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# Human Rights and Social Justice

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Academic Editor: Bernadette Rainey

Received: 1 September 2016; Accepted: 13 June 2017; Published: 16 June 2017

**Abstract:** This paper addresses the question of the normative domains of human rights and social justice. Today, the dominant view in political philosophy is that they occupy largely distinct spheres, with social justice being a set of stronger egalitarian norms and human rights functioning as baseline protections against common threats posed by states to the general interests of persons subjected to them. Reflecting on current human rights practice and discourse, this paper develops a reconstructed normative model of social justice and human rights as nested membership norms in political societies. By connecting membership to processes of political legitimacy, human rights are conceptualized as increasingly functioning as the language of contesting and reforming barriers of exclusion to that status. This leads to an understanding of the possible content of human rights that is dynamic and relational, bringing it closer in line with the egalitarianism of social justice.

**Keywords:** human rights; social justice; political legitimacy; membership

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## 1. Introduction

Domestic and international human rights documents and discourses are characterized by conceptual and normative links between the aims of human rights and social justice. As James Griffin observes, disapprovingly, the foundational document of the modern human rights movement, the Universal Declaration of Human Rights (UDHR), is characterized by a “whole scale inclusion of justice among human rights . . . (and) includes not only procedural justice, but also distributive justice and fairness” (Griffin 2008, p. 186). The UDHR’s preamble indeed states that human rights are the ‘foundation’ of justice ‘in the world’, and many of its articles include egalitarian aspirations across the full institutional range of modern political societies (UN General Assembly 1948). For example, in addition to articles covering procedural justice (e.g., article 10), UDHR article 7 establishes the human right to equal public protection against discrimination; article 21.2 states the right to ‘equal access to public service’; article 21.3 includes broad entitlements to democratic rights; article 23.2 contains the right to ‘equal pay for equal work’, with 23.3 adding the ‘right to just and favourable remuneration’; and, article 26 develops a range of educational and opportunity rights. The UDHR’s invocation of these aims is widely re-iterated in subsequent international and domestic human rights documents (e.g., the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of Persons with Disabilities) as well as by a diverse range of actors in human rights advocacy groups and networks (Clapham 2007, pp. 160–62; Garcea and Hibbert 2011, pp. 53–56; Hucker 1997; Jetsckhe 1999, pp. 144–46).

In quite a strong contrast, what can be considered the dominant philosophical view in contemporary liberal political philosophy is that human rights and social justice occupy largely distinct normative domains (Beitz 2009; Cohen 2010; Jones 2010; Nickel 2007; Rawls 1999b; Raz 2010; Risse 2012). On the dominant philosophical view, while overlapping in cases of constitutionally essential equal civil and political rights, social justice is theorized as requiring significantly greater distributive equality across a range of political and socioeconomic institutions than human rights.

The dominant view can therefore be understood as presenting a ‘discontinuous’ conception of the normative relationship between social justice and human rights. As Charles Jones frames it, while different conceptions of human rights will vary as to the “*extent* of justice commitments” they cover, the requirements of social justice include “further specifications on the range of legitimate inequality of basic goods (that) are compatible with universal rights protections” (Jones 2010, p. 133). The dominant philosophical view thus presents a type of *human rights-plus* conception of social justice: social justice includes human rights but contains a further conception of equality rights that are not human rights.

The aim of this paper is to push back against the dominant, discontinuous, view of the relationship between the normative domains of human rights and social justice, and to outline a normative model of human rights that overlaps more fully with an egalitarian conception of social justice. This reformed normative model of human rights is ‘political’ in the sense of being based on a reflection on current human rights practice, understood to consist of both institutional and discursive elements (Beitz 2009, p. 8). The purpose of a normative model is to provide a ‘reconstructive account’ of the “norms and ideals that are implicit and play a structuring role in our practices” (Heath 2011, p. 28). Reflecting on current global and domestic human rights institutions and discourses suggests an ‘emergent’ and contested practice, marked by disagreement over the basic norms and values that ground the practice (Beitz 2009, pp. 8–9). Nevertheless, there is reason to hold that the normative dimensions of the development of human rights practice reflects a growing convergence on the dominant, egalitarian, philosophical understanding of the normativity of social justice. To account for this convergence, the goal of this paper is to outline an account of how social justice and human rights increasingly share normative space based on their grounding in the ideal of ‘membership’ in a political society, and both function at different levels of abstraction from political practice to protect against exclusions from that status.

The discussion proceeds as follows: the first section presents a synthesized version of the dominant discontinuous philosophical view, which grounds human rights and social justice on distinct justificatory interests—the interest in common protections against standard associative threats and the interest in fair terms of inclusion in a relational status of political membership respectively. The next section presents the idea that reflection on the current human rights practice suggests that membership interests are a more appropriate justificatory grounds for capturing existing and deepening egalitarian elements of human rights, bringing them closer to the normativity of social justice. The third and fourth sections develop the idea of human rights and social justice as nested membership norms by exploring their respective roles in establishing and satisfying the conditions of political legitimacy. The final section defends this view against the objection that the distinctive aspect of human rights as international concern marks them off from many of the demands of social justice that are not coherently matters of international concern.

## 2. The Dominant Philosophical View of Human Rights and Social Justice

Today, social justice in political philosophy is characterized as a strongly egalitarian norm. In Ronald Dworkin’s view, all plausible political philosophy is now, in an abstract moral way, egalitarian, such that theories of social justice rest on, and are evaluated by their correspondence to, the fundamental moral idea that people are equals, and as members of a political society are entitled to equal respect and consideration in the “design and administration of the political institutions that govern them” (Dworkin 1978, p. 189); see also Kymlicka on the idea that contemporary political philosophy has reached an ‘egalitarian plateau’ (Kymlicka 2002, p. 4). This, in turn, grounds significant requirements of distributive equality in egalitarian theories of social justice, such as, for example, John Rawls’ requirement of equal distributions of primary goods. In contrast, human rights, on the dominant view, while also resting on an abstract principle of equality, when worked out institutionally, are thought to be consistent with greater levels of inequality than social justice in the distribution of benefits and burdens in a political society. Instead of requiring interpersonal comparisons of relative

standing between members, human rights are theorized as establishing non-comparative baselines of entitlements and protections.

This distinction between the normative domains of social justice and human rights differs somewhat from another prominent grounds for the discontinuous view. Often, social justice is distinguished from human rights along the lines of the distinction between political and civil rights, on the one hand, and socioeconomic rights on the other, whereby social justice includes the latter while human rights do not (O'Neill 2005). The understanding of the discontinuous view as presented in this paper, however, proceeds in a somewhat different direction. Under the dominant philosophical view, social justice and human rights both cover the full range of benefits and burdens that are involved in modern political societies, and so the distinction between civil/political and socioeconomic entitlements and exclusions is not the key dimension of the distinction. The discontinuity, rather, concerns the underpinning justifications, and their distributive requirements, of human rights and social justice across these areas of political practice. While covering the same areas of political and socioeconomic life, human rights, on the dominant philosophical view, require much less by way of an egalitarian distribution to be satisfied, than do standard theories of distributive justice.

A prominent theoretical ground for the dominant, discontinuous view of human rights and social justice is a distinction between their underpinning justificatory interests, or what Charles Beitz calls their "justifying purposes" (Beitz 2009, pp. 128–29). Human rights and the further rights of social justice, he argues, "are grounded in interests of different degrees of urgency and therefore exert different weights" on the distributive requirements of political and socioeconomic institutions (Beitz 2009, p. 142). What types of justificatory interests, then, does the dominant philosophical view respectively rest human rights and social justice upon?

One notable feature of the dominant philosophical view of human rights is that it treats human rights as distinctly political, which stands in contrast to a previous wave of theorizing in which human rights were treated as a euphemism for the older idea of natural rights (Cranston 1973; Finnis 2011). Natural rights are rights that are held by persons in all times and places, and concern basic interests of personhood that are stable across different political contexts. A political conception of human rights, in contrast, is context-dependent, and presumes specific interests that are only intelligible with reference to particular institutional practices (Buchanan 2005, pp. 73–74). While a theory of rights grounded in nothing but our humanity is undoubtedly an important element of theorizing rights, the problem of reducing a conception of human rights to such a conception is that it is, as Joseph Raz puts it, "so removed from the practice of human rights as to be irrelevant to it" (Raz 2010, p. 322). A principal evaluative component of a political conception of human rights is therefore that it captures important elements of current human rights practice in an institutional context that approximates current modes of political organization.

On the dominant philosophical view, the most important element of the context of current human rights practice is the fact that *states* are the primary institutional arrangement for governing people; as Beitz puts it, the "practice of human rights as it has developed so far can only be understood as a revisionist appurtenance of a world of independent, territorial states" (Jones 2010, p. 128). Human rights are, on this conception, general norms for regulating the functioning of states as it concerns the general associative interests of those subjected to them. A further element of practice that limits the content of human rights, in the dominant view, is that, while standards for domestic states, human rights are also matters of international concern. This has the effect of universalizing the content of human rights across a diverse range of domestic societies organized by states by setting up shared standards for the international community for concern and action regarding a state's treatment of its own members, and imposing common constraints on "the permissible exercise of the prerogatives traditionally associated with the norm of sovereignty" (Jones 2010, p. 133). The 'justifying purpose' in the dominant philosophical approach to human rights is, then, establishing common protections against standard and predictable associative threats created by states. These include a range of protections against the vulnerabilities created by exposure to the coercive capacities of states

and egregious forms of socioeconomic vulnerability the state can generate or neglect. The dominant view of human rights is sensitive to the current context of political practice, while maintaining the normative dimension of universality inherited from the natural rights tradition, by linking the content of human rights to the shared interests of persons subjected to states in common protections against standard and predictable associative threats.

As mentioned, the standard view of social justice, in contrast, is grounded in the interest of equal respect and consideration of all interests relevant to living in a political society that fall under the purview of governing institutions, extending well beyond the interest in protections against general associative threats that grounds human rights. Treating persons with equal respect will involve making inter-personal comparisons between them to assess relative levels of advantage and disadvantage. This sort of justificatory interest can be understood as a *membership* interest, which is a deeper and more inclusive norm than that of common protections against predictable associative threats. As Joshua Cohen characterizes the idea of membership, “to be treated as a member is to have one’s interests given due consideration, both in the processes of authoritative decision-making, and in the content of those decisions” (Cohen 2010, p. 328). The idea of membership helps distinguish a voluntaristic associative system of legitimate cooperation from one of imposed domination, including a range of potential scenarios which may have sufficient protections against associative vulnerabilities to satisfy the dominant view of human rights. The ideal of membership, for example, is at the core of John Rawls’ distinction between domination as “merely socially coordinated activity . . . by orders issued by some central authority” and a genuinely legitimate system of social cooperation that is “guided by publicly recognized rules and procedures that those cooperating accept and regard as properly regulating their conduct” (Rawls 1993, p. 16). Because membership is inclusive, rather than a common baseline standard of treatment, it involves comparative assessments with the condition of other members and leads to egalitarian changes to barriers of exclusion. It permits variation in the demands of social justice across political societies based on different patterns of social exclusion that constitute membership interests in particular societies. A conception of social justice grounded on membership interests is therefore relational and dynamic in its content and institutional requirements. This stands in contrast to an absolute and universal conception of human rights that rests on the common justificatory interest in protections against standard associative threats.

### 3. Human Rights as Membership Norms

Are common protections against standard associative threats the most appropriate justificatory interest on which to ground a political conception of human rights? There is reason to think not. Reflecting on current human rights practice reveals important egalitarian normative elements that suggest that interests related to inclusion in the status of membership, and the goal of legitimate social cooperation, better captures these dimensions. If so, this brings human rights much closer to the normative domain of social justice than under the dominant philosophical view.

Of course the relevant point of evaluation for all theories of human rights is not necessarily providing an adequate “critical reconstruction of human rights as they are in the legal doctrine and practice of human rights” (Buchanan 2010, p. 680). This is, however, a crucial consideration in the case of *political* conceptions, to which the dominant philosophical view belongs, that presume existing institutional arrangements as the context of human rights, and aim to reconstruct a normative model of current human rights practice. Reflecting on current human rights practices to make salient their underlying normative logic reveals significant, and deepening, levels of egalitarianism that stretch beyond the conception of human rights as common protections against standard associative threats. These include, but are not limited to, formal equality before the law, participation rights, opportunity-oriented socioeconomic entitlements and anti-discrimination and employment equity rights (Rawls 1993; Garcea and Hibbert 2011; Hucker 1997). These kinds of human rights protections are comparative and relational, suggesting an inclusionary standard of membership, rather than a baseline standard of common protections.

If this is so, how might the egalitarian and relational elements of current human rights practice be normatively accounted for? One possibility is Allen Buchanan's compelling egalitarian theory of human rights that departs from the non-egalitarian nature of the dominant model. Buchanan argues that there are seven distinct egalitarian elements of current human rights practice that are inconsistent with the standard protections against associative threats normative model (the 'inclusive assumption', 'robust equality before the law', 'positive rights', 'equal political participation rights', 'anti-discrimination rights', comparative assessments of an 'adequate standard of living' and the 'right to work') (Buchanan 2010, p. 683). On Buchanan's view the institutional and discursive practice of human rights have evolved away from standard protections against predictable associative threats and towards an inclusive and relational idea of equality. He argues that the "most secure and straightforward grounding" for the egalitarian elements of human rights "is the idea of equal status" (Buchanan 2010, p. 687). Buchanan's idea of status equality is conceptually similar to the justificatory idea of membership discussed above, given the central ideas of inclusion, comparative assessments of well-being and relative assessments of rights protection. The justificatory ground of equal status reflects the idea that human rights involve interests related to protections against exclusion from a social notion of status that is intelligible as being recognized and treated as a full member of a political society, rather than a subject.

While developing in the direction of membership norms, Buchanan goes on to argue, however, that human rights remain normatively distinct from social justice because status equality, while extending beyond common protections against standard threats, does not presuppose "an egalitarian distributive principle," as is the case with social justice. The status equality of human rights is distinct from the distributive equality required by egalitarian theories of social justice, and securing status equality through human rights is "compatible with a wide range of differences and with their social recognition in the form of material inequalities" (Buchanan 2010, p. 685). Equal status, on this conception, "constrains" material inequality without requiring the extent of distributive equality entailed by egalitarian theories of social justice. Buchanan holds that "a principle of equal distribution of resources or of well-being" 'exceeds' the protections needed for securing equal status through human rights (Buchanan 2010, p. 684). Buchanan therefore maintains the discontinuousness of the dominant philosophical view while incorporating egalitarian principles into his normative model of human rights based on the justificatory interest of status equality and its requirements of social inclusion and socially comparative assessments of 'standards of living'.

There is reason, however, to question the stability of this space between the status and distributive elements in an egalitarian concept of human rights. Equality of relational status entails fair terms of inclusion in both the material and socio-cultural life of a political association. As Will Kymlicka puts it, "one way to ensure that social relationships are egalitarian is to ensure that individuals have roughly equal shares of social resources" (Kymlicka 2002, p. 196). A similar connection between distributive and status equality is interestingly found in Rawls' theory of justice. He argues that "perhaps the most important primary good is that of self-respect" (Rawls 1999a, p. 386). This entails elimination of barriers of exclusion to status equality, and is cashed out distributively as fair access to the "social bases of self-respect;" thus, a theory of justice that "gives more support to self-esteem than other principles is a strong reason . . . to adopt it" (Rawls 1999a, p. 386). Like in Kymlicka's account, this links into robust distributive requirements of social justice because, according to Rawls, "our self-respect normally depends on the respect of others" and extending fair terms of inclusion to shared institutions is an expression of persons' "respect for one another" (Rawls 1993, pp. 155–56). These at least plausible connections between status and distributive equality evoke Nancy Fraser's notion of a "false antithesis" between material inequalities and "recognitional" structures of "cultural domination . . . (and) social patterns of misrepresentation, interpretation and communication." Much of social inequality, she argues, is "bivalent" and consists of complex intersections of "economic differentials and culturally constructed distinctions" (Fraser 1996, p. 7). While the notion of status is an abstract, recognitional, standing, it conditionally grounds concrete egalitarian distributive requirements. Indeed, if as Rawls

contends, the self-respect that comes from one's status as a full member in a political community is "the most important primary good," much of the materialist distributive requirements of social justice can be understood as grounded in that interest.

The connections between status and distributive equality stabilize a conception of an overlapping normative domain of human rights and social justice as nested regulative principles for associative practices and institutions which function to protect against exclusions from status equality. The notion of *nested* principles here accounts for the fact that social justice and human rights function at different levels of abstraction from institutions. Social justice consists of structural principles that apply to the cumulative functioning of a political society over time as it affects the membership interests of those involved in it (Rawls 1999a, p. 6). Human rights, in contrast, function less deep in the structural background of a political society and apply more concretely in specific institutional settings. Take for example the idea of fair 'equality of opportunity' as a widely endorsed principle of social justice (Rawls 1999a, pp. 73–77). It is clearly linked to the idea of inclusion in the status of membership and is used to evaluate the way in which the institutions of a political society interactively function to shape persons' prospects over time. A society is more or less just depending on how it structures the opportunities for political and socioeconomic participation held by its members. The principle of equality opportunity can be seen to 'nest' a host of subsequent human rights requirements as they pertain to the functioning of specific institutional settings as they feed back into the overall structure of opportunities, including: human rights in educational institutions (Ray and Tarrow 2014), societal and workplace discrimination oriented human rights (Gravel and Delpech 2008), human rights concerns regarding poverty alleviation (Vizard 2006), and ability and mobility oriented human rights. Human rights of these kinds work to address barriers of exclusion in particular institutional settings, while affecting the general condition of opportunity in a society. Generated human rights will be grounded in more concrete social identities and interests than the deeper, and necessarily more general, principles of social justice. By applying to more specified practices, they are also more easily, though not necessarily, translated into formal juridical and legislative entitlements.

One notable example of this dynamic is the development in human rights protections of disabled persons as the primary mechanism of addressing unfair opportunity inequality based in disability. The development of human rights for disabled persons illustrates how the general concerns of social justice as regulative principles for a society's major socioeconomic and political institutions ground more specified, though still rather abstract human rights conventions, which are subsequently incorporated at various levels of governance into legislative and legal reform. At the level of an egalitarian conception of social justice, mental and physical disabilities would be treated as unjust (i.e., morally arbitrary) barriers of exclusion—or denial of equal opportunities for inclusion—into the status of membership across a wide range of societal institutions. Corresponding to the normative relationship between human rights and social justice suggested in this discussion, increasingly human rights are treated as the primary political mechanism for addressing this general instance of injustice in the distribution of opportunities for disabled persons to be full members of a political society. As in the case of previous iterations of the emergence of human rights practices, the human rights of disabled persons begins at the level of international conventions, with the Convention on the Rights of Persons with Disabilities (CRPD) coming into force into 2008 (Weller 2009). Reflecting the idea of membership protections, the CRPD adopts a 'social model of disability' that brings together at a high level the interconnected sources of the social exclusion and marginalization of persons with disabilities, articulating broad categories of rights, including non-discrimination equality, equality rights and rights associated with social participation. The articles of the CRPD begin by establishing disabled persons as appropriate subjects of rights, moves to addressing barriers of exclusion and ends with positive entitlement claims to aspects of active social participation. Following the enactment of the CRPD, and following the broad trend of twenty-first century human rights practice, instances of "translating abstract principles of human rights into the content of domestic law" began to occur (Weller 2009, p. 7). Thus, the CPRD is an effective example of the nested nature of the normativity

of social justice and human. Human rights are nested in general principles of social justice, like fair equality of opportunity, that are designed to regulate the overall institutional structure of a political society. Such principles are used to evaluate specific kinds of unjust opportunity inequality and generate human rights mechanisms that identify subjects of rights, and particular sources of exclusion. Moving from international convention to domestic legislation and jurisdiction, human rights norms are applied to concrete institutional dynamics and interactions. In the case of CPRD, we see abstract rights claims in international conventions eventually filter down to re-evaluations of legislative entitlements, including as fine-grained applications as reforming empowerments of health care providers and patients at the level of treatment delivery (Weller 2009).

To wrap up this section, theorizing human rights as mechanism for protections against exclusion from political membership has two primary implications for their normative structure that bring them closer to the idea of social justice. The first is that human rights, conceptualized as membership norms, are comparative, rather than baseline standards of protection and inclusion. This is so because one's status as a member depends on relational aspects of one's relative standing to the procedural and substantive conditions of a political society that form the general expectations of membership in that society. The second implication is that human rights as membership norms are dynamic, and not necessarily standardized across societies because, as the general conditions of society evolve, the requirements of inclusion in that society similarly change. This stands in contrast to the less dynamic nature of common protections against standard associative threats that ground human rights in the dominant philosophical view.

The following section considers how a normative model of human rights that is continuous with the egalitarianism of social justice fits in with what is widely seen as the principal political function of human rights as establishing and satisfying the conditions of political legitimacy. In so doing, it addresses a central claim of the discontinuous view that an egalitarian conception of human rights is incompatible with at basic aspect of human rights practice of establishing the normative requirements of the legitimacy of states.

#### 4. Membership and Political Legitimacy

The status of membership distinguishes between subjection to imposed political coordination and an ideal of voluntary social cooperation. While different kinds of systems of subjection can remain stable through the effective exercise of domination, without respect for membership, such societies can be said to lack normative political legitimacy. Developing the idea of membership, this section aims to show that an egalitarian normative model of human rights that shares normative space with social justice does not require abandoning the primary aspect of current human rights practice of establishing political legitimacy, though it does entail a particular conception of legitimacy.

The function of securing political legitimacy is central to the 'justifying purpose' of human rights in the dominant approach, and a primary ground for discontinuity between the normative domains of human rights and social justice. The focus, however, is principally placed on international, recognitional, legitimacy. As Raz puts it, "while human rights are invoked in various contexts, and for a variety for purposes, the dominant trend in human rights practice is to take the fact that a right is a human right as a defeasibly sufficient ground for taking action against violators in the international arena, that is to take its violation as a reason for such action" (Raz 2010, p. 9; see also Rawls 1999b and Beitz 2009). This conception of the role of human rights in political legitimacy ties into other features of the dominant normative view. One is the universalism of the content of human rights required to establish a shared international standard for the "limits to state sovereignty" (Raz 2010). Another is the relative minimalism of the concept of human rights as common protections against standard associative threats, needed for both respecting the value of sovereignty itself and for respecting the value of toleration of diverse, though recognizably legitimate, forms of political arrangements. The final section of this paper will return to the issue of how the status of human rights

as matters of international concern may limit their egalitarianism; however, the focus for now will be on establishing the role of human rights in domestic processes of political legitimacy.

All violations of legitimacy need not be understood as mapping onto the “limits to state sovereignty,” and as the trigger of interventionist action. International, recognition, legitimacy therefore does not exhaust the role of human rights in political legitimacy, as it has internal dimensions that apply in the first instance to the interests, attitudes and behaviours of persons with respect to the institutional arrangements that govern them. Given this, the dominant philosophical view of human rights is not a satisfactory conception of the constraints and requirements on institutions that would constitute the interests of those governed by them, if they are to have their membership interests respected. Because of the possibility of different ways of organizing governing institutions, persons can reasonably expect terms of justification and forms of inclusion that go beyond maintaining common protections against standard threats created by political power, as conditions to accept as legitimate ‘the disciplines and burdens’ of membership. In current political practice, these deeper justificatory claims are increasingly made in the language of human rights, building up their egalitarian standing, and bringing them closer to the normativity of justice.

It may be objected that the cost of a more egalitarian conception of human rights, nested in the requirements of social justice, is that it becomes an inappropriate standard of internal legitimacy as it will be too demanding to be a realistically achievable condition of political legitimacy. This concern informs, for instance, Cohen’s distinction between human rights as baseline membership norms of political legitimacy and social justice as a more maximalist ideal for social cooperation—“the rights that are required if individuals are to be treated as members would be identical to the rights that are required if the requirements imposed by law and other regulations are to be genuine obligations . . . (and treating these rights as human rights is) . . . certainly more plausible than a theory of obligation that ties political obligation to justice” (Cohen 2010, p. 329). Thus, if human rights are to function as the condition of domestic legitimacy, their content needs to be limited to a feasible point for persons to accept and act on the types of obligations necessary for political stability.

Against this ground for distinguishing between human rights and social justice is the possibility of a conception of legitimacy as principled support and stability that does not appeal to correlative moral obligations of compliance (Green 1988; Parekh 1993). Rather than producing stability through acquired obligations, an alternative, non-obligatory, conception of legitimacy includes a more diffuse range of attitudes and behaviours. On Charles Taylor’s view, “a society has legitimacy when members so understand and value it that they are willing to assume the disciplines and burdens which membership entails” (Taylor 1993, pp. 64–65). Political stability based on normative legitimacy is, then, “distinguishable from purely self-interest or instrumental behavior on the one hand, and from straightforward imposed or coerced rule on the other” (Hurrell 2005, p. 16). Legitimacy, on such a view, is not an ‘either-or’ scenario, but is an ongoing dynamic of contestation and the formation of pluralistic beliefs and commitments that signify acceptance or rejection of institutional arrangements and their regulative principles. Rawls presents a similar rendering of the concept in suggesting that legitimacy amounts to political stability “for the right reasons” (Rawls 1993, p. 391); that is, when members accept its proffered terms of justification, and support its institutions based on perceptions of generally sufficient satisfaction of these terms in its functioning. Human rights and social justice, operating at different levels of abstraction from political practice, can be seen to establish what Rawls calls a ‘range of legitimacy’ (Rawls 1993, p. 428). Certain types of inequalities and exclusions are necessarily ruled out of this range as baseline conditions of legitimation; it should not, however, be treated as static and leaves significant space for democratic deliberation and social choice as to the cooperative ends to be pursued and the appropriate regulative principles for the distribution of relevant cooperative burdens and benefits.

Political legitimacy, of course, is a deeply contested concept, and this paper does not seek to argue in favour of a particular conception. The aim here is instead to consider how a particular, non-obligatory, conception of legitimacy creates theoretical space for an egalitarian normative model

of human rights. Thinking of legitimacy as a dynamic range of institutional requirements for the justified exercise of authority establishes political openings for deepened practices of human rights and social justice. Through contestation and demands for reform, previously tolerated forms of exclusionary barriers to membership can be ruled out of subsequent demarcations of the range of legitimacy. Human rights activism, iteration of human rights norms and consolidation of deepened institutionalized human rights protections have the effect of altering standards of legitimacy by, as Seyla Benhabib puts it, raising “the threshold of justification to which formerly exclusionary practices are now submitted” (Benhabib 2006, p. 60). Normative standards of legitimacy should therefore not be treated as fixed, as in the case that ties it to a conception of human rights as common protections against standard associative threats. The requirements of legitimacy are, rather, responsive to institutional formation and changing forms of political discourse and activism, and so, as Jeffrey Reiman argues, “we cannot take for granted that any existing formulation of (legitimacy’s) conditions is complete . . . a government must do more than merely keep within some identified set of conditions . . . (it) must be continually monitoring the conditions of its legitimacy and effectively correcting existing formulations of these conditions” (Reiman 1997, p. 127). With this dynamic understanding of political legitimacy, a key way in which equality emerges in the world is when the legitimacy of the exercise of political power is challenged by those subjected to it who oppose barriers of exclusion it establishes and perpetuates (Nagel 2005, pp. 146–47). Such demands are increasingly made in the language of human rights. In this sense, human rights are not merely a given set of formalized protections and immunities, but also function as the language of contestation and aspiration for deepened practices of inclusionary membership in the institutional arrangements that govern people.

## 5. Human Rights as Aspirational

Building on the link between human rights as membership norms and iterative processes of the development of the standards of political legitimacy, this section further develops overlapping points of normativity between human rights and social justice in their functioning as principles of social aspiration in the contestation of power by individuals and groups. In this respect, human rights are not only existing protections against exclusions from the status of membership, but are also, in part, constitutive of expectations for further inclusion held in its name. It is suggested that human rights increasingly overlap with the language of citizenship rights in grounding inclusionary claims of justice in particular institutional settings. The discursive elements of human rights practice in which novel demands for social inclusion are made through the language of human rights, human rights function not just to meet the requirements of legitimacy, but also to define and reconfigure them moving forward.

The aspirational quality of principles of social justice is relatively straightforward given their status as general principles (e.g., fair equality of opportunity) that function in the deep background of the institutional structure of a political society. Human rights, on the other hand, operating, as has been suggested, as specific manifestations of principles of social justice in particular settings as concrete claim rights are often theorized as ‘mandatory norms’ limited by the identification of specific duty-bearers, which often has the effect of limiting equality rights in socioeconomic areas (Nickel 2007, pp. 31–35). Though it is the case that human rights are often operationalized as formal juridical and legislative entitlements imposing correlative duties on domestic and international institutional agents, it is important to recognize that an equally significant, and perhaps prior, aspect of human rights practice is that of framing aspirations for reforming exclusionary barriers to a dynamic ideal of membership that can give rise to juridical and legislative change. Theorizing this dimension of the concept of human rights, while deepening their egalitarianism, also addresses the standard concerns of egalitarian conceptions of human rights of inflationary infeasibility and democratic acceptability within political pluralism.

Amartya Sen’s theory of human rights exhibits this dualistic political role for human rights. Like principles of social justice, human rights do frequently function as “inspiration for legislation” and help

to illuminate the “legislative route” towards greater inclusion (Sen 2009, pp. 363–64). However, in many cases, the legislative route is not always open, or the most appropriate path, for human rights, but, as Sen puts it, “(b)ecause of the importance of communication, advocacy, exposure and informed public discussion, human rights can have influence without necessarily depending on coercive legislation” (Sen 2009, p. 365). Informal routes of the influence of human rights work by altering, institutionally and discursively, the general conditions of political legitimacy and the ‘threshold of exclusion’ in subsequent law and legislation. Human rights are, in this functioning, closer to Joel Feinberg’s idea of socioeconomic rights as ‘manifesto rights’—broad and dynamic expectations and aspirations for entitlement that condition institutional formation—than a conception of rights as mandatory norms consisting of claims against concrete duty-bearers. As aspirational norms, human rights operate to establish general expectations with respect to the functioning of institutional systems, and function politically “as determinants of present aspirations and guides to present policy” (Feinberg 1973, p. 67).

Understanding human rights in this way suggests compelling similarities in their functioning to citizenship rights as a core mechanism of deepened practices of social justice. In T.H. Marshall’s foundational view of the egalitarianism of citizenship, the primary function of citizenship rights, rather than setting formal entitlement, is to condition the salient social ideas, experiences and expectations that condition the legitimacy requirements of states. Citizenship right, he argues, represents a “principle of equality” that functions ideally against “structural inequality.” Juridical and legislative entitlement embodying citizenship’s principle of equality, “instead of being the decisive step that puts policy into immediate effect, acquires more and more the character of a declaration of policy that it is hoped to put into effect some day” (Marshall 1964, p. 104). Institutional treatment and entitlement reflecting the equality of citizenship affects the “superstructure of legitimate expectations” held by members and functions as a normative standard of inclusion that “is perpetually moving forward” (Marshall 1964, p. 115). Thus, according to Marshall, “societies in which citizenship is a developing institution create an image of an ideal citizenship against which achievement can be measured and which aspiration can be directed” (Marshall 1964, p. 84). An aspirational view of human rights understands their political functioning as an additional normative layer to the equality of citizenship that can further condition the legitimacy requirements of institutional development towards egalitarian justice.

Reflection on current human rights practice suggests a primary function of human rights is to work as critical taming norms for the status of citizenship in particular societies by providing external egalitarian grounds to contest different features of its condition. As Jeremy Waldron notes, there is increasingly an “interesting duplication of the subject matter between cosmopolitan norms and rules of municipal law,” such that human rights function as critical “ideas about how municipal law should be changed” (Waldron 2006, pp. 85–86). Kymlicka develops a similar claim about the relationship between human rights and citizenship, whereby the former works as ‘inspiration’ for the inclusionary tendencies of states’ treatment of historically excluded groups in traditional practices of citizenship. He argues that, “the trend towards liberal multiculturalism can only be understood as a new stage in the gradual working out of the logic of human rights, and in particular the logic of the idea of the inherent equality of human beings” (Kymlicka 2007, p. 89). While inspiring new multicultural forms of treatment of minority groups within states, Kymlicka makes the further claim that human rights also function to ‘constrain’ contestation of citizenship, as with the ascendancy of the language of human rights, “there is no legal space for minorities to set aside human rights norms in the name of multiculturalism, and, in the case of most minorities, there is no wish to do so” (Kymlicka 2007, p. 93). The addition of human rights as a further layer of regulative principles for the development of institutions may be seen as a welcome development from the liberal perspective because of the more explicit disconnection of aspirational ideas of equality from historically exclusionary bases of citizenship, such as nationality and ethnicity, which limited its capacity as a mechanism of justice. Incorporation of human rights into the ideational character of membership in political associations helps to ‘loosen’ the connections between more or less closed identities and citizenship solidarity and,

as Spinner-Halev suggests, allows states to more easily “turn to the needs of their minority groups” (Spinner-Halev 2008, p. 615).

A common criticism of an aspirational and informal understanding of the egalitarian dimensions of human rights (and indeed of citizenship rights) is that it potentially weakens the practice by diminishing the key conceptual dimension of a right as a claim against specific, capable, duty-bearers (Kymlicka 2002; Spinner-Halev 2008). According to Nickel, the structure of human rights as ‘mandatory norms’ in political development includes both entitlement claims and obligations as “modes of directing the behaviour of the addressees” (Nickel 2007, pp. 30–31). The requirement of concrete duty-bearers, with sufficient capacities, he argues, protects against expansion of entitlement beyond present material and motivational capacities which weakens the political practice of human rights.

Under the concept of human rights as membership norms that function in processes of political legitimacy, however, the inflationary possibility that attends human rights as aspirational norms is less of a concern, and is indeed a welcomed source of dynamism. Human rights should be sensitive to changing conditions of membership and be adaptable to the kinds of exclusions that prevent persons from achieving membership status. While there are general kinds of membership interests that transcend context, many are dynamic, subsequent ideas that cannot be easily understood when abstracted from the relevant political association’s unique patterns of producing and distributing burdens and benefits. What membership requires in one time and place may be substantially different than in others. In this respect, dynamism and inflation are necessary components of a theory of human rights as membership norms.

While endorsing a dynamic conception of the content of human rights, grounding them in the interests of membership does impose limits on inflation beyond existent institutional and resource capacities. Though membership is an ideal and aspirational status of inclusion, it is based in the actual range of burdens and benefits that constitute the reasonable expectations of membership in particular political societies. In making inclusionary claims, a responsibility of membership is formulating them in line with the reasonable expectations of membership and present resource availability (Buchanan 2010, p. 187). This can largely be expected to be the standard case with human rights claims as they tend to be directed towards forms of exclusion to institutional opportunities that shape the expectations of most members. They will be generally feasible since to be reasonable expectations of membership, they will already be secured for most persons.

Theorizing human rights as aspirational norms of membership also addresses the common criticism that holds that an egalitarian and expansive conception of human rights undercuts the idea of universality and introduces a justificatory concern of parochialism. On this objection, in light of the deep diversity across and within political societies, human rights, as standards of legitimate exercise of political authority, should be relatively minimal and uncontroversial across a wide range of ethical and moral doctrines. Expanding the sites of exclusion that are concerns of human rights, and expanding the kinds of human rights instruments that are available to address them, it is argued, can introduce tensions between human rights as acceptable standards of legitimacy and ideals of toleration and self-determination of reasonably diverse societal cultures (Cohen 2010, pp. 343–47). However, theorizing human rights as aspirational norms of inclusion into the constitutive institutions and practices of membership in a particular society, rather than as formally required universal standards for all societies, helps to reconcile an egalitarian conception of human rights with the values of self-determination and endogenous emergence of regulative norms. As aspirational standards of inclusion, human rights are available to a wide range of interests that stem from the material and cultural particulars of different forms of political association. Contextualized human rights claims can be seen in this sense as re-iterations of universal ideals of inclusion that are appropriately sensitive to the condition of membership in specific settings. As Benhabib characterizes the iterative dynamic of the universal idea of human rights in ways that reconcile it with the self-determination of particular value structures, the “iteration and interpretation of norms . . . is never merely an act of repetition. Every iteration involves making sense of an authoritative original in a new and different context”

(Benhabib 2006, pp. 46–50). This view of the role of universal human rights norms in shaping the conditions of legitimacy in particular political societies, moves the concept of legitimacy away from a formal conception of standardized protections and entitlements towards an ongoing deliberative conception “creative appropriation” of human rights in particular sites of political membership. Theorizing human rights in this way has the effect, as Jeremy Waldron suggest, of “shifting out attention away from formal democratic legitimacy to the more demotic legitimacy of ordinary iteration . . . (and so) we need not be as pre-occupied as we are . . . with borders and the scope of norms. Norms emerge in the world in the circumstances of dense interactions that occur *all over the place* (and are) democratic simply in the demotic dailiness of (their) use” (Waldron 2006, pp. 97–98). As aspirational norms for inclusion as a member of a political society, human rights emerge and exist in the world as universally available grounds for principled criticism, contestation and reform that can be adopted and applied to conditions of membership as they are found and understood.

## 6. International Concern

The discussion of the egalitarian nature of social justice and human rights as nested membership norms in processes of establishing and satisfying the conditions of political legitimacy has thus far been domestic in its orientation. As mentioned, however, the primary approach to theorizing human rights as conditions of legitimacy concerns the terms of international recognitional legitimacy. The idea of human rights as international concern is widely thought to be a critical piece of an adequate conception of human rights, and one that marks it off from the normative domain of social justice (see, for example, (Beitz 2009; Rawls 1999b; Raz 2010; Risse 2012)). Human rights, on this view, while applying to the relationship between the institutions of political association and its members, are marked off from other political norms for association by being, further, standards of justification the violation of which imposes obligations of assistance on non-members. They are not, then, purely membership norms but are matters of international concern that make claims on the resources and capacities of non-members in ways that social justice does not. As Raz formulates the distinction, what makes a right a human right is that it is a right against one’s government that is “assertible in the international arena” and that its violation is “a (defeasible) reason for taking action against violators in the international arena . . . (such that) . . . (d)isabling the defence ‘none of your business’, is definitive of the political conception of human rights” (Raz 2010, pp. 328–32). With this distinctive function, human rights will fall short of the rights of social justice, as not all violations of social justice trigger international concern. Charles Beitz has fully developed this ground for distinguishing between the normativity of human rights and social justice, and this section responds to two of his arguments for this position.

Beitz’s theory of human rights identifies the idea of international concern as a constitutive element of its normative structure that marks it off from social justice. He presents a three-part conception of human rights: human rights protect interests that are sufficiently important to make their protection a ‘political priority’; they apply to states as duties and it is advantageous for persons that states work to protect the underlying interests; and, the failure to protect the relevant interests in a ‘range of cases’ is a ‘suitable object of international concern’ (Beitz 2009, p. 136). Human rights, in this view, while applying to the relationship between the institutions of political association and its members, are marked off from other political norms for association by being, further, standards of justification the violation of which imposes obligations of assistance on non-members. They are not, then, purely membership norms but are matters of international concern that make claims on the resources and capacities of non-members in ways that social justice does not. International concern, it is important to note, includes a range of non-coercive ‘paradigms of implementation’, such as, ‘accountability’, ‘inducement’, ‘assistance’, ‘domestic contestation and engagement’, ‘compulsion’, and ‘external adaptation’ (Beitz 2009, pp. 33–40). This leads to a conception of human rights that is not ‘minimalist’ (because of the expansive non-coercive view of concern and intervention), but is not

'maximalist' in the sense of overlapping with the full domain of social justice due to other limiting considerations of international concern.

The constitutive idea of international concern in a concept of human rights, according to Beitz, marks it off from social justice for two related reasons, both of which address different issues of the capacity of international actors and the concern that "some requirements of justice may not be achievable by means of any permissible form of action available to outside agents" (Beitz 2009, p. 143). The first reason addresses limited material capacity, since "the international resources available for advancing human rights are scarce." Given the limited resources behind international concern for human rights, it is important, Beitz argues, to distinguish and prioritize the interests underpinning human rights and social justice. Human rights, he holds, are underpinned by the more urgent non-relational interest in having a "standard of living adequate for a decent life" whereas social justice is underpinned by the comparative "interest in not feeling ashamed or humiliated by one's material situation considered in relation to those of others" (Beitz 2009, pp. 142–43). Because there is a significant material distinction between "assisting a society to develop its economy sufficiently to eliminate the worst forms of poverty and causing it to attain an income distribution that satisfies some more ambitious standard of distributive justice" human rights should be limited to the more minimal, and apparently cheaper, aim of satisfying the requirements of a decent life (Beitz 2009, p. 143).

It is not clear, however, that this objection's framing of social justice as the stronger relationally egalitarian, and therefore more expensive, norm necessarily holds. As discussed, social justice primarily functions as regulative principles for existing political practice, and provides general standards for fair terms of inclusion into the material and cultural life of a political society. Social justice itself, in other words, does not tend to motivate social cooperation, but comes in as conditions of its normative legitimacy through processes of contestation. Actualized requirements of justice are, then, as Sangiovanni puts it, 'practice dependent' (Sangiovanni 2008). That is, while relational, requirements of social justice come in subsequently to institutionalized cooperation to regulate the broad distributive patterns of cooperative benefits, and to compel redistribution in cases where inequality excludes groups of persons from the status of political membership. A concept of justice as regulative principles for social cooperation will take the kinds of benefit production and development levels as found and primarily concerns interpersonal comparisons in the distribution of whatever kinds and levels of benefits are being produced. For example, in a three-person micro-case, all things being equal, a (1-1-1) distribution is just even if resource level (1) is meager and falls short of "a standard of living adequate for a decent life" (the interest Beitz identifies underpinning human rights). In this respect, human rights, as concerned with objective thresholds of well-being, not social justice, requires increasing (1) to, say, (2), which is, perhaps, more materially demanding than redistributing at the level of existing resources. One question of justice is whether the move from (1-1-1) to (8-4-2) is just, in addition to being an efficient move from the status quo.

The second argument to distinguish the respective domains of human rights and social justice that Beitz makes from the "practical role of human rights as sources of reasons for transnational political action" concerns the epistemological capacity of international actors. He argues that the laws, institutions and policies of social justice can be expected to "vary across societies in ways that respond to differences in the economic, social and cultural background" and that "judgments about the requirements of justice at this level sometimes turn on complex assessments of the significance of the pertinent background facts . . . that outsiders are at a disadvantage in making" (Beitz 2009, p. 143). The membership concept of human rights suggests against this reason to distinguish it from social justice. It has been suggested that human rights and social justice are nested egalitarian norms, operating at different levels of abstraction from institutions, in establishing and satisfying the normative conditions of legitimacy in a political association. Social justice operates at a deeper level of abstraction from institutions than human rights and concerns the working of institutions together as it bears on general principles of justice, such as equal opportunity. Human rights function at more concrete levels of institutions and entitlements as mechanisms for more realizing general principles of

social justice. Given the function of human rights in delivering general principles of social justice in specific institutional areas, it is human rights that would seem to be necessarily more sensitive to the particularities of context, and the importance of entitlement levels in a specific area for the general structure of membership. Human rights as membership norms can be expected to display significant variation at the level of implementation based on differences across associations in the institutional and policy areas to which they apply. This should not, however, suggest against the status of human rights (or social justice) as matters of international concern, but that external forms of what Sen calls 'social help' (Sen 2004, p. 329) should be part of consultative processes in which relevant capacities and insights are brought to bear on the process by different domestic and international agents.

Reflecting on these two arguments, the idea of non-coercive international concern does not seem decisive in setting a firm distinction between human rights and social justice, whereby human rights are the more minimalist, less egalitarian norm. A political conception of justice as subsequent regulative principles for the distribution of cooperative benefits and burdens need not require greater material or epistemological capacities on the part of international actors than a similar concept of human rights. It is also plausible that conventional concerns of comparative inequality in a theory of social justice above the threshold of decent levels of well-being can be properly seen as matters of international concern, such as in the case of significant relative inequality between a structurally advantaged majority and disadvantaged minority (or vice versa), even when the shares of the worse off is above, even well above, the preferred conception of decent or minimal levels of well-being (Griffin 2008, p. 201).

## 7. Conclusions

Human rights practices have become a remarkably significant political force in a relatively short period of time (Raz 2010, p. 321). Increasingly, it is the dominant language of contestation of political structures and of formulating entitlement claims to different forms of institutional treatment. In this respect, human rights have not necessarily given rise to new kinds of political concerns than those addressed by claims of citizenship rights, but work to more explicitly link conventional kinds of normative claims and expectations in political associations to the universal language of the equal moral standing of humanity. Human rights connect membership claims within a political association to an external egalitarian status that bears on its legitimacy.

A notable development in the continuing emergence of human rights norms is the expansion of the kinds of inequality and exclusion they cover, including both the relevant sites and identities of exclusive practices. This ongoing development increasingly brings human rights practice closer in line with forms of membership-oriented comparative evaluations that characterize a political concept of social justice than with a general idea of a socially situated minimally decent level of well-being. The basic suggestion of this paper is that the upward tendencies in the development of human rights practice need not be theoretically capped short of the principles of social justice. It aimed to show that an expansive, egalitarian, conception of human rights can be reconciled with them functioning as the basic mechanism of (a specific conception of) political legitimacy. The discursive and institutional elements of this dynamic also address concerns of inflationary concerns that attend to resource availability, as well as worries about problematic justificatory parochialism in an egalitarian normative model. It was further argued that the status of human rights, as matters of international concern, needs to be seen as decisive in ruling out an egalitarian conception of their demands.

**Acknowledgments:** This paper was supported by a University of Saskatchewan President's SSHRC Grant, for which I am grateful.

**Conflicts of Interest:** The author declares no conflict of interest.

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