, it is worth at least noting, along with Tasioulas, that whether an account of human rights validates too many or too few human rights vis-à-vis international practice should be

considered a separate matter from whether an account of human rights is correct.⁵⁵ To be sure, proponents of both Naturalistic and Political Conceptions of human rights have criticized Rawls's list of human rights as being too narrow. But the criticism is not just that Rawls's list is too short, but also that it fails to validate some rights as human rights that *should* be human rights.

In any case, there are reasons to believe that a Naturalistic Conception would not face the dilemma Beitz has outlined. For instance, Griffin's notion of agency already comes close to approximating most of the human rights in the universal declaration, yet it is a fairly restrictive notion comprised of only three rights: autonomy, welfare ('minimum provision'), and liberty. Also, there are approaches that are more pluralistic than Griffin's account (such as the primary essential conditions approach defended by one of us),⁵⁶ which may be able to approximate even more of the human rights in the Universal Declaration. At the same time, there is no evidence that these approaches would 'exceed the scope of what the underlying idea of "naturalness" will bear.' If this is right, then proponents of the Naturalistic Conception could circumvent Beitz's dilemma. In general, it seems that the concern about Timelessness can be accommodated once we recognize that a Naturalistic Conception can affirm both general, basic, and timeless human rights, on the one hand, as well as specific, derived, and non-timeless human rights, including many of those we find proclaimed in international political and legal practice, on the other.

V. Formal Compatibility

As we have seen, the current rhetoric, especially by adherents of the Political Conception, is that Naturalistic and Political Conceptions represent two largely incompatible conceptions of human rights. We shall now argue that the theoretical distance between these two conceptions is not as great as it has been made out to be. To see this, consider the *formal* features of both conceptions. According to the Naturalistic Conception, human rights are rights that we have simply in virtue of being human. And, according to the Political Conception, human rights are rights that set limits to a society's internal autonomy (Rawls and Raz) and/or rights that the international community has a responsibility to protect in modern societies (Beitz). Are these two formal features incompatible? One way of seeing that they need not be is to notice that the formal features of Political Conceptions seem to be concerned with the issue of who is responsible for protecting and promoting human rights – that is, the issue of the *duty-bearers* of human rights – while the formal features of Naturalistic Conceptions seem to be concerned with what *grounds* human rights. Since questions about the grounds and questions about the duty-bearers of human rights are non-overlapping or, at least, need not overlap, it is in principle possible for one to accept both a Naturalistic and Political Conception of the formal features of human rights. To flesh this point out, let us begin by examining what advocates of Naturalistic Conceptions have said about the issue of duty-bearers.

A number of them hold that human rights are rights against all able persons and agents in appropriate circumstances. For example, Maurice Cranston says that “To speak of a universal right is to speak of a universal duty.”⁵⁷ Other writers hold that human rights are rights against *some* able persons and agents in appropriate circumstances. For instance, D.D. Raphael argues that:

The expression ‘a universal moral right’ may be used in a stronger sense or in a weaker sense. In the stronger sense it means a right of all men against all men; in the weaker sense it means simply a right of all men, but not necessarily against all men. In the weaker sense, all men may have a right which is, for each of them, a right against some men only.⁵⁸

To keep the discussion simple, let us focus on the:

Strong Sense: Human rights are rights against all able persons and agents in appropriate circumstances.

Is the Strong Sense version of the Naturalistic Conception incompatible with a Political Conception, according to which human rights first and foremost set limits to a society’s internal autonomy (Rawls and Raz) and/or are rights that the international community has a responsibility to protect in modern societies (Beitz)? The two formal features can in principle be compatible given that ‘all able persons and agents in appropriate circumstances’ can be read as an abstract statement about who the duty-bearers of human rights are, and that ‘the state and/or the international community in modern societies’ can be read as a more specific formulation of who such duty-bearers are. Indeed, supposing that the relevant ‘appropriate circumstances’ are those of modernity, if one were to ask advocates of the Naturalistic Conception who the ‘able persons and agents’ in modern societies are, it seems likely that they would accept that it is first and foremost the state and/or the international community that are the relevant ‘able persons and agents.’ But if advocates of these two Conceptions would come to the same conclusions about who the relevant duty-bearers of human rights are, this suggests that the two Conceptions can be compatible in this respect.

Lest one remain unconvinced, let us attempt to articulate versions of the Naturalistic and the Political Conceptions that would conflict with each other on this question. For instance, consider the following version of the Political Conception.

States Only: Human rights are rights that are held *at all times and places* against the state and/or the international community *and against no one else*.

States Only would conflict with a Naturalistic Conception according to which human rights are rights against all able persons and agents in appropriate circumstances. Suppose that we are in a future world in which scattered, adequately functioning human beings are in contact with one another, but in which there is no state or international community to speak of. According to States Only, if there were human rights in this future world, these rights could not be held against anyone, since there would be no state or international community. But on the Naturalistic Conception, according to which human rights are rights against all able persons and agents in appropriate circumstances, human rights (if there were human rights in this future world) could be held against some human beings as long as some of them could be regarded as “able persons and agents.” So there are possible versions of the Political Conception that would conflict with the Naturalistic Conception on the issue of duty-bearers.

However, as far as we are aware, no advocate of the Political Conception believes in States Only. Beitz, for example, holds only that human rights are rights that are held *in modernity* against the international community. And no advocate of the Political Conception seems to hold that human rights are held against the state and/or the international community *and against no one else*. All advocates of the Political Conception seem to accept that human rights could be held against agents other than the state and/or the international community, e.g.,

individuals. So while there could be versions of the Political Conception that would conflict with Naturalistic Conceptions, it remains to be seen whether anyone would venture to defend such versions.

Likewise, consider the following version of a Naturalistic Conception:

Individual Only: Human rights are rights against all able persons and agents in appropriate circumstances *but never against the state or the international community*.

Individual Only would conflict with a Political Conception according to which human rights are held against the state and/or the international community. But again, as far as we are aware, no known advocate of the Naturalistic Conception believes in Individual Only, which makes it a rather irrelevant doctrine. If all this is right, then the formal features of a Political Conception are in principle compatible with those of a Naturalistic Conception of human rights.

That said, for the two conceptions to be genuinely compatible, adherents of the Political Conception would, among other things, have to accept that human rights can be timeless, something they may not be willing to do, despite what we have said earlier.⁵⁹ Still, the remarks above should show that the distance between the two conceptions is not as great as it is often thought to be.

VI. Formal and Substantive Accounts of Human Rights

We shall now argue that Naturalistic and Political Conceptions are not only in principle formally compatible, but that, in fact, the Political Conception is incomplete without the theoretical resources that a Naturalistic Conception characteristically provides.

According to the Political Conception, one of the main roles of human rights is to specify when it is justified for global agents to interfere in the internal affairs of an independent political community. The Political Conception gives the impression that when one examines the doctrine and discourse of human rights as found in international political practice, one will find human rights performing certain definitive political roles. For instance, Beitz writes that “Human rights apply in the first instance to the political institutions of states.”⁶⁰ Similarly, Raz claims that human rights are primarily rights against states.⁶¹ But the international roles of human rights are not so narrow or definitive. To give an example, consider the UN Declaration of Human Rights. In the Preamble, it proclaims that:

every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction (our italics).

This passage suggests that, from the very start, human rights impose duties on every individual and every institution of society, and not just on the modern state.

However, the difficulties facing the Political Conception extend beyond the diversity and ambiguity of the modern international practice of human rights. We should also ask whether the methodological agenda of the Political Conception – which involves understanding the

distinctive nature of human rights in light of their role or function in modern international political practice – is itself theoretically limiting. To see this, it is useful to distinguish between a *formal* and a *substantive* account of human rights. A formal account provides criteria for distinguishing human rights claims from those that are not human rights claims. A substantive account, by contrast, provides criteria for generating the content of human rights. A Naturalistic Conception typically provides us with not just a formal, but also a substantive, account of human rights. Consider Griffin's notion of agency, for instance. Griffin argues that:

What seems to me the best account of human rights is this. It is centered on the notion of agency. We human beings have the capacity to form pictures of what a good life would be and to try to realize these pictures. We value our status as agents especially highly, often more highly even than our happiness. Human rights can then be seen as protections of our agency - what one might call our personhood.⁶²

Setting aside whether agency or personhood is a plausible criterion for human rights, the notion of agency seems to provide a robust, substantive criterion for generating the content of human rights. In particular, following Griffin, it seems that the notion of agency can be used to derive a rich list of rights such as the right to life and to minimum welfare (because human beings cannot be agents if they are not alive and if they cannot sustain themselves), the right to some basic education (because human beings must be informed in order to be able to determine their life choices), the right to freedom of expression, freedom to worship, freedom to form personal relationships (since these rights promote liberty), and so on.⁶³

By contrast, the Political Conception tends to provide us with only a formal account of human rights. This is clearest in Beitz's account. Beitz does not provide a list of human rights

that we have, but instead proposes what he calls a “model” of such rights, which has three key elements:⁶⁴

- (i) Human rights protect urgent individual interests against standard threats that one might find in the modern statist global order.
- (ii) Human rights apply in the first instance to the political institutions of states.
- (iii) Human rights are matters of international concern. A state’s failure to carry out its responsibilities may be a reason for “second level” agents such as the international community to hold the state accountable for carrying out these responsibilities, to assist the state if the state lacks capacities to carry out these responsibilities, and to interfere in the state if the state is unwilling to do so.

Beitz’s account surely provides us with criteria for distinguishing human rights claims from those that are not human rights claims. To keep things simple, consider (i). According to (i), if something is a human right, then it will protect some urgent individual interest. And if something is not an urgent individual interest, then it will not be protected by a human right. The notion of an urgent individual interest therefore tells us something about the formal features of human rights, but it is unclear what substantive human rights would follow from this notion. Similar things can be said regarding (ii) and (iii).

It may be worth mentioning that Beitz has said that an understanding of the public role of human rights can constrain the content of human rights in at least three ways:⁶⁵

- 1) It might exclude from the catalog of genuine human rights those that protect interests that could not be seen as significant by most members of any existing society.
- 2) It might exclude values for which a failure to protect them in a society would not provide any intelligible reason for action to external agents.
- 3) It might exclude values for the deprivation of which no remedy is achievable through some permissible form of international action for which there is a reasonable expectation of success.

But these points are compatible with the idea that Beitz's account provides only a formal account of human rights. For instance, according to 1), if most members of any existing society do not see an interest as significant, then it is not important enough to be protected as a human right. But this does not tell us very much; and at the very least, it is not clear that it provides us with much more guidance than the formal idea that if something is not an urgent individual interest, it will not draw the protection of a human right. Likewise, according to 2), if the failure to protect an interest does not give external agents a reason to act, then that interest is not important enough to be protected by a human right. This is also a rather contentless criterion. And 3) appears to express a practicality constraint: namely, that the means of interference should be ethical and feasible. But this, too, does not seem to help us determine the content of human rights. So, all in all, Beitz's account seems to provide just a formal account.

The same can be said about Raz's version of the Political Conception. Raz also does not provide a list of human rights that we have, but he proposes the following three steps as a way to determine whether something is a human right:⁶⁶ a human right exists if:

- (a) there is an individual interest that is sufficient to establish an individual moral right;
- (b) states are to be held duty bound to respect or promote this interest; and
- (c) states do not enjoy immunity from interference should they fail to respect or promote this interest.

Raz's three-step program would, for example, exclude (from the category of interests protected by human rights) interests that cannot ground individual moral rights or interests that states have no duty to protect or promote. But, again, it is unclear what human rights would follow from this program. So Raz's account also does not give us a substantive account of human rights.

Rawls does provide us with a list of human rights: the rights to life (including the means of substance), personal liberty (including liberty of conscience), personal property, and equal treatment under the law.⁶⁷ As one can see, Rawls's list does not include many of the rights that can be found in the international law of human rights, including rights to freedom of expression and association, and the right to democratic political participation. According to Rawls, such rights amount to "liberal aspirations" or "presuppose specific kinds of institutions."⁶⁸ By contrast, the rights he has identified are what he considers to be "human rights proper," by which he means that they are not "peculiarly liberal or special to the Western tradition."⁶⁹

Despite this, it remains unclear whether Rawls's account provides us with more than a formal account of human rights. To see why, recall that for Rawls, one of the main roles of human rights is to set limits to a society's internal autonomy. This provides us with a criterion for distinguishing human rights claims from those that are not human rights claims. In particular, it says that if something, X, is a human right, then X will set limits to a society's internal

autonomy. And if an individual right, Y, does not set limits to a society's internal autonomy, then Y is not a human right. However, it is unclear what human rights will follow from this criterion. And so it does not provide us with a substantive standard with which we can determine the content of human rights.

However, Rawls also claims that human rights are 'necessary conditions for any system of social cooperation.' So it might be thought that Rawls intended the notion of social cooperation to serve as such a substantive criterion. But this interpretation of Rawls faces two difficulties. First, the idea that X (a set of human rights) is a necessary condition for Y (a system of social cooperation) is not equivalent to the idea that X is based on, or grounded in, Y, and it is the latter sort of relationship that is required for something to serve as a substantive criterion. Compare: the idea that air is a necessary condition for agency is not equivalent to the idea that air is based on, or grounded in, agency; the latter does not even make very much sense. Hence, the claim that human rights are necessary conditions for social cooperation is not the same as the claim that human rights are based on, or grounded in, social cooperation. Given this, the fact that Rawls has claimed the former does not mean that he has claimed the latter. And since the latter is what is required for something to serve as a substantive criterion, the fact that Rawls has not claimed the latter means that it is unclear that Rawls intended the notion of social cooperation to be a substantive criterion.

Second, even if Rawls did intend for the notion of social cooperation to be a substantive criterion, it does not seem to be a plausible one. Not all societies that fail to respect the human rights that Rawls lists command by force.⁷⁰ For instance, it is implausible to think that communities that do not recognize personal private property (one of Rawls's human rights) must

command by force. Moreover, it is unclear how one derives the right to personal property from the notion of social cooperation. Hence, a substantive account of human rights based on the notion of social cooperation seems to be fraught with difficulties.

It might be said that the Political Conception was never intended to answer the sort of substantive questions that we have accused it of failing to address. However, if this is right and, in fact, the Political Conception, as a formal account of human rights, leaves the important problem of generating the content of human rights out of view, then the Political Conception is incomplete. Accordingly, it may very well look to the Naturalistic Conception as a source for generating a substantive account of human rights.

VII. Conclusion

In this paper, we have assessed the polemic between Political and Naturalistic Conceptions of human rights, and we have put forward three main theses. First, we found that the Naturalistic Conception can accommodate two of the main concerns that proponents of the Political Conception have raised against it. In particular, with respect to the concern about Ordinary Moral Reasoning, we argued that some philosophical forms of moral reasoning may in fact be quite shareable. And, with respect to the concern about Timelessness, we showed that the distinction between basic and derived rights can explain how many human rights can be considered timeless even if many of the human rights proclaimed in international declarations do not seem to be so.

Second, we argued that the theoretical distance between Naturalistic and Political Conceptions of human rights is not as great as it has been made out to be. In particular, the two

conceptions can in principle be compatible at the formal level since the formal features of Political Conceptions seem to be concerned with the issue of who is responsible for protecting and promoting human rights – that is, the issue of the *duty-bearers* of human rights – while the formal features of Naturalistic Conceptions seem to be concerned with what *grounds* human rights. Finally, we argued that the Political Conception tends to offer only a formal account of human rights, which means that a Political Conception of human rights is, on its own, incomplete, and may very well look to a Naturalistic Conception to provide what it is missing, i.e., a substantive account of human rights. If we are right, then, *pace* proponents of the Political Conception, the Political Conception is not only compatible with the Naturalistic Conception but also incomplete without the theoretical resources that a Naturalistic Conception characteristically provides. These conclusions provide us with a new and largely conciliatory perspective on the contemporary polemic between Political and Naturalistic Conceptions of human rights.⁷¹

¹ A. John Simmons, 'Human Rights and World Citizenship: The Universality of Human Rights in Kant and Locke,' in *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001), p. 185.

² Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009). What we are calling the Naturalistic Conception has also been called the “orthodox” view (Charles Beitz, 'Human Rights and the Law of Peoples,' in *The Ethics of Assistance: Morality and the Distant Needy*, ed. Deen Chatterjee (Cambridge: Cambridge University Press, 2004); John Tasioulas, 'Taking Rights out of Human Rights,' *Ethics* 120 (2010)); and the “traditionalist” account (Joseph Raz, 'Human Rights without Foundations,' in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010a)).

³ John Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited"* (Harvard: Harvard University Press, 1999).

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- ⁴ Beitz 2009, op. cit.; Raz 2010a, op. cit.
- ⁵ Beitz 2004, p. 197.
- ⁶ Beitz 2004, p. 198
- ⁷ Raz 2010a, p. 324.
- ⁸ Rawls 1999, p. 79.
- ⁹ Rawls 1999, p. 80.
- ¹⁰ Rawls 1999, p. 68.
- ¹¹ Rawls 1999, p. 81.
- ¹² Raz 2010a, p. 328.
- ¹³ Raz 2010a, p. 329.
- ¹⁴ Raz 2010a, pp. 330-332.
- ¹⁵ Beitz 2009, p. 101.
- ¹⁶ Rawls 1999, p. 81.
- ¹⁷ Rawls 1999, pp. 3-4.
- ¹⁸ Rawls 1999, pp. 71-78.
- ¹⁹ Rawls 1999, p. 68.
- ²⁰ Rawls 1999, p. 74.
- ²¹ Rawls 1999, pp. 59-60.
- ²² Rawls 1999, p. 68.
- ²³ Rawls 1999, p. 55.
- ²⁴ Rawls 1999, p. 37.
- ²⁵ Beitz 2009, pp. 99-100.
- ²⁶ Beitz 2004, p. 202; Beitz 2009, p. 72.
- ²⁷ Beitz 2004, p. 198; Beitz 2009, p. 57.
- ²⁸ Joseph Raz, 'Human Rights in the Emerging World Order,' *Transnational Legal Theory* 1 (2010b), p. 40.
- ²⁹ Beitz 2009, p. 57.
- ³⁰ Beitz 2009, pp. 56-57.

³¹ Raz 2010b, p. 41.

³² Raz 2010a, p. 334.

³³ James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), p. 25.

³⁴ See, e.g., S. Matthew Liao, 'Agency and Human Rights,' *Journal of Applied Philosophy* 27, no. 1 (2010).

³⁵ See also Allen Buchanan, 'Taking the Human out of Human Rights,' in *Rawls's Law of Peoples: A Realistic Utopia?*, ed. Rex Martin and David A. Reidy (Oxford: Blackwell, 2006).

³⁶ Griffin 2008, p. 50

³⁷ Tasioulas 2010, p. 671.

³⁸ Tasioulas 2010, p. 672.

³⁹ Tasioulas 2010, p. 672.

⁴⁰ <http://www.survivalinternational.org/uncontactedtribes>

⁴¹ Griffin 2008, p. 50. Pablo Gilabert, 'Humanist and Political Perspectives on Human Rights,' *Political Theory* 39 (2011).

⁴² Griffin 2008, p. 50.

⁴³ S. Matthew Liao, *The Right of Children to Be Loved* (Unpublished Book Manuscript).

⁴⁴ Tasioulas 2010, pp. 670-671.

⁴⁵ Tasioulas 2010, p. 670.

⁴⁶ Tasioulas 2010, p. 671.

⁴⁷ Tasioulas 2010, p. 671.

⁴⁸ Tasioulas 2010, p. 671.

⁴⁹ James Griffin, 'Human Rights: Questions of Aim and Approach,' *Ethics* 120 (2010), p. 746.

⁵⁰ Raz 2010a, p. 335.

⁵¹ Raz 2010a, p. 335.

⁵² On this picture, the aim of ensuring that human beings acquire the knowledge necessary to be adequately functioning individuals in their circumstances could be derived from a more basic aim (e.g. the aim to ensure that human beings have effective agency), which in turn may ground a more basic right (the right to effective agency).

⁵³ Beitz 2009, pp. 55-56.

⁵⁴ Beitz 2009, p. 56.

⁵⁵ Tasioulas 2010, p. 648.

⁵⁶ See, e.g., Liao 2010, op. cit.

⁵⁷ M. Cranston, *What Are Human Rights?* (London: Bodley Head, 1973), p. 69.

⁵⁸ D.D. Raphael, 'Human Rights, Old and New,' in *Political Theory and the Rights of Man*, ed. D.D. Raphael (London: Macmillan, 1967), p. 65.

⁵⁹ There is another type of compatibility, which may be called *methodological* compatibility, that we do not discuss here. As we have seen, Beitz and Raz are committed to a certain practice-based view of how questions about the distinctive nature of human rights ought to be answered by philosophers and theorists. In particular, their view is that philosophical questions about the formal nature of human rights ought to be answered by identifying the distinctive features and functions of human rights in international political practice. Moreover, they have suggested that only proponents of the Political Conception take up such a practice-oriented methodology. This suggestion is dubious, however. There is nothing in principle preventing a proponent of the Naturalistic Conception from adopting the very same methodology. In fact, both Griffin and Tasioulas understand their conceptions of human rights to illuminate the current international practice thereof, and Griffin explicitly advocates a “bottom-up” approach of developing an account of human rights. See, e.g., Griffin 2008, pp. 28-32; John Tasioulas, “Human Rights: An Orthodox View” (Unpublished Manuscript), Section I.

⁶⁰ Beitz 2009, p. 109.

⁶¹ Raz 2010a, p. 329.

⁶² James Griffin, 'Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights,' *Proceedings of the Aristotelian Society* CI (2001), p.4; Griffin 2008.

⁶³ See Griffin 2008.

⁶⁴ Beitz 2009, p. 109.

⁶⁵ Beitz 2009, pp. 105-106.

⁶⁶ Raz 2010a, p. 336.

⁶⁷ Rawls 1999, p. 65.

⁶⁸ Rawls 1999, p. 80, n. 23.

⁶⁹ Rawls 1999, p. 65.

⁷⁰ Raz 2010a, p. 330.

⁷¹ We would like to thank John Tasioulas, Fabienne Peters, James W. Nickel, Jonathan Quong, Samuel Scheffler, David Velleman, Joseph Raz, Dale Jamieson, Matt Smith, Japa Pallikkathayil, Paul Bloomfield, Ben Saunders, Rowan Cruft, Massimo Renzo, audiences at the Colloquium on “Human Rights Beyond the Law?” at the University of Stirling, and an anonymous reviewer at the *Journal of Moral Philosophy* for their helpful comments on earlier versions of this paper.