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Human rights, specification and communities of inquiry

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Abstract: This paper offers a revised political conception of human rights informed by legal pluralism and epistemic considerations. In the first part, I present the political conception of human rights. I then argue for four desiderata that such a conception should meet to be functionally applicable. In the rest of the first section and in the second section, I explain how abstract human rights norms and the practice of specification prevent the political conception from meeting these four desiderata. In the last part of the paper, I argue that full-fledged tolerance in the international order – that is tolerance-as-non-intervention and tolerance-as-respect – should be attached to (1) compliance with *jus cogens* norms and to; (2a) a political community recognizably organized as a community of inquiry that is; (2b) committed to the specification and incorporation or expression of the idea of human rights within its local legal system.

Keywords: human rights; inquiry; legal pluralism; legitimacy; specification

In the last two decades, mainly driven by John Rawls's *Law of Peoples*, the role of human rights in political theory has moved away from 'justification for internal resistance' and 'driving force for reform' towards the establishment of limits to the internationally protected sphere of action of states. This view is now widely known as a political conception of human rights. It offers two main political roles to human rights, they: (1) establish limits to the 'internal autonomy' of political institutions and (2) 'restrict the justifying reasons for war'.[1] In this view, respect for human rights is necessary to establish the immunity of a state from intervention in its internal affairs while the violations of human rights provide defeasible reasons for intervention.[2]

[1] J Rawls, *The Law of Peoples; with "The Idea of Public Reason Revisited"* (Harvard University Press, Cambridge, MA, 1999) 79.

[2] J Raz, 'Human Rights without Foundations' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 328. See also J Donnelly, 'Human Rights' in JS Dryzek, B Honig and A Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press, Oxford, 2006) 610; A Buchanan, 'The Legitimacy of International Law' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 94–5.

It is extremely contentious, however, that the *essential* role of human rights should consists in the establishment of limits on sovereignty. For instance, James Nickel lists 14 different political roles of human rights, only three of which are directly related to international intervention.[3] One important normative feature of human rights that is lost to political theory when we focus exclusively on their sovereignty limiting function is their role in orienting and shaping legislation.[4] Human rights can also serve as goals that our political institutions (ought to) strive to enact and incite other political institutions to adhere to. Doing away with this feature ignores too much of the scholarly literature on human rights and fails to capture, for instance, the ideas associated with Feinberg's discussion of manifesto rights or Nickel's idea of human rights as 'right-goal mixtures'.[5]

This highlights an issue with Rawlsian political conceptions of human rights: they do not sufficiently acknowledge the critical potential of human rights for officially engaging less than fully just political institutions.[6] This is mainly due to Rawls's over-demanding notion of tolerance, to which I return below. By distinguishing between two notions of tolerance, 'tolerance-as-non-intervention' and 'tolerance-as-respect', it is possible to provide a political conception of human rights that acknowledges both the peremptory and the goal-like functions of human rights.[7]

However, acknowledging that goal-like human rights can be used to criticize other states is itself problematic. This is because notwithstanding whether human rights are conceived solely as peremptory norms or also as

[3] J Nickel, 'Are Human Rights Mainly Implemented by Intervention?' in M Rex and DA Reidy (eds), *Rawls's Law of Peoples; A Realistic Utopia?* (Blackwell Publishing, Oxford, 2006) 270–1.

[4] Ibid 271; W Hinsch and M Stepanians, 'Human Rights as Moral Claim Rights' in M Rex and DA Reidy (eds), *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell Publishing, Oxford, 2006) 126.

[5] J Feinberg, *Social Philosophy* (Prentice Hall, Englewood Cliffs, NJ, 1973); J Nickel, 'Human Rights' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2014 edn) available at <http://plato.stanford.edu/archives/spr2014/entries/rights-human/>.

[6] Rawls's position could allow criticism of other states for not fully taking into account human rights values, but this would be coming from private persons and NGOs and in order to preserve freedom of speech in a liberal society. The point here is that human rights should allow critical engagement from official agents and not just private individuals pursuing 'liberal aspirations'. See (n 1) 80; (n 3) 273.

[7] Cohen pursues a similar project: 'I want to differentiate between the project of arriving at a morally justifiable set of human rights that appear as aspirational norms in human rights documents on the one hand and hard international legal norms which suspend the sovereignty argument so that they can be enforced'. In contrast, I want to integrate the two projects more closely such that hard human rights rules and goal-like human rights principles would be in a continuum grounded in inquiry and collective acceptance as opposed to distinct enterprises. JL Cohen, 'Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization' (2008) 36 *Political Theory* 578, 588.

goals, their formulation remains abstract. Human rights remain vague both in regard to their content – what precisely the rights amount to – and to their limits – how they should be balanced with other considerations – but often also in direction – who precisely holds the duties associated with the rights. In this sense, human rights are underdeterminate and require a process of specification in order to be applicable.[8] Despite acknowledging the importance of specification, contemporary human rights theory fails to fully concede the inconvenient consequences of such an acknowledgement on a political conception of human rights.

The task I set myself in this paper is to argue for a conception of human rights as conditions of tolerance in the international order that takes seriously the difficulties associated with abstraction and specification. The conception I put forward captures the functions of human rights as peremptory norms and as goals all the while respecting pluralism. I argue that we should distinguish between two aspects of human rights that can both be derived from 'the idea of human rights' and which can be justified by considering the notion of collective acceptance: human rights as peremptory rules and abstract human rights norms. The former are strict conditions of tolerance whose violation defeat whatever immunity states may have from military intervention; I will associate these with rules of *jus cogens*. The latter are essential considerations that ought to be specified by political communities, thus giving rise to rules and principles, so as to be applicable. They only play a derivative role in the assessment of a state's immunity due to the necessity of their specification. Additionally, political communities need to be recognizably organized as communities of inquiry to determine when such specifications are worthy of tolerance-as-respect and immune from lesser forms of intervention and criticism.[9,10]

Full-fledged tolerance is then attached to (1) compliance with *jus cogens* rules and to; (2a) a political community recognizably organized as a community of inquiry that is; (2b) committed to the specification and

[8] I use 'abstract' to cover both abstractness in the narrow sense and generality, as opposed to concreteness and specificity. I refer to 'specification' as the process by which abstract rights can be made concrete and specific.

[9] In this paragraph, I introduced the vocabulary associated with Robert Alexy's constitutional theory. 'Principles' refer to *prima facie* deontological requirements 'which require that something be realized to the greatest extent possible given the legal and factual possibilities. Principles are *optimization requirements*'. 'Rules' refer to definitive 'norms which are always either fulfilled or not' and which 'insist that one does exactly as required'. R Alexy, *A Theory of Constitutional Rights* (Oxford University Press, Oxford, 2002) 47, 48, 57.

[10] On rules, principles and human rights, see M Scheinin, 'Core Rights and Obligations' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, Oxford, 2013) 527–40.

incorporation or expression of the idea of human rights within its local legal system.

A few caveats are in order before moving on. Firstly, this paper adopts a synthetic method: it connects arguments and views from different areas of political philosophy – e.g. human rights, legal pluralism, pragmatist political philosophy – so as to orient our theorizing of the political conception towards a legal pluralistic view of human rights grounded in collective acceptance and assessed with the help of epistemic considerations.

Secondly, this paper does not provide a substantive theory of which human rights there are. It is expressly concerned with the normative significance and the justification of human rights from the point of view of political theory. Yet, it does not deny the possibility of other moral justifications for human rights, neither does it claim to capture the full legal and political practices that have come to be associated with human rights. It accepts, as a matter of methodological assumption, that there is no such thing as *a single* theory of human rights; there are rather various theories and practices. This paper is concerned with only one of those: the political theory of human rights as limits to tolerance in the international order.

Thirdly, this focus on the role human rights should play in political theory explains in great part the focus on the state adopted in this paper. It is true that human rights, both in theory and in practice, are no longer seen as applying exclusively to states.[11] Nevertheless, the modern state, with its claim to immunity/sovereignty, remains a central concern for most of contemporary political theory. This is because it occupies a dominant position both in terms of its potential to provide for human rights and to violate them.[12] The point then is not to deny the relevance of non-state actors in thinking about the fulfilment of human rights. The point is rather to engage with and address a specific tradition of political theory which recognizes that states have certain immunity against intervention and to assess the conditions under which this immunity is to be defeated.

Additionally, the manner in which I use 'state' does not entail anything specific about which political units ultimately qualify as states though it paradigmatically includes the modern state. At most, I argue that a political unit must be organized as a minimally recognizable community of inquiry, but this leaves open the other conditions that are required for a political unit to qualify as a state. One can assume that when I use 'state', I refer to any political unit to which immunity, or minimal sovereignty, is granted: this is compatible with views centred on the modern state but also with

[11] J Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca, NY, 2013) 36.

[12] Ibid 33.

other approaches that support a protected sphere of action for smaller scale political units. It is only if one denies that some political units deserve a certain level of immunity that one is not accepting the basic theoretical assumptions of the political conceptions of human rights with which this paper is concerned. Such an alternative view can be left aside in the logic of this paper.

My argument follows three steps. In the first part of the paper, I offer four desiderata of a political conception of human rights. I then show that abstract formulations of rights are subject to serious objections that prevent them from meeting the four desiderata. These objections have been resolved through the acknowledgement of the necessity of specification. However, this practice of specification raises further issues. I then argue that we should turn to the notion of a political community organized as a community of inquiry concerned with the idea of human rights in order to surmount these issues. This allows us to assess the immunity of a political community from intervention, all the while capturing the essential role of specification and uniting the two aspects of human rights; that is their peremptory and goal-like nature. I then explain how the proposed approach meets the desiderata of a political conception of human rights.

I. The political conception and abstraction

This section seeks to offer a recognizable and widely agreeable account of the political conception in order to discuss the theoretical structure of human rights as limits to state sovereignty. It then identifies four desiderata of a political conception: (1) non-redundancy; (2) agreeability; (3) cross-state demandability; and (4) the establishment of right-like claims. This section and the next then establish the shortcomings of the usual political conception of human rights in regard to these four desiderata.

The political conception of human rights

The core function of human rights for those who subscribe to the political conception is to establish the rights that a state cannot violate without defeating the reasons to respect its sovereignty. The violation of a right that is considered a human right renders a state liable to intervention in its internal affairs.[13] A human right is then at least a right held against the state and states that fail to comply with these rights have overstepped the boundaries of what is tolerable in the international order.[14] The correlative

[13] Raz (n 2) 328. See also J Skorupski, 'Human Rights' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 372.

[14] See (n 1) 80.

is that states that comply with human rights deserve tolerance. I explain, in turn, the notions of tolerance and of right at play here.

According to Rawls, tolerance is an extensive notion. It covers more than refraining from direct forceful intervention; it also requires the recognition of other 'societies as equal participating members in good standing of the Society of Peoples'.[15] In this view, if toleration is owed to a society, then it is also inappropriate to criticize that society and even to seek to amend its ways through proselytism.[16] One way of putting this is to affirm that tolerance, for Rawls, covers both 'tolerance-as-non-intervention' in the sense that one should refrain from military, economic and diplomatic interventions, but also 'tolerance-as-respect', in the sense that one ought to refrain from condemning – through official state apparatus – another society in order to avoid harm to the self-respect of that society and to avoid 'great bitterness and resentment'.[17] Once the threshold of tolerance is reached, there is no room for official governmental critical engagement.

The notion of right at play is more complex. According to Nickel, human rights norms are:

> (1) international and universal in the sense of applying to all people everywhere whether or not their governments recognize them; (2) norms of very high priority – 'a special class of urgent rights'; (3) minimal standards that protect people against the most severe injustices; and (4) primarily addressed to governments.[18]

In this view, human rights are at least rights.[19] The specific normative structure of human rights is that citizens hold a valid claim,[20] that ought to be protected and that the right-holder may demand compliance with, against the state such that the state is under a duty fitting to the right; additionally, as will be explained further shortly, valid demands for compliance with the duties correlative to human rights may arise from other states. Human rights are then obligations *erga omnes*, i.e. they are 'owed to the international community as a whole' such that every state has standing to demand 'cessation of the internationally wrongful act, as well as performance of the obligation or reparation in the interest of the beneficiaries'.[21]

[15] Ibid 59.

[16] K-C Tan, 'The Problem of Decent Peoples' in M Rex and DA Reidy (eds), *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell Publishing, Oxford, 2006) 81.

[17] See (n 1) 61.

[18] See (n 3) 264.

[19] Skorupski (n 13) 358.

[20] J Feinberg, 'The Nature and Value of Rights' (1970) 4 *The Journal of Value Inquiry* 243–60.

[21] E de Wet, '*Jus Cogens* and Obligations *Erga Omnes*' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, Oxford, 2013) 556.

Human rights designate a subcategory of rights since not every right may defeat the sovereignty of a state: rights do not qualify as political human rights simply in virtue of being moral rights held by every human being. It is not sufficient, for instance, that the state acts wrongly or in undesirable ways for its sovereignty to be defeated. It is by failing to comply with its duties arising from human rights that the state forsakes its claim to immunity in the international order. Which rights need to be elevated to the status of a human right is a political question. Human rights are, in this view, human artefacts, grounded on moral considerations, determined by contextual social and political considerations.[22]

Desiderata of the political function of human rights

I argue for four desiderata of a political conception of human rights: (1) non-redundancy; (2) agreeability; (3) cross-state demandability; and (4) the establishment of right-like claims. Each of these desiderata is required for a political conception of human rights to provide functional conditions of tolerance in the international order. This refers to the general structure of the political conception rather than to any specific substantive account.

(1) The first desideratum of a political conception of human rights is its non-redundancy and non-platitude. Human rights should play a specific and significant role that is not already played entirely by some other normative consideration. It is essential, then, for a political conception to show that human rights add something to our political theory. Otherwise, they are redundant and nothing is lost by doing away with the category.

Human rights lists tend to be fairly minimal under the political conception.[23] Cohen, for instance, seeks to restrict enforceable human rights to elements already present in international law, such as the: 'Genocide Convention and the International Criminal Court statute defining and outlawing crimes against humanity, ethnic cleansing, and severe forms of discrimination'.[24] Such minimal lists are often taken to cover 'basic human rights' so as to differentiate them from more goal-like human rights,

[22] Skorupski (n 13) 357; Donnelly (n 11) 99.

[23] A Buchanan, 'Taking the Human out of Human Rights' in M Rex and DA Reidy (eds), *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell Publishing, Oxford, 2006) 150.

[24] She also recognizes the role of 'aspirational' human rights that could give rise to forms of criticism that Rawls would qualify as intolerant. Cohen's position is then highly compatible with mine. Nonetheless, were we to restrict human rights to those she identifies as enforceable, the issue of redundancy would arise. See Cohen (n 7) 587, 604 n 46, 600.

which would include human rights to healthcare and education. The issue here is that by trying to secure agreement on basic human rights, there is a risk of equating human rights with already existing obvious elements of political theory.

As Tasioulas writes: 'can anyone credibly deny that a right to be free from torture is possessed by all humans and should be respected by all societies? Of course not'.[25] One way of putting the point is to affirm that, in order to be significant, human rights norms need to include more than the rules of *jus cogens*. A rule of *jus cogens* is a 'peremptory norm', establishing an *erga omnes* obligation, which is 'accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted'.[26] The rules of *jus cogens* are generally held to include, amongst other things,[27] the prohibitions of torture, slavery and genocide. If human rights were limited to the absolute prohibition of generally recognized atrocities, there would be no need to rely on a special category of rights to explain the limits of state actions. It could be argued, for instance, that no political entity that practises the atrocities recognized to be part of *jus cogens* qualifies as a political association. This is because '[t]he situation of one lot of people terrorizing another lot of people is not per se a political situation: it is, rather, the situation which the existence of the political is in the first place supposed to alleviate (replace)'.[28] It would therefore be a category mistake to identify this form of 'human association' with a political institution worthy of tolerance. In a sense, the reasons to respect sovereignty would not apply

[25] J Tasioulas, 'The Legitimacy of International Law' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 110. Williams refers to Nagel who affirms that: 'the flagrant violation of the most basic human rights is devoid of philosophical interest'. B Williams, *In the Beginning was the Deed: Realism and Moralism in Political Argument* (Princeton University Press, Princeton, NJ, 2005) 18. For a discussion of this assertion, see E Scarry, 'On Philosophy and Human Rights' in HH Koh and RC Slye (eds), *Deliberative Democracy and Human Rights* (Yale University Press, New Haven, CT, 1999) 71–8. An anonymous referee objects that not everyone agrees that there is an absolute right against torture such that it could hold potential philosophical interest. I concede that there are always debates at the margin and there are definitely practical and philosophical interests in specifying even basic human rights. Yet, I want to resist the idea that the violations of the core of basic human rights require much philosophical theorizing. As Williams rightly puts it: 'no very elaborate or refined philosophical discussion is needed to establish what these [most fundamental] rights are'. Ibid 19.

[26] T Endicott, 'The Logic of Freedom and Power' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 245; de Wet (n 21) 555.

[27] de Wet (n 21) 543.

[28] Williams (n 25) 5.

ab initio rather than being overridden.[29] The task of a political conception of human rights is, then, to capture, assuredly, the rules of *jus cogens* against, e.g., genocide, slavery and torture, but also to identify more than self-evident recognized limits on the sovereignty of states.

(2) Despite having to be more than basic and self-evident, the limits set on states sovereignty should not be overly demanding.[30] This is the second desideratum: agreeability. The point of a political conception is not to deny the legitimacy of states, but rather to set limits to their protected sphere of actions. Since violations of human rights should disqualify the immunity of states from interference, we should make sure that these standards can actually be met. Furthermore, not everything can and should be made a human right. Some state decisions, even if they conflict with moral rights, remain within their legitimate authority.[31] There are two additional related considerations for seeking minimal standards: respect for pluralism and achieving near-complete agreement. Both of these will allow the third desideratum to be met.

Firstly, I agree with Williams, that since human rights violations are extremely serious 'political accusations', '[i]t is a mark of philosophical good sense that the accusation should not be distributed too inconsiderately'.[32] Accordingly, we should not declare a violation of human rights what 'in its locality … can be decently supposed to be legitimated'.[33] There are limits to what can be decently supposed to be legitimated but this is neither here nor there. The point is that we should not make a violation of human rights what people in their context genuinely judge to be right whatever we ourselves may judge about the topic.[34] Hence, the establishment of a

[29] 'As Walzer puts it, "When a government turns savagely upon its own people, we must doubt the very existence of a political community to which the idea of self-determination might apply …". When human rights violations are "so terrible that it makes talk of community or self-determination … seem cynical and irrelevant" … , the moral presumption against intervention may be overcome. Human rights violations that "shock the moral conscience of mankind" … conclusively demonstrate that there are no moral bonds between a state and its citizens that demand the respect of outsiders'. Donnelly (n 11) 258–9, quoting M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books, New York, NY, 1977) 90, 101, 107.

[30] For references to philosophers who support a minimalist view, see Nickel (n 5).

[31] Tasioulas (n 25) 114.

[32] Williams (n 25) 72.

[33] Ibid; Skorupski (n 13) 368–9.

[34] The idea, explored below, of a recognizable community of inquiry establishes a limited test to ascertain the genuineness of such judgements. Additionally, it will be argued that actions that are in violations of the recognized core of human rights, ultimately referred to as rules of *jus cogens*, cannot decently be supposed to be legitimate. In this sense, agreeability is a weakly normative desideratum. It has a negative normative content in ruling out some agreement as invalid and it has a limited positive content which covers the basic ideology of human rights and the rules of *jus cogens*.

functional political conception of human rights requires the acknowledgement of the various acceptable normative circumstances in which agents can find themselves. In other words, we should make sure that our list of human rights does not violate genuine pluralism. This is partly because we want to avoid an appearance of subjection[35] of the rest of the international order to some local moral standard. Otherwise, there is a risk that interventions would appear to be unjustified and as the enforcement of a local view.

Another way of putting this point is to affirm the importance of avoiding parochialism in defining a list of human rights.[36] Human rights are, more often than not and especially in practice, offered as universal rights which apply to every state. If the rights included in the list do not respect the various genuine ordering of values found across the globe, human rights will appear as the expression of a particular world-view rather than as the expression of some universality.[37] Accordingly, the list of rights which are elevated to human rights need to take into account pluralism so as to appear universal and to allow the political conception to function as limits on the power of every state without the presumption of subjection.[38]

Secondly, human rights are also formulated in abstract ways. This is in order to secure agreement. The more precise and worked out the rights included in the list of human rights and the more they demand, the less probable an agreement. Without agreement, it is unlikely that human rights will, in practice, serve as conditions of tolerance in the international order. This is linked to the third desideratum.

(3) I borrow the third desideratum from Skorupski: human rights are 'rights which it is permissible for all, including all states, to demand that all states should positively protect and promote. Call this cross-state demandability'.[39] If the violation of a human right is to count as a justification for intervention, then, those who intervene must be authorized to intervene and must be in a position to demand compliance. Furthermore, it means that those who

[35] S Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Hart Publishing, Oxford, 2005), 109.

[36] Buchanan (n 2) 95; (n 23) 159.

[37] Williams (n 25) 19.

[38] An anonymous referee sees a tension between the goal of respecting pluralism and the cosmopolitan human rights project. It would be a mistake, however, to ignore that human rights have both a universal and a relative aspect. Emphasizing their relative aspect by requiring the respect of genuine pluralism is not incompatible with the validity of universal norms. It rather embodies the concern of the political conception for the idea that states have certain immunity against intervention by balancing universal norms and sovereignty. See Donnelly (n 11) 104.

[39] Skorupski (n 13) 367.

demand compliance must be in a position to assess that there has been a right violation.

(4) Finally, human rights need to establish right-like claims and duties, such that a violation can be identified more or less straightforwardly.[40] Human rights, for the sake of their practical political function, need to establish some valid claims on the part of every one against states to comply with some relatively clear duty or rule. Accordingly, whatever is the case for other (moral or legal) rights, human rights, under the political conception, cannot only consist in goals or partially theorized agreements: 'For then we would also have to accept that where human rights are unmet there is no breach of obligation, nobody at fault, nobody who can be held to account, nobody to blame and nobody who owes redress. We would in effect have to accept that human rights claims are not real claims.'[41] The idea that the state breaches a rule, thus violating some owed duty, is required to make sense of the fact that the state is at fault in a way that authorizes intervention. In what follows, I raise doubts on the ability of the political conception to meet these four desiderata.

Reasons to be sceptical about abstract human rights

Albeit appealing, the idea that human rights embody the universal object and purpose of political institutions, and that they can stand constantly before us in order to judge political institutions[42] is highly difficult to capture and formulate precisely. Despite some (incompletely theorized) agreement on human rights, disagreement remains about their exact scope and limits. Accordingly, human rights are generally formulated in abstract ways such that what a right exactly amounts to is left underdetermined. This raises two issues for the political conception. Firstly, abstract formulations of rights are too easily infringed. Secondly, if abstract human rights are taken as rules that require strict compliance and whose compliance with can be assessed, then there seems to be a tension with the idea of allowing diverse local specifications of the same abstracts rights. Yet, such specifications are required in order to locally operationalize abstract human rights norms.

Here is the conundrum in more detail. Despite the usefulness of abstraction in order to identify an area of agreement, mostly any attempt to capture such an area of agreement on human rights and to give it a specific

[40] Hinsch and Stepanians (n 4) 120.

[41] O O'Neill, 'The dark side of human rights' (2005) 81 *International Affairs* 427, 430.

[42] See the preface of 'Declaration of Human and Civic Rights of August 1789' available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf>.

formulation is at risk of doing violence to the acceptable diversity of human institutions and practices especially if such a formulation is to be used as a strict condition of tolerance. Yet, were such formulations not to count as strict conditions of tolerance, it would become difficult to see them as, strictly speaking, claim rights with correlative duties whose violation can be assessed. This is unless we restrict the rights in question to only basic peremptory norms. Accordingly, the predicament in which the usual political conception of human rights finds itself is to be in violation of either the first or the second desiderata: either human rights are obvious and uninformative or they risk being anarchical by consisting in a list of abstract rights whose compliance with is hardly possible. This is unless we maintain that such abstract formulations do not consist in strict rights but rather in considerations in need of specification. But then, the fourth desideratum is violated and it also becomes difficult to achieve cross-state demandability. I first explain the issue with abstraction before turning to the problems of specification.[43]

Human rights are offered as abstract considerations in need of specification. Just as Webber explains for constitutional law, human rights take the form of an 'underdetermined guarantee "everyone had a right to φ" [which is] providing an encompassing right for all to all that is related to φ'.[44] This can clearly be seen in the way, for instance, that Article 19 of the *Universal Declaration of Human Rights* is formulated: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Such a right takes an abstract formulation detached from any specific political context. The right is left unlimited and unbalanced with other rights that might conflict with it such that its scope is extremely wide.[45]

[43] Alexy discusses this problem for constitutional rights: 'Taken literally, limitlessly guaranteed constitutional rights norms protect too much. The problem with constitutional rights norms with simple limitations is that, taken literally, they seem to guarantee too little.' Alexy (n 9) 76. The theory of principles along with proportionality reasoning provides a solution to the problem of abstract rights for local legal systems. See also M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford Scholarship Online, Oxford, 2012). However, this solution does not translate perfectly to the international system conceived as constituted of discrete sovereign legal systems. A possible solution, that would allow the theory of principles to readily apply at the international level, would be to give up the idea of a statist international order and to explore the idea of an integrated multi-level international constitutional order. The question of whether or not we should give up on the idea of a statist international order is not, however, one addressed in this paper.

[44] GCN Webber, *The Negotiable Constitution; On The Limitation of Rights* (Cambridge University Press, Cambridge, 2009) 2.

[45] Alexy (n 9) 210.

Neither is the direction of the right specified: is it a purely vertical right such that only the state is concerned or is it also a horizontal right such that citizens are also under the duty?

In order to achieve agreement on such abstract norms, the essential specificity required for human rights to stand as conditions of tolerance is left behind. It is this inescapable abstractness of universal statements of human rights that brings me to my objection to abstract human rights as conditions of tolerance. If human rights, as they are formulated, i.e. as abstract and unspecified norms, are to stand as conditions of tolerance then no government is ever tolerable or our list of human rights is too minimal to bring anything of interest to political theory. This is an absurd conclusion and one that is contrary to the desiderata of the political conception. This insight can already be found in Jeremy Bentham's *Anarchical Fallacies*:

> Right, the substantive right, is the child of law: from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters, 'gorgons and chimæras dire'. And thus it is, that from legal rights, the offspring of law, and friends of peace, come anti-legal rights, the mortal enemies of law, the subverters of government, and the assassins of security.[46]

Bentham held it to be absurd that the rights found in the French Declaration could stand as conditions of legitimacy. They were anarchical and could lead to the overthrow of any government since any government by its unavoidable infringement of abstract rights – such as the abstract inalienable right to liberty – would become illegitimate and therefore liable to rebellion.

The point here is not to follow Bentham all the way to the stilts of nonsense. What I retain from his argument is more limited: universal abstract rights detached from a legal process of specification can be dangerous declarations that risk undermining government rather than providing clear limits to the power of political institutions. As soon as we depart from obvious requirements such as the avoidance of genocide and from the clear core of rights, it becomes difficult to see how any state that does not perfectly respect abstract rights can be tolerable. Consider the right to freedom of speech: if the right consists in 'an encompassing right for all to all that is related to freedom of speech' then there is no way in which this right cannot be violated in a normal state. Crying 'fire' in a crowded

[46] J Bentham, *The Works of Jeremy Bentham vol. 2* (William Tait, Edinburgh, 1848) 523, available at <http://oll.libertyfund.org/title/1921/114226>.

theatre or slander could not be prevented without forbearing immunity from intervention. It would not suffice to bite the bullet while affirming that intervention is simply not warranted in practice since the violation of the right would not be grave enough. It is anarchical and wrong, in principle, to maintain that any infringement or any balancing of an abstract right consists also in its violation such that the state cannot in practice not forsake its claim to immunity. This is simply contrary to the purpose of the political conception of human rights as stated by the second desideratum.

The obvious answer to this problem is to acknowledge that human rights, under the political conception, do not and cannot require strict compliance with their abstract formulations. Hence, in order to be applicable, human rights need to undergo a process of specification to clarify their content, limits and direction. In the next section, I show how this already acknowledged practice of specification affects the ability of human rights to meet the third and fourth desiderata.

II. Humans rights and specification

Theorists and practitioners of human rights widely acknowledge that abstract human rights need to be specified, that is given content, limited and balanced. For instance, freedom of speech will be defined as covering communication in the press, the Internet and public spaces. The right will then be limited through balancing, that is the specified right of freedom of speech will be held not to apply to shouting 'fire' in a crowded theatre. Finally, the right may be limited further by balancing it with other considerations such as public security – e.g. freedom of speech may be infringed if information voiced would affect national security.[47] In this sense, abstract rights are given a determinate and concrete meaning through specification.[48] As long as the definitive right embodies the optimal concretization of the right/principle based on what is factually and legally possible, the state respects the right in question. In this section, I explain how this process of specification is recognized both in practice and in theory. I then argue that it prevents a political conception of human rights from meeting the third and the fourth desiderata listed in the previous section.

[47] The distinction between infringement and violation can be useful here. See J Oberdiek, 'Specifying Rights Out of Necessity' (2008) 28 *Oxford Journal of Legal Studies* 127–46; Alexy (n 9) 178–81.

[48] A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford Scholarship Online, Oxford, 2004) 75.

The practice and the theory of specification

The process of specification is already well-established in our legal practice. It is a process by which abstract rights are operationalized and locally constituted such that the locally defined human rights norms are held not to be in violation of the abstract rights. As Webber explains regarding constitutional rights, the process of specification through legislation 'translates underdeterminate rights into determinate rights. In this way, legislation is enabling and *constitutive* of a right – not, as is generally assumed, merely either in compliance with or in violation or infringement of that right'.[49] The idea that the process of specification is *constitutive* of the right is key in understanding how it is possible to mitigate Bentham's fears. The political process of specification replaces the abstract rights with a well-defined concrete formulation along with clear correlative duties with which compliance is possible.

In legal practice, the local specification of abstract human rights norms is recognized as a legitimate process across different local and regional legal systems.[50] For instance, the European Court of Human Rights applies what is known as a margin of appreciation.[51] Another example comes from 'regional and international human rights body [… who] despite enforcing a significantly different law … consider themselves as sufficiently close to be "functional equivalent"'. This means that they will not hear cases already heard or being heard by another body.[52] In this sense, the practice of human rights is consistent with the idea that the same abstract rights and even different rights for that matter can be operationalized in different legitimate ways.

This recognition of the need for specification is also found in contemporary theories of human rights. Buchanan affirms that, in order to be monitored, compliance with a norm requires 'concrete guidelines and procedures'.[53] Tasioulas affirms that: 'objectivity does not entail prescriptive invariance'.[54] By this, he acknowledges that the concrete requirements of an abstract norm are dependent on their context of implementation. Accordingly, institutions require the capacity to adjust human rights such that 'there may be diverse ways of specifying the

[49] See (n 44) 8–9. My emphasis.

[50] See Klatt and Meister (n 43) 18.

[51] GL Neuman, 'Subsidiarity' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, Oxford, 2013) 375–7.

[52] F Mégret, 'International Human Rights and Global Legal Pluralism: A Research Agenda' in R Provost and C Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism*, Ius Gentium: Comparative Perspectives on Law and Justice 17 (Springer, Dordrecht, 2013) 77.

[53] See (n 48) 75.

[54] Tasioulas (n 25) 106.

content of that right, and of trading it off against countervailing considerations in cases of conflict'.[55] In a similar way, Griffin affirms that only abstract rights are properly universal, such that '[t]o determine the limits of human rights we need both ethical and empirical considerations'.[56]

The practice of specification is then clearly part of both the practice and the theory of human rights. As long as this is the case, the objection that human rights are anarchical is implausible. This is because human rights norms, exception made to clearly defined rules of *jus cogens*, function more as basic ethical considerations, or principles, in need of specification and optimization than as strict rules requiring compliance.[57] Two issues follow from this: (1) cross-state demandability becomes challenging such that the third desideratum is affected and; (2) abstract formulations of human rights do not establish right-like claims such that the fourth desideratum cannot be met.

Issues with specification

Once we acknowledge the process of specification as constituting human rights locally, cross-state demandability becomes difficult for more than basic and obvious requirements. In other words, it becomes difficult to require or assess compliance with anything more than the core of the right.[58] This is because human rights norms are given concrete life through different and various valid specifications, each dependent on the local state for its realization. Consider freedom of speech: one polity may construe freedom of speech as preventing the state from forbidding peaceful demonstrations by people wearing masks. Alternatively, this same freedom may not be considered as extending to the protection of masked demonstration in another state.[59] Determining the compliance of each of these states with human rights norms regarding freedom of speech depends on the local process of specification. But, if the local process of specification determines what the abstract human rights norm entails within its local conditions, then the outsider state can hardly be

[55] Ibid 111.

[56] J Griffin, 'Human Rights and the Autonomy of International Law' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 350.

[57] See Buchanan (n 48) 75, 79.

[58] On the core of human rights, see Scheinin (n 10).

[59] This precise issue has become prominent with the use of Guy Fawkes masks during many demonstrations associated with the Occupy Movement. More precisely, I have in mind the debate concerning freedom of speech and by-law P-6 in the city of Montréal. D Barrette, *Libertés d'expression et de réunion pacifique: une vigilance nécessaire* (19 March 2014) available at <http://liguedesdroits.ca/?p=1864>.

in a position to assess compliance, so as to intervene in cases of violation, with anything else than the right as it is locally specified. Accordingly, since local processes of specification constitute human rights, cross-state demandability appears to be prevented. No clear conditions for bypassing local processes of specification are provided, such that nothing more than the most egregious violation of rights can be affirmed.[60]

The essence of the problem here is that the process of specification is at risk of defeating the purpose for which the political conception of human rights is designed in the first place. Again, Bentham provides a clear insight about this issue: 'But this clause reduces all his rights to nothing; … Nothing can be more fallacious than a declaration which gives me with one hand, what it authorizes the taking from me with the other. Thus cut down, this declaration … do neither good nor harm.'[61] And elsewhere: 'What is the security worth, which is thus given to the individual as against the encroachments of government? What does the barrier pretended to be set up against government amount to? It is a barrier which government is expressly called upon to set up where it pleases.'[62] In these two passages, Bentham shows that when governments, without further conditions, are charged with defining and limiting abstract human rights, such rights are no longer limits on the authority of the government. Governments become the keepers of their own limits through specification such that one can legitimately ask: *Quis custodiet ipsos custodes?*

Additionally, based on the necessity of specification and on Bentham's point, most abstract human rights norms fail to establish, as they stand, right-like claims or definite rules.[63] This is because the demand that may arise from a human rights norm is established through specification. Each state will constitute locally abstract human rights – such as a right to education or even a right to a fair trial – in different ways, thus giving rise to, though probably similar, significantly different duties. Before specification, human rights stand as fundamental abstract ethical considerations that are held to apply to all human societies and which are owed to each human being. It is then impropriety and confusion to see these fundamental considerations as claim rights or rules. If that is the case, then, human rights that require more than compliance with basic *jus cogens* rules do not qualify, strictly speaking, as rights which provide clear cross-state

[60] This issue is problematic even for those, like Rawls, who would be comfortable with human rights conceived as a minimal threshold which, once passed, entitles one to both tolerance-as-non-intervention and tolerance-as-respect. This is because 'even the most basic human rights norms are not self-specifying'. Buchanan (n 2) 95.

[61] See (n 46) 534.

[62] Ibid 515. See also: Alexy (n 9) 212–13.

[63] Klatt and Meister (n 43) 19.

demandable duties. Accordingly, the fourth desideratum is not met and O'Neill's point applies; 'human rights claims are not real claims' and our political conception fails to establish right-like claims for more than basic *jus cogens*.

This confusion between rules and abstract norms is well captured by Macdonald: 'The *idea* of human rights is not flawed because of any of its inherent characteristics, but because of what its proselytizers have made it into. Imagining human rights in action as the application of propositional knowledge to particular cases misperceives the character of law.'[64] The issue is that human rights are too often taken as strict rules enforced and applied from above, rather than as a certain set of shared ideals[65] or general hypotheses that peoples are called upon to consider and to realize by their own lights. The idea I want to advance in the rest of the paper, and which is a major departure from the traditional political conception, seeks to capture this point that respect for human rights does not consist in the application of propositional knowledge. Rather, the attribution of full-fledged tolerance to a political community requires an assessment of its attitude towards human rights fundamental norms and of the process by which human rights norms are given life within its local legal system. We should conceive of what is required for tolerance as something akin to virtue as opposed to strict rule abidance.

Before moving on, there are two objections to the arguments presented in this section that need to be addressed. Firstly, it could be argued that the problem raised about cross-state demandability and specification ignores the fact that international and regional legal instruments have already achieved a high level of specification and that there are actual mechanisms by which compliance with human rights norms can be monitored.[66] Even if we acknowledge these facts about the current human rights regime, we should not confuse the practice of human rights with the role we want human rights to play in political theory. This paper pursues the aim of determining the limits of tolerance in a way that is compatible with the state being the ultimate unit responsible for the specification and fulfilment of human rights norms. I do not ignore that specification can be achieved (with state consent) at the international level; I simply hold that this does not have to be the case such that the state can remain the ultimate locus of specification. If that is so, the problem regarding cross-state demandability remains.

[64] RA Macdonald, 'Pluralist Human Rights? Universal Human Wrongs?' in R Provost and C Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism*, Ius Gentium: Comparative Perspectives on Law and Justice 17 (Springer, Dordrecht, 2013) 26. Emphasis in the original.

[65] Tasioulas (n 25) 110.

[66] Donnelly (n 11) 32, 103, 164–7.

Secondly, it could be argued, following Alexy, that the state is bound to respect the core of human rights *and* that it is bound to 'balance interests' through 'the principle of proportionality'.[67] Human rights, when conceived as principles, would entail a rule commanding states to optimize these principles through proportionality reasoning. The principle of proportionality would provide conditions by which specifications could be assessed across states. I do not deny that if there are human rights principles then states that fail to give them due considerations should not be tolerated. In fact, I believe this strategy to be right: we need to be concerned with the process by which abstract human rights norms are specified and expressed rather than with strict compliance. What I deny is that proportionality reasoning constitutes the minimally acceptable practice to which tolerance should be attached. It appears overtly restrictive by making any practice of specification that falls short of the principle of proportionality a violation of human rights. In the following section, I defend a view that seeks to include other practices which, without being as optimal as proportionality reasoning, are nonetheless tolerable.

III. Human rights and communities of inquiry

In this last section, I aim to address the following questions: can we make sense of prescriptive and goal-like human rights as conditions of tolerance in the international order while accepting (1) that they are abstract considerations (2) which are not immediately applicable independently from a local political process, i.e. that they are in need of specification, and (3) that this process is itself in need of conditions of legitimacy?[68] I defend the view that full-fledged tolerance in the international order should indeed be attached to respect for human rights as the political conception of human rights asserts. However, respect for human rights should be understood as compliance with peremptory rules *along* with the expression of the ideal of human rights in the legal system of a political community recognizably organized as a community of inquiry.[69] This allows the separation of tolerance-as-respect from tolerance-as-non-intervention.

The idea guiding the arguments in this section is that we should consider what it is for a political decision to stand as a decision that can be accepted by those subject to it in a manner which can give other states reasons to tolerate and respect it: this is why I turn to the notion of collective

[67] Alexy (n 9) 190.

[68] Buchanan (n 48) 115.

[69] There are then minimally substantial (*jus cogens* rules) and procedural conditions (minimally recognizable epistemic practices) of legitimacy applicable to the process of specification.

acceptance and to recognizable epistemic practices. Rather than only associating tolerance in the international order with compliance with basic human rights rules, I argue that tolerance-as-respect should in fact be associated with the attachment of a political community recognizably organized as a community of inquiry to the idea of human rights. This offers a significant role to human rights norms and integrates the two aspects of human rights – their peremptory and goal-like nature – in the attribution of tolerance to a state. I first explain what is meant by a political community organized as a community of inquiry and why the epistemic credentials of a political community matter. I then mention under which conditions a political community counts as a recognizable community of inquiry. In the last part on this section, I show how this approach meets the four desiderata of a political conception.

We should note, however, that the proposal put forward is very modest. Some might be dissatisfied with my reluctance to provide a checklist of precise criteria to define what counts as proper epistemic practice or as respecting the idea of human rights. Notwithstanding, I believe that the modesty of this approach is not a defect. In fact, it expresses the right precision that the topic under consideration allows. Requiring a comprehensive principled political conception of human rights negates the essential role that people's judgements play in the determination of what makes a political order tolerable or intolerable. Additionally, there is something highly suspicious and hubristic in the presumption that we occupy a vantage position from which we can conclusively and comprehensively assess the decency of people's political arrangements regardless of what they themselves accept in their own context. The modesty of my account consists therefore in an acknowledgement of the limited reach inherent to the task of determining conditions of tolerance.

A political community as a community of inquiry

The question of whether a state deserves tolerance-as-respect in the international order should be based, to borrow Burke's words, on 'the method of procuring and administering' the fundamental ethical considerations that human rights norms are.[70] In essence, respect, as refraining from official condemnation and lesser forms of intervention, has to be attached to the manner by which local decisions are achieved. Considering the uncertain nature of our moral epistemology, the fact of

[70] E Burke, *Select Works of Edmund Burke, vol. 2* (Liberty Fund, Indianapolis, IN, 1999) 152, available at <http://oll2.libertyfund.org/titles/burke-select-works-of-edmund-burke-vol-2>.

reasonable moral and social pluralism and the necessary relative aspects of principles, the possibility of relying on human rights norms as 'propositional knowledge' ready to be applied here and there is extremely limited. Rather, tolerance-as-respect should be attached to the procedural legitimacy of a political community recognizably organized as a community of inquiry seeking to express in its local legal system the idea of human rights. Accordingly, local decisions are worthy of tolerance inasmuch as they are the outcome of a local decision-making process exemplifying some minimally recognizable epistemic credentials that pays due concern to the basic ideology of human rights.[71]

I will assume that a political community consists in a collection of individuals sharing a reflexive attitude of belonging to a same group[72] bound to act together on some collective problems and collectively accepting some propositions as the group's resolves. As Gilbert explains, the fact of collectively accepting a proposition is constitutive of a group.[73] Acceptance, here, refers to the fact of each individual holding a proposition, for epistemic or practical considerations, to be correct for the sake of determining how to act collectively. Even if belief is not required, individuals are at least expected to act in such a way that the group can be seen as acting along the lines of what it accepts.[74]

By itself, it is hard to see why the simple fact of consisting in a group can grant that group immunity from intervention unless one already assumes that peoples should be respected.[75] I argue that the solution is to be found in the epistemic goals of groups: seeking to collectively accept as many true propositions as possible and seeking to enact correct laws and decisions.[76] The prevalence of these epistemic goals in determining a group's resolves are essential to make sense of why the decisions of a group are worthy of tolerance, i.e. of why there can be a minimal positive presumption about the normative validity of the decision. This is partly because without epistemic goals it is not clear why anyone should care about the views of the group.[77]

[71] On epistemic proceduralism, see F Peter, *Democratic Legitimacy* (Routledge, New York, NY, 2009). See also Buchanan (n 2) 96; Buchanan (n 48) 115–17.

[72] See (n 1) 23.

[73] M Gilbert, 'Modelling Collective Belief' (1987) 73 *Synthese* 185, 195.

[74] BK Wray, 'Collective Belief and Acceptance' (2001) 129 *Synthese* 319, 321.

[75] See (n 1) 61.

[76] D Fallis, 'Collective Epistemic Goals' (2007) 21 *Social Epistemology: A Journal of Knowledge, Culture and Policy* 267–80.

[77] D Fallis and K Mathiesen, 'Veritistic Epistemology and the Epistemic Goals of Groups: A Reply to Vähämaa' (2013) 27 *Social Epistemology: A Journal of Knowledge, Culture and Policy* 21, 23.

Inasmuch as we have epistemic goals ourselves, we have reasons to take seriously and respect what another group accept for epistemic reasons. Tolerance is then to be grounded in our own commitment to achieve correct answers.[78] This is because toleration of epistemically decent groups is proper epistemic practice if we seek to correctly enact human rights:

(1) Different specifications of human rights consist in the operationalization of underdetermined and inconclusive considerations. If specifications are achieved through an epistemically adequate process, then it is not clear why any other specification is more authoritative such that intervention would be warranted.
(2) As Mill famously argued, diversity can increase our own chances of getting the right answer.[79]
(3) A common commitment to basic universal moral requirements is better realized in a pluralist way, since the fragmentation of a legal order can help, amongst other things, to take into account local knowledge and local views about rights.[80]
(4) Only by adopting an overconfident epistemology can one assert the correctness and *enforceability* of one's views over other communities that exemplify recognizable and minimally adequate epistemic practices.[81] This would require adopting a method of inquiry that rejects evidence from other inquirers. This does not mean that people's reasoning can never be evaluated, engaged with and rejected. Rather, it affirms that if people's reasoning is epistemically decent then there is something epistemically wrong to completely disregard it when circumstances make it possible to tolerate.

From this follows a need for greater tolerance towards different specifications and understandings of human rights than the usual political conception of human rights accepts. Specification is more than a makeshift practice; it is essential to enable the plurality of ways required for human

[78] On our commitment to epistemic goals and on epistemically grounded tolerance, see R Talisse, *Pluralism and Liberal Politics* (Routledge, New York, NY, 2012); *Democracy and Moral Conflict* (Cambridge University Press, Cambridge, 2009); and C Misak, *Truth, Politics, Morality: Pragmatism and Deliberation* (Routledge, London, 2000).

[79] JS Mill, *On Liberty and The Subjection of Women* (Henry Holt and Co, New York, NY, 1879) 101–2, available at <http://oll.libertyfund.org/titles/347>.

[80] CI Fuentes, R Provost and SG Walker, 'E Pluribus Unum – Bhinneka Tunggal Ika? Universal Human Rights and the Fragmentation of International Law' in R Provost and C Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism*, Ius Gentium: Comparative Perspectives on Law and Justice 17 (Springer, Dordrecht, 2013) 38.

[81] See F Peter, 'Epistemic Foundations of Political Liberalism' (2013) 10 *Journal of Moral Philosophy* 598–620.

rights to be properly specified but also expressed.[82] Yet, we need to recognize that this process of specification needs to meet certain conditions to enable the local specifications to be worthy of respect. The notion of a political community organized as a recognizable community of inquiry is meant to capture the idea of a group giving sufficient consideration to its epistemic goals to be worthy of respect.[83]

A community of inquiry is a notion found in pragmatist epistemology but the way I am using it is not committed to anything specifically pragmatist. Its main characteristic consists in the adoption of the method of science to settle beliefs/acceptances. This method should not be confused with the actual scientific method. It is rather a method of inquiry 'by which our beliefs may be determined by nothing human, but by some external permanency – by something upon which our thinking has no effect'.[84] Inquirers assume that an answer is to be had – at least one correct answer – with regard to the point under consideration and what ought to be believed should not be determined by preferences or passions. In other words, those involved in inquiry should 'be aiming at the truth—at getting things right, at avoiding mistakes, and at improving their beliefs and theories.'[85]

The achievement of 'truth' cannot rely on a steadfast commitment to beliefs recalcitrant to experience or on a blinded commitment to authority. These two latter methods of fixing beliefs are deficient methods since they insulate beliefs and make them depend in an irrelevant way on something human. A proper commitment to correct beliefs and to inquiry requires a willingness to revise and to adapt one's beliefs or acceptances through

[82] The concept of specification should be understood as covering, not just the local application of external norms but, also, the idea of expressing a commitment to the idea of human rights. In this sense, a commitment to human rights can be realized both by multiple states subscribing to a common list of human rights but also by states arriving at different lists.

[83] Buchanan argues that democracy is essential for the legitimacy of local specifications. Just as with proportionality reasoning, I believe that democracy offers an optimal method by which groups can achieve tolerable collective acceptances. Democracy does not, however, constitute, in theory, the only decent manner by which groups can achieve collective acceptances. I recognize, however, that in practice, democracy may be a more easily assessable feature of states than adequate epistemic practices. Nonetheless, my arguments warrant caution in assessing collective acceptances; it is not democracy as such that matters but the fact that a view validly expresses an epistemically informed collective acceptance. Buchanan (n 48) 116.

[84] CS Peirce, 'The Fixation of Belief' (1877) 12 *Popular Science Monthly* 1–15, available at <http://www.peirce.org/writings/p107.html>.

[85] C Misak, 'Pragmatism on Solidarity, Bullshit, and other Deformities of Truth' (2008) 32 *Midwest Studies in Philosophy* 111, 114. See Misak (n 78) on how this method applies to morality.

the assessment of evidence, experiences and relevant reasons. At least, if one defers to authorities one needs to do so for the right reasons: because one freely regards an authority as more informed, wiser or more apt to get the answer right. A community of inquiry is, accordingly, a group of inquirers that recognizes its own fallibility and which is collectively committed to the achievement of correct acceptances following the method of science.[86] A political community organized as a community of inquiry is then a group of individuals collectively accepting some propositions determining how they collectively ought to act for political purposes following the method of science.[87]

A respectable community of inquiry

We can now turn to what makes a political community, organized as a community of inquiry, respectable and for this we need to expound two elements of this account. Firstly, some content needs to be added to explain what a recognizable method of inquiry is. Secondly, political communities can pursue various ends along with their epistemic goals, some of which may be nefarious. There is then a need to develop the notion of seeking to implement or express human rights norms. This will also allow me to clarify in what sense human rights peremptory rules and abstract human rights norms can be given a unique source in inquiry and collective acceptance.[88]

As explained earlier, a forsaking of immunity should not be attached to what 'in its locality can be decently supposed to be legitimated'. In this sense, the epistemic credentials required of a community have to be minimal and to take into account various epistemic practices that are genuinely judged in their context to be proper epistemic practices and

[86] Talisse, *Pluralism and Liberal Politics* (n 78) 49.

[87] Misak affirms that 'there is only one community of inquirers [and] that we must think of inquiry as embracing all peoples and cultures'. Misak (n 78) 133. Yet, the practical object of inquiry is sometimes local. In some circumstances, we care about what ought to be done here and now for us. There is no reason to think that thus deciding how to act is of any impediment to the overall task of inquiry. As such, there can be multiple political communities all organized as communities of inquiry.

[88] At first sight, it can seem absurd to affirm that human rights are grounded in inquiry and collective acceptance. One does not appeal to inquiry to condemn genocide. Yet, one readily appeals to what it is for a political community to be a political community, as made clear by Walzer's and Williams's quotes (nn 28, 29). It is by associating inquiry and collective acceptance with what it is for a political community to be a (respectable) political community that they can ground even basic human rights. Additionally, the wrongs of violating basic human rights are overdetermined. My account simply focuses on what it is for a decision to be collectively accepted, in order to determine the political limits of tolerance, without precluding other accounts of what makes a violation of human rights wrong.

which can be recognized as such.[89] If that is the case, human rights specifications, or the expression of human rights norms, achieved by states are to be respected when they can be regarded in their context as the results of a reasoned process concerned with the achievement of correct decisions and not because they happen to match a predefined list of human rights ready to be incorporated.

Yet, seeking minimal epistemic standards does not mean the uncritical acceptance of any locally accepted epistemic practice. It is possible to assess how social practices and institutions can impede or favour the acceptance, for epistemic reasons, of propositions leading to correct collective actions. This is the purpose of what Buchanan has named 'social moral epistemology'.[90] In this view, we can conceive three situations, the first two qualifying as recognizable communities of inquiry: (1) some communities may exemplify near-ideal epistemic practices;[91] (2) some other may show good faith in inquiry but display defective practices and; (3) other communities may simply fail to adopt epistemically adequate practices.

States whose local specifications are unjustifiably excluding the evidence and the experiences coming from parts of their citizenry – e.g. overly authoritarian regimes and regimes that forcefully exclude women – or states plagues with such culpable social inequalities that the epistemic credentials of their decisions are affected should not be granted tolerance-as-respect. This is despite not violating basic human rights norms and despite not being aggressive towards other states. Yet, if some part of the citizenry genuinely recognizes in its context the capacity of the powers-that-be to make correct decisions even without their input – imagine a law-lords lead society – then such a society can appear as a (defective but tolerable) community of inquiry even if it does not adopt the best epistemic practices. In this sense, Rawls's consultative hierarchy and benevolent despotism may or may not count as minimally recognizable communities of inquiry depending on whether those making the decisions are locally seen as able to make correct decisions.[92]

[89] By focusing on minimally acceptable epistemic practices, which should be recognizable from the point of view of any inquirer, this approach seeks to capture the practices that allow us to recognize the views held by others as expressing potentially valid judgements. It can thus resist the objection of overconfidence that could have been raised had it relied on ideal epistemic practices.

[90] A Buchanan, 'Social Moral Epistemology' (2002) 19 *Social Philosophy and Policy* 126–52.

[91] This ideal can take various concrete forms. Yet, we can affirm that it would at least cover properly functioning democratic states and states whose judiciary's decisions are generally accepted and that follow the principle of proportionality. On proportionality and correctness, see Klatt and Meister (n 43) 70.

[92] See (n 1) 72.

Nonetheless, we can affirm that, despite various practices being tolerable in theory, in practice and in most cases, complete respect should not be extended to societies which fall short of good epistemic practices. Our presumption should be that such societies are simply not organized as communities of inquiry such that their collective acceptances reflect nothing highly epistemically significant: we cannot regard their specifications or expressions of human rights norms as guided by a concern for what is correct such that they provide us with no (epistemic) ground for tolerance. This is because, with our current understanding of what it is for a decision to be uncoerced and to express a valid judgement, a special access to truth for a particular cast is seen as the stuff of 'dealers in intellectual poison' and the widespread good faith recognition of the values of the decisions of hierarchical powers-that-be is unlikely. This is especially the case when we recognize that epistemically deficient arrangements that are nevertheless locally accepted may be so only in function of the citizenry's subjection.[93]

The second necessary element required for a community of inquiry to qualify for tolerance-as-respect and therefore to be granted immunity from intervention is its subscription to the basic ideology of human rights or, in other words, the fact that it is resolved to express or incorporate human rights norms in its local legal system. This is not so much a substantial requirement about the precise content of decisions, but rather a requirement about the direction of inquiry. Political communities can have various goals. Epistemic goals often help a group to pursue their other practical goals such as comfortable living and economic growth but they can also be used to pursue evil ends.[94] In order to ground respect, the pursuit of a group's goals needs to be directed or limited by some purportedly desirable or valuable goal itself subjected to inquiry. Yet, we need to define this direction of inquiry in a way that respects pluralism (second desideratum) but that allows us to cover both basic peremptory rules and further human rights norms (first desideratum).

The idea of a political community subscribing to the basic ideology of human rights is meant to capture the idea of a community seeking to enact correct laws within the parameters of what would be morally defensible for all those subject to the power of that community. In other words, it is meant to capture the idea that the goals to be pursued by a community should be at least limited by the status or value of those constituting the

[93] For the '*critical theory principle*' and the idea of what is acceptable in our current historical circumstances see Williams (n 25) 6, 8. More generally, see Donnelly (n 11) 70.

[94] I Somin, *Democracy and Political Ignorance; Why Smaller Government Is Smarter* (Stanford Law Books, Stanford, CA, 2013) 54–6.

group (without denying the possible value of the whole). It is also meant to capture the idea that human rights function as goals that political communities seek to enact, realize or express in various ways.

Once we move away from the idea that respect for human rights requires the application of propositional knowledge, the idea of attaching tolerance-as-respect to the instantiation of a commitment or attitude towards some basic ethical considerations is more easily understood. Subscribing to the idea of human rights consists therefore, not in strict compliance, but rather in expressing a type of collective virtue by giving a specific direction to inquiry regarding political actions. In other words, it consists in accepting that some requirements apply to the goals that are to be pursued by a political community and that these requirements may also guide what should be enacted. These requirements are to take seriously the idea that persons are of value or have a protected status, that those who constitute the community are to be respected and that there are limits to the legitimate sphere of action of states.

If human rights are to count as sovereignty defeaters, we need to be clear that some important value or status is attached to *individuals*.[95] If human rights are to play the role we want them to play, their normative significance needs to rely on the fact that individuals can limit the actions of states. In this sense, it is perfectly sensible to affirm that the basic ideology of human rights has something to do with the acknowledgement of some value or status to the individual.

Once we affirm that the ends pursued by a political community organized as a community of inquiry need to be limited by the basic ideology of human rights, we should be able to justify why full-fledged tolerance is to be associated with (a) respect for *jus cogens* rules and (b) the pursuit of the idea of human rights by (c) a recognizable community of inquiry.

A community which fails to respect the obvious core of human rights is clearly not giving due concern to the basic ideology of human rights in the pursuit of its goals. Such a community is acting without concern for, something along the lines of the 'interests', 'status', 'dignity' of its citizens. A political community that fails to take this basic ideology into account is 'part of the problem' of what political power is meant to resolve.[96] It simply does not qualify as a political community and does not qualify for immunity. It is appropriate to refer to these core rules as rules of *jus cogens*, i.e. as peremptory rules generally accepted and recognized by the international community of states as a whole, to the extent that they are (politically) recognized rules derived from human rights norms whose

[95] See Griffin (n 56) 341–2.
[96] Williams (n 25) 63.

violation demand intervention. This is even more so since the norms which can be known with a sufficient level of clarity, specificity and self-evidence[97] to count as clear violations of human rights in a way that can bypass local processes are limited to those most fundamental human rights rules that are generally included in the *jus cogens*, e.g., torture, genocide and slavery.

Nonetheless, it is possible, in principle, that there could be some clarity and specificity attached to less fundamental human rights whose violations would not warrant military intervention such that their inclusion in the *jus cogens* as presented in this section would be inappropriate. If there are such rights, they could be seen as the core of some universally recognized human rights and they could provide additional substantive limits to tolerance. Yet, as I argue shortly, the normative significance of such core rights is lessened by the notion of a recognizable community of inquiry.

A complete disregard for the fact that the members of the community are of some significant value is incompatible with the idea that the decisions of this community are worthy of respect as the resolves of the group. The decisions of a political community that are not directed and limited by the basic ideology of human rights structurally do not fit what collective acceptance entails. Group decisions were presented as collectively accepted views and, even though agents may disagree with the views accepted, they still need to acknowledge that this is the view accepted by the group. Such an acceptance is unlikely, as long as the group aims to remain one group, if the group fails to subscribe to the basic idea that each member of the group has some value. [98] In this sense, for a political decision to be regarded as what is accepted by a group, and hence for it to be associated with the epistemic benefits of being a decision achieved by a community of inquiry, it needs to take into account this 'value', this basic ideology of human rights, in its deliberation.

Furthermore, a failure to have as a goal the correct expression of the basic ideology of human rights fails to provide reasons to regard the decisions of a group as limited by anything valuable from the point of view of political morality. By acknowledging the importance of inquiring about and taking into account the limits of state's action, a community of

[97] See the idea of 'an epistemic law of increasing marginal discriminability' Alexy (n 9) 424. See also: 'the more extreme the injustice, the more certain the knowledge of it'. R Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford University Press,Oxford, 2002) 52; Klatt and Meister (n 43) 31–2, 38, 68, 125.

[98] This is similar to Rawls's idea that basic human rights offers 'the minimal conditions required for persons to be able to engage in social cooperation in any real sense'. L Wenar, 'John Rawls', in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2013 edn), available at <http://plato.stanford.edu/archives/win2013/entries/rawls/>; see Rawls (n 1) 68.

inquiry indicates that, again structurally, its decisions pursue some goal informed by ethical considerations. This is the case even without having to be committed to any specific substantive list of human rights. This is because the basic ideology of human rights is to be pursued as a goal and peoples can live in accordance with it and realize it in various valid ways when left to do so by their own lights.[99] Accordingly, the basic ideology of human rights can be asserted as a fundamental moral/political value of political institutions all the while respecting pluralism.

A political community that deserves immunity is then a political community recognizably organized as a community of inquiry committed to truly or correctly expressing or specifying human rights norms and which respects basic rules of *jus cogens*. Inquiry is recognizable only when it is achieved in good faith following the method of science. Consideration for the basic ideology of human rights grounds tolerance-as-respect since it shows the decisions of a political community of inquiry as consciously limited and directed towards the realization of politically adequate moral standards. We should be careful, however, not to see the requirement of giving due concern to the basic ideology of human rights as establishing anything more than a requirement for an attitude or orientation in inquiring about what ought to be done. The point of this requirement is not to establish an external abstract standard of tolerance on states but rather to affirm an internal requirement such that respect for human rights also consists in the expression of a community's understanding of human rights. Accordingly, it is not the presence or the absence of, e.g., freedom of speech as we know it in contemporary Western democracies that makes a community respectful of human rights, but rather its well-directed and epistemically acceptable engagement with the fundamental ideology of human rights which might result in a differently specified version of freedom of speech.

Hence, by affirming that people are of value and that this proposition needs to structure the inquiry of a political community about what ought to be done, room is open for (official) critical engagement regarding the realization of this proposition in the resolves of other political communities. A lack of respect for a human right to freedom of speech might not be a ground for military intervention, but it can be a ground for critical deliberative engagement with a political community that fails to give

[99] See (n 64) 19. Though, now and around here, the lists we encounter can be seen as close approximations of this claim, political theory should nonetheless acknowledge that 'universal human rights not only may but should be implemented in different ways at different times and in different places, reflecting the free choices of free peoples to incorporate an essential particularity into universal human rights'. Donnelly (n 11) 105.

proper concern to the relations between the value or status of individuals and freedom of speech. Yet, this latter view might in principle nonetheless be worthy of respect such that condemnation and intervention would be unwarranted. Hence, even if there are some other rights over which some clarity and specificity is achieved such that we could meaningfully speak of the core of a universally recognized human right, it remains that when we face a minimally recognizable community of inquiry which takes seriously into account the basic ideology of human rights, the critical import of these 'core' rights is lessened. To apply Donnelly's words to my own argument, we could say that: 'There are good reasons to suggest such rules. To demand them in the face of strong, reasoned opposition, however, seems to me to make little sense—so long as the underlying objectives are realized in some other fashion.'[100] With sustained opposition from a recognizable community of inquiry, and to an increasing degree depending on the quality of the epistemic practices of this community, it is precisely the critical claim that the underlying objectives are not realized which is put into doubt. One should not exclude *a priori* that one may in fact be the true barbarian[101] – such is the nature of proper inquiry and of deliberative engagement.

The emphasis put by my approach on the relevance of the epistemic credentials of the processes by which political units arrive at their views regarding human rights should strike a clear difference with cultural relativism. A cultural relativistic approach to human rights would argue that deviations from human rights standards should be tolerated and even respected if they can be explained by an appeal to cultural differences. Culture would have 'overriding prescriptive force' such that a practice would have 'to be evaluated entirely by the standards of the culture in question'.[102]

On my account, however, the simple fact that a certain practice or value is embedded in a given culture is normatively irrelevant. What matters is the minimally plausible validity of the normative judgements expressed in people's practices and collective acceptances based on recognizable epistemic practices. I agree, then, with Johnson when he affirms that what matters 'is respect for the political processes that allow individuals to arrive at considered judgments' and 'in those processes the particularistic claims of culture have no special normative standing'.[103] Culture and

[100] Donnelly (n 11) 103.

[101] LA de La Hontan, *Dialogues de M. le baron de Lahontan et d'un sauvage, dans l'Amérique* (Vve de Boeteman, Amsterdam, 1704).

[102] Donnelly (n 11) 108.

[103] J Johnson, 'Why Respect Culture?' (2000) 44 *American Journal of Political Science* 405, 417.

differences of values as such are not sufficient to explain why different specifications of human rights should be tolerated. We primarily need to consider the epistemic credentials of the processes by which these specifications have been achieved.

We can now turn to when immunity is to be defeated and to when local specifications can be bypassed. On the view put forward, failure to respect *jus cogens* rules, to constitute a community of inquiry, or to subscribe to the basic ideology of human rights defeat the immunity of states from full-fledged tolerance. This is because: (1) we have urgent reasons to intervene when basic *jus cogens* rules are violated, especially since the community in question fails to qualify as a political community in the first place. (2) We have reasons to intervene, to demand compliance, in appropriately forceful ways when a community is not responsive to arguments and evidence and when this community is involved in what appear to be less than extreme violations of rights – such as disregard for human rights norms. This is because such a community does not settle its collective acceptance by a method susceptible to reasons and evidence and to cross-state deliberation. Forceful incentives may then be required to bring about a concern for human rights norms or to direct such communities towards adequate epistemic practices. (3) We fail to have reason to respect, as opposed to tolerate, the decisions of political communities that do not violate *jus cogens* but that do not subscribe to the basic ideology of human rights. This is because respect for their collective acceptance about what ought to be done requires that it be guided towards and limited by decent political goals and it is not clearly so without considerations for human rights norms. Yet, forceful incentives may not be the appropriate means to demand compliance with human rights norms if such communities are organized as proper communities of inquiry. This is because they acknowledge their fallibility and are responsive to arguments and evidence. Requests and cross-state deliberation would be appropriate means to steer these communities towards respect for the ideal of human rights.

Political communities as communities of inquiry and the four desiderata

In order to conclude this section and the paper, it is appropriate to return to the reasons that motivated my proposal of a revised political conception of human rights. I argued that usual political conceptions fail to meet the four desiderata specified earlier, partly due to a lack of consideration for the possible detrimental consequences of specification. In what remains, I show how my proposal can meet the four desiderata: (1) non-redundancy; (2) agreeability; (3) cross-state demandability; and (4) the establishment of right-like claims.

The first desideratum is easily met: full-fledged tolerance in the international order is attached to both respect for *jus cogens* rules and to the subscription of a community of inquiry to the basic ideology of human rights; both of which are grounded in the ideas of inquiry and collective acceptance. This captures in a consistent way the peremptory aspects of human rights and their goal-like nature. This account goes above and beyond basic and obvious requirements and in this sense offers a specific role to human rights that is not already played by basic and obvious norms of political theory. This specific role is the ascription of some value or protected status to the individual and the affirmation that there are limits to the legitimate sphere of actions of political communities that go beyond obvious basic requirements.

Secondly, by affirming basic rules of *jus cogens* and by requiring only the subscription of the community to the *idea* of human rights, this approach remains agreeable and respects pluralism. This is especially the case since the local concretizations of the idea of human rights and the global specification of the rules of *jus cogens* depend on political processes and social considerations. In this sense, human rights norms remain truly political. Furthermore, this account acknowledges the importance of the practice of specification in giving concrete life and meaning to human rights norms but also to the idea that communities can express different rights. Indeed, this approach subscribes, for epistemic reasons, to the legal pluralist view that universal subscription to the idea of human rights need not entail a unitary and identical set of human rights. In fact, what this account offers is a way to capture the idea that diversity enables us to truly realize the universal idea of human rights.[104] In this sense, the notion to which a community of inquiry needs to subscribe to be immune from intervention is minimal enough to be agreeable and yet sufficient to require more than mere avoidance of egregious violations of *jus cogens*.

Thirdly, by avoiding the idea that what is demandable is compliance with abstract rules in need of local specification, we avoid the problem of cross-state demandability referred to earlier. What can be demanded consist in universal requirements whose exact institutional realizations take different forms but whose compliance with can still be assessed from an external point of view (without precluding that states could collectively subscribe to specified human rights lists and enforcement mechanisms, as seen in practice). These cross-state demandable requirements are respect for *jus cogens* rules, the adoption of a recognizable method of inquiry and a commitment to the specification and incorporation or expression of the idea of human rights within the local legal system. This latter

[104] See (n 80) 52, 68.

requirement is probably the most difficult to assess in practice. Yet, we should not be so cynical as to assume that any regime's lip service to human rights will be uncritically accepted.[105]

An additional aspect of this account with regard to cross-state demandability is that it allows various degrees of intervention to be justified based on the separation of tolerance-as-respect from tolerance-as-non-intervention.[106] Military intervention is to be associated with violations of urgent rules of *jus cogens* while weaker forms of intervention are appropriate for failures to subscribe to the basic ideology of human rights or for truly improper epistemic practice in the specification or expression of human rights norms. Yet, this does not preclude the idea that requests and admonitions, as opposed to demands or condemnations, can be made such that different political communities, to which full-fledged tolerance is granted, can be involved in a dialogue or in cross-state deliberation about how best to express human rights norms.

Fourthly, since this account takes seriously the practice of specification, it remains that individual human rights, except *jus cogens* rules, do not individually establish right-like claims. This is because they are rather better described as fundamental considerations than as, strictly speaking, claim rights. Nevertheless, it is not a defect of the human rights discourse if each of the rights included in extensive lists do not establish right-like claims and correlative duties. It is simply a feature of specification supported by epistemic considerations. What this makes clear is that we should not seek to base a political conception of human rights on provisions found in declarations. A political conception should rather be based on the duties entailed by an acceptable practice of specification as described in the last section of this paper. On this view, human rights norms, exception made to *jus cogens* rules, only play a derivative role in the assessment of a state's immunity since it is only as an ensemble, as principles to be taken into account by political communities, that they can establish a right-like claim that can defeat the immunity of states. If there is such a human right, it is something along the lines of: every x has a right that the basic ideology of human rights be taken seriously against political institutions[107] and taken seriously here means implemented or expressed by a recognizable community of inquiry. This formulation adequately captures the essence of the political conception of human rights, respects pluralism and is sufficient to meet the four desiderata specified.

[105] See Donnelly (n 11) 111.
[106] On the continuum of interventions, see Donnelly (n 11) 201.
[107] J Skorupski, *The Domain of Reason* (Oxford University Press, Oxford, 2010) 311–12.

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