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## Mediating the Theory and Practice of Human Rights in Morality and Law

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# 5

## Mediating the Theory and Practice of Human Rights in Morality and Law

David Ingram

### 5.1 INTRODUCTION

The thesis I propose to defend in this chapter asserts that an account of human rights that is responsive to the full range of human rights practice must allow that human rights fulfill multiple complementary functions: political, legal, and moral. While legal and political accounts mainly highlight the function of human rights in promoting social justice, moral accounts mainly highlight the function of human rights in protecting vital individual interests. The account I defend posits a closer connection between these functions by examining the practical conditions underlying institutionalized (specifically justiciable) human rights.

My argument has four parts. Part I examines the ambiguous moral-legal status of human rights in official human rights documents and practices. The second part discusses several iconic political and legal theories of human rights that have been advanced by John Rawls and Jürgen Habermas. Their theories, I argue, reveal a tendency inherent in the legal-political approach to deviate from moral features of human rights practice. Drawing from James Griffin and Habermas, Part III shows how moral theories of human rights suffer from an opposite defect. Part IV concludes with a defense of my own pluralistic account, which endorses a stronger role for democratic legitimation than that put forward by Allen Buchanan.

### 5.2 PART I: THE AMBIGUOUS STATUS OF HUMAN RIGHTS

The Preamble to the Universal Declaration of Human Rights (UDHR, 1948) describes human rights in a variety of ways that are by no means harmonious. They are described as “the highest aspiration of the common people” and “a

common standard of achievement for all peoples and all nations,” universal and effective recognition of which should be spread through “teaching and education.” Such recognition is further tied to the “dignity and worth of the human person and in the equal rights of men and women” that have promoted “social progress and better standards of life in larger freedom.” So construed, human rights are *moral aspirations* in two senses: first, they progressively interpret freedom in terms of “better standards of life”; second, they progressively extend to all persons equally, solely in virtue of their “inherent dignity and worth.” Consonant with this second aspiration, Article 2 asserts that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Belying this *moral interpretation* of human rights, with its emphasis on the equal dignity of the individual and social progress in living conditions, is a *juridical interpretation* that describes human rights as legal claims that “should be protected by the rule of law.” This clause is immediately followed by another clause that adds: “whereas it is essential to promote the development of friendly relations between nations . . .” Here the aim of human rights is political: the facilitation of international peace and cooperation.

Much ink has been spilled contrasting this last aim, with its recognition of the legal sovereignty of nations (as set forth in Article 2(7) of the UN Charter), and the legal protection of individuals’ human rights, if need be, by contravening national sovereignty (as permitted under Chapter VII, Articles 41 and 42). The problem of reconciling these aims is an important one but remains outside the scope of this chapter.<sup>1</sup> My problem concerns the conceptual tension between moral and legal interpretations of human rights. To the extent that government officials view human rights as setting forth legal limits demarcating tolerable conduct between persons and states, they are inclined to limit their core content to protecting essential constitutional liberties from criminal predations by providing benchmarks for sanctions and military intervention.<sup>2</sup> Conversely, by conceiving human rights as evolving

<sup>1</sup> As Buchanan notes, human rights and state sovereignty can also reinforce each other. Enforcing human rights by compelling global economic multilaterals (GEMs) such as the WTO to modify patent provisions of the TRIPS agreement that currently prevent states from cheaply producing life-saving pharmaceuticals for their citizens could strengthen the sovereign power of states to carry out their human right responsibilities to not only respect and protect human rights but to promote them domestically (Lafont 2014).

<sup>2</sup> This conforms to the narrow version of the “responsibility to protect” doctrine that was adopted at the 2005 UN World Summit, which replaced the broader version, drafted by the 2001

moral standards and utopian aspirations demarcating a life of human dignity, ethicists run the risk of succumbing to human rights inflation, endorsing manifesto rights that do not refer to basic human needs meriting institutional protection.

In truth, the tension between moral and legal interpretations of human rights is more subtle than the above description suggests. A narrow moral interpretation, focusing on minimal or selective protection of *individual* core interests, runs the risk of rights truncation. Likewise, a broad legal interpretation, expanding protection to include superfluous *welfare* functions, runs the risk of rights inflation. To correct tendencies toward truncation and inflation, it is advisable to develop a comprehensive account of human rights that takes into consideration the multiple and complementary functions that both legal and moral human rights serve.<sup>3</sup> But how? Bottom-up accounts that hew more or less closely to actual human rights documents and their practical implementation have the advantage of reflecting a working compromise between many different moral standpoints and legal aims. Nonetheless they suffer, as we have just seen, from lack of theoretical coherence. To mitigate this problem, the UDHR, which is not a legally binding treaty, was selectively codified by subsequent human rights covenants and treaties. The interpretation and enforcement of these treaties, which bind only signatory states, have been marked by disagreement and political expediency from the beginning. In practice, only gross violations of civil and political rights – genocide, ethnic cleansing, and the like – have elicited occasional international humanitarian intervention and criminal prosecution. Severe deprivations of economic welfare have not inspired similar responses.<sup>4</sup>

International Commission on Intervention and State Sovereignty (ICISS), that also targeted severe risks to life posed by natural environmental catastrophe. The latter version was deemed to be too controversial and too difficult to apply. Perhaps one reason for resistance to the broader version is that the most powerful government in the world, the United States, has ratified the International Covenant on Civil and Political Rights (ICCPR) but not the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Too, violations of civil and political rights, understood as violations of negative duties to refrain from harming others, are often thought (mistakenly, in my opinion) to be worse than neglect of economic, social, and cultural rights, which usually involve omissions in the performance of positive duties to provide assistance.

<sup>3</sup> James Nickel (2006, p. 270) lists fourteen of these functions, ranging from standards of criminal prosecution and adjudication used by courts, standards of assessment used by NGOs, UN committees, governments, and global lending institutions (such as the IMF) in determining progress along some dimension of welfare, standards of government conduct for criticizing, sanctioning, or militarily intervening, and guides for education, constitution-building, political action, and aspirational reform.

<sup>4</sup> See note 2.

Judging from historical practice, one might conclude that the right to welfare does not merit protection comparable to that afforded to other human rights, but historical practice, lack of international consensus, and difficulty of implementation alone do not establish this fact, which would require higher-order theoretical reflection on the meaning and function of human rights in general.

In response to this objection, a defender of the practical approach can object that no higher-order theoretical reflection is needed to determine whether a right to welfare is a human right. Not only does the UDHR assert a person's right to "a standard of living adequate for . . . the well-being [of a person] and his family" (Art. 25.1), but the ICESCR asserts the same right as a legally binding right (A.3.5). Furthermore, if international law does not currently contain a complete list of rights that should be universally recognized, it nonetheless prescribes procedures for adding more rights. A group lobbying to add a hitherto unrecognized right to a healthy environment can persuade the United Nations Sub-Commission on Human Rights to draft a set of principles to that effect, assuming that there is growing international consensus (as reflected in local charters and conventions) to do so. An endorsement of the draft principles by the General Assembly would further strengthen the case that a human right to a healthy environment exists, which would then become conclusive upon the widespread ratification of legally binding treaties asserting this fact.<sup>5</sup>

Of course, the formal positing of a right in international law cannot tell us whether it should have been posited in the first place. More importantly, human rights courts must appeal to norms that are not expressly stated in treaties in applying human rights law. For example, despite the fact that a human rights framework was not incorporated into the 1992 United Nations Framework Convention on Climate Change (UNFCCC) or the Kyoto Protocol (1997), the Chair of the Inuit Circumpolar Conference submitted a petition in 2005 to the Inter-American Commission on Human Rights on behalf of the Inuit of the Arctic regions of the United States and Canada arguing that the impact of global climate change caused by the "acts and omissions" of the United States violated the fundamental human rights of the Inuit peoples. Subsequent petitions by the Maldives and Small Island Developing States sought to incorporate a human rights framework in the negotiating process of UNFCCC. A report entitled "Climate Change and Human Rights" (2008) that was developed by the International Council on

<sup>5</sup> I draw this example from Griffin (2008), pp. 203–04.

Human Rights notes the advantage of shifting from aggregate cost–benefit analysis (emissions rights) to analysis of climate impact on individual human lives (human rights) in setting minimally acceptable outcomes and procedures for legal implementation. Should plaintiffs’ petitions and supporting documents reach international courts, a difficult decision will have to be made whether a right to a healthy environment is a human right pursuant to other recognized human rights.

A legal positivist who sought to completely eschew any reference to normative theory in making this decision would have little reason on which to base her decision. The Statute of the International Court of Justice seems to reject legal positivism as well, stating that, besides treaties and customary international law, its decisions will be based on such “subsidiary means” as general principles of law recognized by all nations, past judicial decisions, and most importantly the teaching of highly qualified publicists (i.e. experts) (Article 38.1). The use of such subsidiary means seems to require, as some legal scholars note, further appeal to legitimate interests, *jus cogens* norms, and most importantly the normative idea of humanity and the dignity of the human person as discussed in both binding and non-binding conventions.<sup>6</sup>

So, not just *theoretical* reflection, but *theoretical moral* reflection, unavoidably enters into the *legal practice* of human rights (Ingram 2014a, 2014b). Legal positivists worry that such top-down theorizing about human rights will subordinate practical considerations to theoretical reflection in ways that misinterpret or undermine doctrinal human rights legal practice.<sup>7</sup> Agreeing with Griffin that human dignity is intrinsically bound up with living integrally

<sup>6</sup> See my discussion (2014a) of Judge Elihu Lauterpacht’s separate opinion delivered to the ICJ in the *Genocide* case (1993) which affirms the supremacy of *jus cogens* norms over both UNSC decisions and treaty law.

<sup>7</sup> In justly criticizing what he calls the “mirroring view” (Buchanan, pp. 14–23), which holds that international human rights law is justified only insofar as it appeals to moral human rights, Buchanan notes that the UDHR and the ICESCR impose duties on states to not only forbear from harming their subjects but to provide them with a minimum level of well-being (32). States must act for the sake of their *individual* subjects (27) – by securing moral aims of a *social* nature, such as welfare, public safety, and peaceful coexistence – that are irreducible to (indeed, go beyond) realizing their individual interests taken singly. Institutional means such as these thus comport with collectivist moralities, thereby circumventing what Rawls and to a certain extent Buchanan perceive to be a liberal bias in favor of individualism inherent in the UDHR (314). That said, Buchanan embraces the UDHR’s *status egalitarianism*, which prohibits any discrimination in the enjoyment of human rights (28). This egalitarian emphasis, along with Buchanan’s concession that human rights norms mandating social aims need not take the form of human rights (40), suggests a closer link between moral and legal human rights than Buchanan acknowledges (Letsas 2014). This link is strongest in that area of humanitarian law dealing with gross criminal conduct involving the violation of *justiciable* human rights not to be tortured, kidnapped, murdered, arbitrarily imprisoned, etc. (as Buchanan notes [314], it is

with one's community and environment, a human rights court could conclude that a government's decision to invest in destructive, polluting industry violates the hitherto un-codified individual human right of its (and other nations') citizens to a healthy environment. Conversely, after reading Rawls, a human rights court could decide that the very concept of human dignity as it appears in the UDHR reflects a Western bias in favor of individualism, so that a government's decision to advance the common good of its citizens in the long run through temporary investments in destructive, polluting industry – even by denying them the right to veto this decision through some form of electoral recall – is *not* a violation of an individual human right.

Such disputed theories about what the legal/doctrinal practice of human rights ought to be often single out a primary function that human rights *properly* fulfill. As we shall see, some of the most frequently mentioned functions that human rights are said to serve are founding constitutional liberties (Habermas 1996, 1998a, 2001), setting benchmarks for non-intervention and egalitarian cooperation between states (Rawls 1999), selecting high-priority moral duties enjoining the protection of human beings from grave harm to their individual agency, however this is defined (Griffin 2008; Habermas 2010), and articulating moral aspirations enjoining the creation of a just society wherein each may achieve a flourishing and fulfilling life (Pogge 2008). Besides defending an exclusive core function that aims to critically broaden or restrict official lists of human rights, theoretical approaches tend to downplay or even dismiss the importance of historical experience and practical limitations in shaping human rights traditions.

No doubt most accounts of human rights fall somewhere in between the extremes of pure theoretical reconstruction and practical interpretation (Griffin 2008; Buchanan 2013; Habermas 2010). However, I contend that theoretical and practical accounts of human rights, even when suitably conjoined, retain residues of elitism unless they are submitted to dialogical criticism and emendation that cuts across cultures and permits local flexibility in application and interpretation. This view resonates with the spirit of Habermas's democratic, or discourse theoretic, account of human

weaker in that area of humanitarian law addressing humanitarian crimes, such as genocide). In addition to these points, I would argue that moral norms pertaining to customary human rights law, such as the peremptory and compelling norms of *jus cogens* prohibiting slavery and torture, and the "requirements of public conscience" and "laws of humanity" mentioned in the Martens Clause that was inserted into the 1899 Hague Convention II (Regulations on the Laws and Customs of War on Land) also enter into adjudicating human rights. See, for example, the *Palestinian Wall Advisory Opinion of the ICJ* (2004) and my discussion of this case (Ingram 2014a).

rights; an approach, I argue below, that has much to recommend once it is suitably qualified.

Although a discourse theoretic account of human rights represents a top-down account of human rights – and as such poses the risk of theoretically misrepresenting legal and moral human rights practice – it is unique in its theoretical aim, which is to transfer the discourse of human rights from elite philosophical theory to democratic practice. However, before discussing the limits and possibilities of Habermas's discourse theory for moral and legal practice, it behooves us to first examine the political theory of human rights famously developed by Rawls, whose practical limitations Habermas himself singles out for criticism.

### 5.3 PART II: POLITICAL AND LEGAL THEORIES OF HUMAN RIGHTS

Social contract theories view human rights as part of a subset of moral norms that exclusively underwrite just cooperation between legal subjects, as distinct from moral norms that articulate the dignity of the individual qua human being (what I call the moral approach to human rights). Paradigmatic examples of this view may be found in the theories of Rawls and Habermas. Leaving aside their disagreement over the proper way to justify and interpret human rights,<sup>8</sup> both philosophers agree that deducing human rights from a list of universal human interests and capabilities, which such rights ostensibly serve to protect and promote, wrongly presumes consensus on what these goods and capabilities are. By contrast, they believe that ascertaining features of legal agency that require human rights protection is less controversial.

<sup>8</sup> There now exists a vast literature comparing Rawls and Habermas's respective political theories (see Hedrick 2010 and Finlayson & Freyenhagen 2011), much of it addressing their contrasting theories of human rights (Ingram 2003; Baynes 2009; Forst 2011; Flynn 2014). Their debate in the 1990s (Rawls 1993b; Habermas 1995) already highlighted differences between their respective grounding of basic constitutional rights, with Habermas favoring a conceptual understanding of civil and political rights as deontological trumps and Rawls interpreting these same rights as primary goods enjoying conditional priority over economic goods. In my opinion, social contract theory should not prioritize categories of rights (or other values) but should underwrite thinner norms for democratically negotiating the (multicultural) meaning and ranking of such substantive goods. I find missing in the Rawls–Habermas literature any discussion of how this democratic procedure can be integrated into courts (including, ideally, international constitutional courts) that are delegated the task of adjudicating basic rights. (See Ingram 2014a.)



### 5.3.1 Rawls: *Human Rights within The Law of Peoples*

I begin with Rawls's political approach to human rights as laid out in *The Law of Peoples* because it illustrates a relatively extreme deviation from the moral approach contained in the UDHR. Rawls develops his approach with the intention of guiding the foreign policy of liberal democracies in their dealings with each other and with a variety of non-liberal, undemocratic regimes. This *state-centric* approach is justified on the grounds that peoples organized as states are (and will likely remain) the primary agents for enforcing human rights, so that what counts as a human right must be a right that all nations recognize. The aim of securing cooperation with illiberal and undemocratic peoples whose common good conceptions of legal justice meet an acceptable threshold of moral decency dictates a contractarian method of reasoning that Rawls developed in *Political Liberalism* (1993b), which sought to show how incommensurable comprehensive systems of belief within liberal democracies that meet a threshold of reasonableness converge or overlap in supporting strictly free-standing liberal democratic values. In the *Law of Peoples* a similar contractarian method is used to defend the stability of a "realistic utopia" composed of peace-loving and justice-seeking peoples that overlap in their agreement on eight principles of international cooperation.

Rawls maintains that all decent and liberal democratic peoples would agree to enforce a special class of urgent rights, "such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide" (1999, p. 79). Most striking in this formulation is the qualification that human rights need not be exercised by all persons in the same way, if they happen to belong to associationist societies that tailor that exercise to accord with the specific cultural roles and interests of different religious and gendered sub-groups within society. Rawls explains that decent societies must permit individual members of such groups to be represented by one of their own in a consultation body to which government leaders are to be held accountable. However, individuals would not have an equal vote to express their personal preferences *qua individuals* in electing representatives.

In addition to non-aggression, Rawls also presents these rights as conditions that authoritarian and outlaw regimes that fall below the moral threshold of decency must secure for their peoples if they are to remain immune from sanctions and external military intervention. Last but not least, Rawls says that such universal human rights "set the limit to the

pluralism among peoples” (1999, p. 80). Rawls is emphatic that these three functions – to specify, respectively, a necessary condition for recognizing the decency of a society’s political and legal institutions, a sufficient condition for excluding justified and forceful intervention by other peoples, and a limit to the pluralism among peoples – serve to distinguish human rights from “constitutional rights or from rights of liberal democratic citizenship, or from other rights that belong to certain kinds of political institutions, both individualist or associationist” (1999, pp. 79–80). Thus, while he accepts Articles 3 through 18 of the Universal Declaration of Human Rights (1948) – which he says characterize human rights proper – as well as their secondary implications, such as the human rights covered in special conventions on genocide (1948) and apartheid (1973), he expressly rejects as a parochial Western interpretation Article 1’s assertion that “All human beings are born free and equal in dignity and rights” and that they “are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” (1999, 80n23). He rejects other rights stated in the UDHR, such as Article 22’s right to social security and Article 23’s right to equal pay for equal work, not because they reflect a Western liberal bias, but because they presuppose specific types of economic and legal institutions that are best characterized as one among many possible means for securing basic human rights, such as the right to subsistence.

Because Rawls understands the function of human rights doctrine in a law of peoples as setting forth conditions for the conduct of war and stipulating a threshold of domestic conduct sufficient to warrant legal immunity from foreign intervention, he endorses a short list of human rights whose violations are widely accepted to be the most serious, a controversial approach to human rights that Joshua Cohen and others (Cohen 2004b; MacLeod 2006) have designated “enforcement minimalism.” But the other two functions Rawls mentions, which fall under the different heading of “justificatory minimalism,” require that he endorse a short list for other reasons. This list must be minimal, Rawls argues, because liberal democracies should voluntarily cooperate with some non-liberal, non-democratic nations in upholding these rights. They should do so precisely because these other nations base their legal and political systems on a decent, common good, conception of justice that merits equal respect, even if it is not fully reasonable or just by Western, liberal democratic standards. To constrain these regimes to adopt liberal democratic institutions using even soft forms of government persuasion and diplomacy would violate liberal principles of toleration and reciprocity essential to peace.

Does Rawls's minimalist approach commit him to a partial or incomplete account of human rights?<sup>9</sup> Rawls endorses Article 3 of the UDHR, which says that "everyone shall have the right to life, liberty, and security of person." But he excludes Article 21 of the UDHR, which asserts that "everyone has the right to take part in the government of his country . . . through freely chosen representatives" and that these representatives will be chosen through "periodic and genuine elections" based on "universal and equal suffrage." Rawls's enforcement provision also excludes a more modest human right to have one's interests represented by means of a decent consultation hierarchy. The reason for excluding a robust human right to political participation, however, is empirical, for Rawls concedes that "[s]hould the facts of history, supported by the reasoning of political and social thought, show that hierarchical regimes are always, or nearly always, oppressive and deny human rights, the case for liberal democracy is made" (1999, p. 79).

Contractarian theory need not be so minimalist, of course, and less truncated applications of it to problems of international justice and human rights could warrant a more cosmopolitan, liberal democratic theory. Thomas Pogge (2006), for instance, criticizes Rawls for having abandoned the contractarian approach he developed in *A Theory of Justice* (1973) and *Political Liberalism* (1993). According to Pogge, the two-stage method of reasoning developed in the early theory, which first justifies general principles of justice and then shows how these are to be applied contextually in subsequent stages of constitutional and institutional embodiment, is abandoned in working out a law of peoples. Instead, Rawls deploys the device of the original position to show

<sup>9</sup> By restricting sanctions and military intervention to the most severe human rights violations, enforcement minimalism acknowledges the detrimental impact these remedies have on the secure enjoyment of many institutional human rights that outlaw states otherwise promote. Enforcement minimalism that focuses exclusively on remedying mass extermination, expulsion, ethnic cleansing, and enslavement (the proposal advanced by Jean Cohen, 2004a) regresses behind current UN thinking about the deadly impact of poverty, climate change, health pandemics, and financial crises on global security (Lafont 2014). Recommendations to divide human rights into two tiers (enforceable and non-enforceable) thus regress behind the "indivisibility" doctrine of the Vienna Declaration (1993). Accommodating this objection, Nickel (2006, pp. 274–5) sensibly argues that dividing human rights into two tiers – high priority/universally accepted and low priority/less universally accepted – allows us to retain a *full* complement of human rights whose ranking for purposes of adjudication and enforcement can be adjusted over time. Some difficulties with such a view are that high-priority rights might not be universally accepted (see note 2); the scale of a rights violation, rather than its priority, might matter most in decisions regarding enforcement; 3) massive violations of low-priority rights may effectively impede the enjoyment of high-priority rights; and the interconnectedness of rights makes distinguishing higher- and lower-level rights difficult (Nickel pp. 274–5). Too, the question of enforceability must address not only states but also GEMs and transnational corporations (TNCs). (See note 29 and Lafont 2014).

that his law of peoples comports, first, with an impartial consensus among liberal democratic peoples and, second, with an impartial consensus among decent peoples. No deeper justification of his eight principles is given to support their superiority in comparison to other alternatives. When Rawls does defend his list of human rights and his proposed duty to assist burdened peoples against cosmopolitan alternatives that seek to extend the principles of justice worked out for liberal-democratic society globally, he appeals to the absence of a global basic structure and disagreement on liberal democratic values, assumptions that have been questioned by Pogge and others.

Allen Buchanan (2006), for instance, questions Rawls's presumption of extreme value pluralism. Rawls's presumption seems to depend on the mistaken view that persons inhabiting associationist societies are incapable of rationally abstracting a concept of individual identity and individual right from a concept of the collective good.<sup>10</sup> If the presumption depends on the moral claim that it is unreasonable to expect them to do so, then that presumption has not been convincingly justified. Rawls compares our respect for decent hierarchical peoples to our respect for decent hierarchical institutions such as the Catholic Church, but membership in the latter is voluntary and does not comprehensively determine public rights and duties, a point he himself makes elsewhere in explaining why consensual patriarchal families must respect equal rights of citizenship.

Rawls defends decent hierarchical societies on the grounds that they count as genuinely voluntary cooperative associations that merit equal respect (1999, p. 84). But are they? Buchanan (2006) and Habermas (2001, p. 125) question whether societies that equate public accountability with responsiveness to dissent without permitting a full and equal freedom of speech and association (as specified in Articles 18–20 of the UDHR) even qualify as voluntary associations. Indeed, Habermas goes so far as to insist that valid consent is only possible in liberal democracies, in which in theory, if not in practice, consent is presumed to meet high thresholds of rationality and reasonableness, pursuant to demanding expectations regarding publicity, openness and inclusion, equal freedom to question accepted opinion and propose alternatives – preferably unconstrained by social and legal power.

According to Habermas, free and rational consent follows from internal critical reflection on fundamental values and interests that has been provoked and informed by public argumentation, argumentation whose standards of rational conviction presuppose an orientation to reaching agreement,

<sup>10</sup> In this connection, see Habermas's earlier objection to Rawls's political liberalism (Habermas 1995, 1998), and Rawls's reply to Habermas (1995).

compelled only by mutually convincing (i.e. shareable) reasons. Using this demanding ideal of rational consent, Habermas challenges the less demanding model of consent implicit in Rawls's contractarian approach (Habermas 1998b). He charges that the bare fact of an overlapping consensus, in which different parties agree to norms for different (and possibly incommensurable) reasons, begs the deeper question about whether this consensus is fully rational.

Rawls's counter – that if only one of several incommensurable rationales supporting an overlapping consensus is true, the consensus in question is valid – doesn't meet Habermas's objection, because it provides no *independent* reason for believing that at least one of the overlapping rationales *is* true. Rawls never submits his law of peoples to critical discussion involving competing principles (as Pogge 2006 notes). Indeed, when he addresses the difficult question whether strands of Islamic social and legal thinking might be compatible with liberal and Western democratic ideals, he leaves the question open, which suggests that his default presumption of the reasonableness of extreme value pluralism may be premature (Rawls 1999, pp. 110n39, 151n46). Equally premature is his intention to “leave aside the many difficulties in interpreting . . . rights and limits, and take their general meaning and tendency clear enough” (1999, p. 27). That the “general meaning and tendency” of human rights is *not* clear enough is evidenced by the United States and the forty signatory countries to the 1993 Bangkok Declaration disagreeing rather vehemently over whether social, cultural, and economic rights are human rights at all, and, if so, whether they trump civil and political rights.<sup>11</sup>

In sum, the contractarian political approach Rawls deploys in rejecting the liberal democratic interpretation of human to human rights contained in the UDHR arguably exaggerates the degree of global value pluralism between peoples. Furthermore, there is no reason to think that an overlapping consensus between peoples is stable for the right reasons. Finally, if voluntary cooperation depends on strong notions of reciprocity in which the terms of the social contract are presumed to respect the equal dignity of each and every individual – a condition dependent on individual rational consent to, or absence of dissent from, these terms – then Rawls must exclude any reference to the equal dignity of persons as a reason why decent hierarchical peoples respect human rights. Decent peoples must guarantee individuals equal

<sup>11</sup> See note 2. For a critique of Rawls's insensitivity to the colonial legacy and his inability to respond to the post-colonial aftermath by taking seriously a multicultural dialogue on human rights, see Flynn (2014).

protection under the law and must treat like cases alike, but they need not regard individuals as having equal rights to plan their lives as they see fit, based solely on their inherent dignity.

### 5.3.2 Habermas: Human Rights within Constitutional Law

Habermas interprets the contractarian approach to human rights less ecumenically than does Rawls, defending a model of rational consent that presupposes liberal democratic institutions. In this respect Rainer Forst,<sup>12</sup> Seyla Benhabib,<sup>13</sup> K.O. Apel,<sup>14</sup> and many others who follow in Habermas's

<sup>12</sup> Forst grounds human rights in a universal *moral* right to justification that defines valid norms in terms of a principle of *non-dissent*: Only those norms are justified to which no affected individual could reasonably dissent. Applying this discourse theoretic principle recursively in light of social facts about typical historical violations of human dignity allows us to construct a basic set of abstract (unsaturated) rights principles. In order for human rights to be fully realized and defined, this stage of *moral* constructivism must be followed by a stage of *political* constructivism in which peoples democratically apply (interpret, or legislate) these principles in the form of concrete prescriptive rights in a manner that is sensitive to their unique historical and cultural context. Following Rawls's mature understanding of his stage-sequential theory of justice, Forst insists that because moral constructivism draws upon pertinent facts about human capabilities, moral psychology and the like, it can yield universal human rights norms that are both procedural *and* substantive, imposing positive duties to provide the economic, social, cultural, and political means for their exercise. In this respect moral constructivism differs from classical natural law theory in drawing its core content from both historical facts and abstract norms, while leaving the more precise determination of human rights to democratic legislation. (Despite its rejection of natural law theory, Forst's theory here evinces the "mirroring view" justly criticized by Buchanan.) Although Habermas accepts a genetic link between the moral concept of human dignity and the legal concept of human rights (see below), he denies that human rights are grounded in a common *moral foundation* of the sort proposed by Forst (Habermas 2011, pp. 296–98).

<sup>13</sup> Like Forst (see note 12) and Habermas, Benhabib (2013) defends a reflexive, two-stage approach to mediating (or reconciling) cosmopolitan humanitarian law and locally bounded democratic self-determination. Invoking Hannah Arendt's claim that human rights are "[moral] rights to have [legal] rights, Benhabib derives human rights from a discursive principle of communicative freedom, which recognizes the equal dignity of each person. This general moral right to equal status within a legally secured polity is encapsulated in international humanitarian law in general terms only. The legitimate political actualization of this universal strand of legal normativity in the legal form of concretely prescriptive, contextually sensitive legal rights must await a "democratic iteration" at the level of a bounded polity. Although she endorses a conceptual link between a moral discourse principle and a concept of human rights, it is less clear whether she endorses a conceptual link between the concept of human rights and democracy in the way that Habermas does. Also unclear is whether she agrees with Forst's view that the substantive content of moral human rights can be discursively specified prior to being reflexively constructed at the legal and political stage.

<sup>14</sup> Apel can be credited with having co-pioneered the concept of discourse ethics. He alone among those who ground human rights in discourse theory insists on interpreting this derivation as an *a priori* (viz., transcendental) moral justification, (Apel 2002; Ingram 2010, p. 167).

footsteps agree, however much they differ on other points.<sup>15</sup> Habermas's discourse theoretic qualification of the social contractarian approach also goes beyond its Rawlsian counterpart in defending a conceptual link between human rights and the equal dignity of the individual person. However, in some ways this congenial compatibility with the UDHR is purchased at the expense of abandoning the equal importance of a human right to subsistence, a feature of the UDHR which Rawls accepts without qualification.

Habermas's theory of rights has undergone a number of changes over the past thirty-five years. Although his earlier efforts derived constitutional rights from morality (Habermas 1988), his most recent and definitive effort bears a positivist inclination. As he puts it: "Human rights are juridical *by their very nature*, what lends them the appearance of moral rights is not their content, and most especially not their structure, but rather their mode of validation, which points beyond the legal systems of nation states" (Habermas 1998a; Ingram 2014b).

In *Between Facts and Norms* (Habermas 1996), Habermas deduces human rights from the classical civil and political liberties informing Western constitutional law. Such rights are not moral rights; they do not follow from prior moral duties. Instead they follow from two axioms: the abstract form of modern law (the principle of subjective, or private, right), which permits legal subjects to pursue their aims without interference from others and without having to justify them to others; and the principle of discourse (D), which asserts that "just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse" (1996, p. 107).<sup>16</sup>

<sup>15</sup> Forst, Apel, and Benhabib derive human rights from principles of discourse that, unlike Habermas's own principle of discourse D, are put forward as *moral* principles. In general, I find any *monistic* derivation of human rights from principles of communication, justification, or discourse problematic. With Buchanan, I hold that the *content* of legal human rights is justified relative to the *plural* aims they serve (Buchanan, 312). *Moral* human rights are grounded in human interests basic to living a worthwhile life either directly or indirectly. The right not to be tortured requires just as little justification as the perceptual fact that the ball before me is red. By contrast, the right to life in its more concrete *legal* specification – but not in its *general moral perception* – does require discursive justification, simply because of the many conventional exceptions that attach to its application. Consequently, the principle of human rights is *conceptually* linked to the principle of justice only in the specific juridical sense associated with (the human right to) equal protection under the law. Institutions securing distributive, democratic, and discursive justice are indeed *instrumental* to the equal exercise of legal human rights and so their moral grounds provide additional moral justification for these rights, quite apart from justifying or realizing moral human rights.

<sup>16</sup> Forst's monism of morality and law, Habermas argues, neglects the essentially *juridical form* of human rights as specifying "subjective rights," or *permissions to act without need of justification* that can be *enforced* against government and non-government agents. Moral rights, by contrast, derive directly from moral *duties*, so that, properly speaking, the moral right to

The intersection of D, which is not to be confused with a principle of moral universalization, and the legal form yields the simple idea that legal subjects should have *equal* rights. The next important move in this deduction, once we derive equal permissive rights, equal rights to membership in a legal order, and equal rights to legal procedures for processing legal claims, is the derivation of *democratic* political rights. These rights follow from a second application of D to the procedure of law-making, which explains the voluntary, binding authority (or *legitimacy*) of laws: we are obligated to obey only those coercive laws which we ourselves have contributed in democratically legislating. Thus, in the words of Habermas, there exists “an internal relationship between human rights and popular sovereignty” (1996, p. 123). The bi-conditional relationship between human rights and democracy leads, finally, to a third application of D, the actual democratic legislation of a democratic constitution in an ideally representative constitutional assembly.

Habermas’s insistence on a conceptual link between democracy and human rights seems both historically and logically mistaken. Constitutional rights to property, freedom of conscience, freedom of speech, and the like predated the birth of democratic constitutions in the late eighteenth century. Furthermore, only some of these classical rights are really necessary for democracy, understood as an institutionalization of inclusive discursive deliberation (one needn’t have a right to property in order to freely deliberate about the scope of one’s right to practice one’s religion, say). In response to these objections, Habermas insists that his bi-conditionality thesis does not assert an existential but only a normative link between human rights and democracy, and that some classical rights (to personal freedom, for instance) have a basis in the “grammar of the legal code” rather than in democracy or norms of discourse (Habermas 2001, pp. 117–18).

But the human right to subsistence and other positive social rights do not seem to have a basis in either the positive right to democratic participation or the modern legal form, which structures rights as permissive negative liberties. In fact Habermas adduces a fifth category of social rights that function to

justification follows from a prior moral duty to justify one’s actions to others (Habermas 2011, pp. 296–298). By conceiving human rights as permissive rights, Habermas commits himself to interpreting human rights violations as violations of reciprocal *negative* duties to desist from causing harm, specifically by interfering with the freedom of others. Although this interpretation can be used to indict global economic institutions for having denied poor people of their rightful access to the world’s resources (see Pogge 2008), it does not explain a government’s positive duty to secure their social, economic, and cultural human rights. Forst’s monistic view does, despite its apparent endorsement of the “mirroring view” justly criticized by Buchanan.



secure the all-purpose means to realizing the former rights. These include “basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded” (1996, p. 123). However, by asserting that the first four categories of basic rights are “absolutely justifiable” while the fifth category “can be justified only in relative terms,” Habermas consigns social rights to a status below that of basic (i.e. relatively absolute and unconditional) human rights. The first three categories of equal rights are essential to the very concept of a modern legal code, the fourth category of democratic rights is essential to the concept of legitimacy. By contrast, the fifth category of social rights serves to guarantee the “fair value” of civil and political rights” (as Rawls puts it). Habermas invokes this phrase against the signatories to the Bangkok Declaration (1993) who seek to reverse the priority of civil and political rights over social, economic, and cultural rights (Habermas 2001, p. 125). Because the latter rights are instrumental toward realizing civil and political rights, they cannot trump these rights.

The priority of civil and political rights over social rights is retained in Habermas’s view that international law must develop itself along a constitutional path. Habermas here recommends that distinct categories of injustice be dealt with by different legal regimes, with the UN policing human rights violations as agent-caused crimes and transnational organizations negotiating terms of global distributive justice. This priority is reinforced by Habermas’s claim that “liberal (in the narrower sense) basic rights make up the core of human rights” and so acquire the *additional* meaning of “liberal rights against the state” (Habermas 1996, p. 174).

In sum, leaving aside the general merits of Habermas’s constitutional approach to human rights, his particular derivation of human rights cannot acknowledge the equal status of social rights. In this respect, Rawls’s denial that human rights are constitutional rights (narrowly construed) seems correct. A right to subsistence plays no *necessary* role in constituting liberal democratic rights.<sup>17</sup>

<sup>17</sup> The narrowness of Habermas’s constitutional approach contrasts sharply with his objection to neoliberalism’s restriction of human rights to the negative liberties of citizens who acquire an “immediate status vis-à-vis the global economy” (2006, p. 186) and his strong endorsement of Germany’s constitutional entrenchment of social rights. Habermas’s instrumental understanding of social rights tracks Buchanan’s, except for the latter’s insistence that civil and political rights possess no greater weight than social rights in securing the equal exercise of human rights (see note 7). This problematic feature of Habermas’s constitutional derivation of human rights does not diminish the considerable merits of his proposal for a constitutionalization of human rights (including social rights), as my own discussion of constitutional human rights review (Ingram 2014a) attests.

One might go farther and argue that juridifying human rights is not always essential for their effective implementation (Pogge 2008, pp. 68–69).<sup>18</sup> This is necessarily true if human rights designate only moral *standards* for assessing society's success in progressively safeguarding the basic dignity of its members. However, we shall see that the moral conception of human rights plays a rather essential role in establishing, if not grounding constitutional and humanitarian law.

#### 5.4 PART III: MORAL APPROACHES TO HUMAN RIGHTS

In a recent essay, “The Concept of Human Dignity and the Realistic Utopia of Human Rights” (2010), Habermas clarifies his juridical approach to human rights by acknowledging the “moral-legal Janus face of human rights through the mediating role of the concept of human dignity” (Habermas 2010, p. 464).

I did not originally take into account two things. First, the cumulative experiences of violated dignity constitute a source of moral motivations for entering into historically unprecedented constitution-making practices that arose at the end of the eighteenth century. Second, the status-generating notion of social recognition of the dignity of others provides a conceptual bridge between the moral idea of the equal respect for all and the legal form of human rights

(2010, 470n10)

Whatever else might be said about the legal and political reasons underwriting human rights declarations regarding education, healthcare, welfare, and other institutional goods,<sup>19</sup> protecting against the violation of persons' human dignity is essentially the *moral* aim of those *constitutional* rights that it is the business of courts to adjudicate. Indeed, it is recognition of this moral status that motivated constitutional rights in the first place. Once dignity – a status that originally grounded the nobleman's claim to preferential

<sup>18</sup> Some of the goods morally required to satisfy an acceptable level of human flourishing need not (and in some instances, should not) be legally mandated. As Martha Nussbaum notes (Nussbaum 2000, p. 295), patriarchal customs, which regulate familial relationships that are otherwise legally constituted, cannot be outlawed without violating consensual rights to familial privacy, even though such customs effectively deny women secure access to education, subsistence, and other goods to which they have legitimate human rights claims. The appropriate remedy to such human rights violations is therefore not legal (or exclusively legal) but pedagogical. Because human rights are generally formulated at a high level of abstraction, they leave open the types of remedies that can bring communities into compliance with them.

<sup>19</sup> See my discussion of Buchanan (2013) in note 7, where I qualifiedly endorse his understanding of the plural grounds underlying different types of human rights.

treatment – became a universal moral status attached to humanity, it opened the “portal” through which moral duties to respect the *equal* humanity of each individual entered the legal domain of claim rights.<sup>20</sup> This is not the only mediating function the concept of dignity performs:

The heuristic function of human dignity is the key to the logical interconnectedness between [civil, economic, social, and cultural] categories of rights . . . Human dignity grounds [their] indivisibility . . . Only in collaboration with each other can basic rights fulfill the moral promise to respect the equal dignity of every person *equally*

(2010, pp. 468–9)

Affirming the equal status of all categories of human rights pursuant to the Vienna Declaration (1993) corrects a defect in Habermas’s earlier constitutional approach, but his appeal to human dignity as the sole (moral) ground for liberal democratic rights seems premature (see note 7). Invoking Kant, Habermas argues that the “infinite dignity” of the individual resides in the “inviolability of [his] domain of free will” (2010, p. 474) as determined by the “self-respect and social recognition from a status in space and time – that of democratic citizenship” (p. 479). Linking dignity to liberal democratic citizenship is questionable for another reason as well: it selects a subset of vital moral capacities that young children and persons with severe mental disabilities lack.

In fact, James Griffin’s grounding of human rights in a similarly narrow notion of normative agency leads him to question whether young children and mentally disabled persons should possess human rights at all. But Griffin draws another implication from this grounding strategy that speaks to its limitations. As he notes, possessing human dignity and living a “minimally worthwhile life” do not directly entail democratic citizenship unless we factor in a second ground for human rights: human practicalities.

In this, as in much of Griffin’s pluralistic account of human rights constrained by human practicalities, there is much to recommend, including (*pace* Habermas) his denial that human rights always trump other worthwhile ends (Griffin, 20; see note 6 and 7). However, whereas Habermas’s appeal to

<sup>20</sup> Habermas traces the modern concept of dignity from the stoics’ supreme elevation of *digintas humana* in the cosmic order, to Christianity’s proclamation of the equal dignity of each individual made in the image of God, and finally to modern secular morality’s demand that each be treated with equal respect, now translated into the legal idiom of a personal claim (right) (2010, pp. 475–6). That this moral genealogy motivated the authors of the UDHR, ICCPR, and ICESCR to characterize human rights as rights that all persons are “born with,” is evidence that they endorsed the “mirroring view” (see note 7), however much at odds that view might be with the best interpretation of many human rights norms (Buchanan 2013, p. 20).

human dignity as an inventive source for human rights that grows out of and unifies the “plethora of human experiences of what it means to get humiliated and be deeply hurt” (Habermas 1996, pp. 467–8) runs the risk of inflating the content of humanitarian law, Griffin’s insistence that human rights be narrowly tailored to protecting individual agency runs the opposite risk of truncating that same content.<sup>21</sup>

A strategy that promises to avoid the extremes of inflation and truncation involves settling on a range of important human capabilities, not restricted to human dignity or normative agency narrowly construed,<sup>22</sup> that human rights are supposed to protect. According to *this* pluralistic approach,<sup>23</sup> a particular human right might protect some capabilities but not others. Supposing that consciousness is one of the important capabilities in virtue of which human

<sup>21</sup> Griffin criticizes as either superfluous or excessive human rights language in the UDHR and other official human rights documents that cannot be grounded in human normative agency and practicalities. For example, he reasonably notes (2008, p. 99) that our strong interest in achieving (as the ICESCR puts it) the “maximal attainable health” possible cannot ground a corresponding human right to maximal health. Elsewhere, this “mirroring view” critique (see note 7) displays a problematic side, as when Griffin (2008, pp. 5, 207–09) criticizes as inflationary the right to work and the right to “periodic holidays with pay” (UDHR A. 23–24). As Buchanan notes, such institutional legal human rights as these might be justified as advancing other social ends (the creation of a welfare state) that are instrumental to the exercise of human rights (Buchanan 2013, p. 18).

<sup>22</sup> Amartya Sen (1999) and Nussbaum (2000) have pioneered the capabilities approach to human rights as an alternative to Rawls’s primary goods approach. Nussbaum provisionally lists about ten capabilities (paraphrasing, these are life, bodily health, cognition, emotion, practical reason, social affiliation, concern for other living things, play, and control over one’s environment). Human rights are claims (and aspirations) grounded in *innate* capability potentials possessed by infants and children (basic capabilities), *naturally developed* capabilities of mature persons (internal capabilities), and in internal capabilities whose development and exercise is advanced or hindered by *external* circumstances (combined capabilities). While innate capabilities ground the “worth and dignity of basic human powers” sufficient to justify human rights to life and bodily integrity, internal and combined capabilities ground higher levels of human functioning whose neglected development suffices to establish a state-condoned human rights deficit (2000, pp. 78–86). Whether these latter capabilities are sufficient to justify the full range of human rights in the absence of other practicalities is doubtful (as I indicate in note 23).

<sup>23</sup> “Pluralism” in this context refers solely to the plural capabilities and statuses that adhere in personhood and underwrite different human rights. Besides personhood, Griffin (2008, p. 37) discusses another ground explaining human rights: *human practicalities*, viz., limits of social and legal association, human motivation, and so on. If justice forms a part of the conditions of social and legal association, then equality and democracy must be additional factors explaining, respectively, the status of human rights claimants and the legitimacy of humanitarian law. Beyond these grounds, there are, as Buchanan notes (see note 7) social and political reasons supporting human rights to specific types of institutional provision that cannot be justified solely in terms of protecting individuals’ capabilities and statuses. Finally, “human rights pluralism” can be extended to include the multiple ends (political and non-political) human rights serve in many different contexts and institutions. See Nickel (2006) and note 3.

life acquires dignity, young children, profoundly mentally disabled adults, and possibly non-human beings (Gilbert 2015)<sup>24</sup> would possess some important moral and legal human rights.

Following accepted human rights doctrine and practice recommends being theoretically open-minded about the meaning and extension of the concept of dignity, whether we understand this concept to refer back to normative agency, human capability, or historical experience of diminution, marginalization, cruelty, and insult. Beyond these general features of personhood, and apart from the circumstantial practicalities associated with the just and legitimate legal protection of personhood, dignity grounds the egalitarian status of human rights holders. However, because defining dignity is a fraught enterprise, its place in humanitarian law instigates rather than mitigates tendencies toward rights truncation or (what is historically the case) rights inflation. Mitigating these tendencies within the current legal framework will remain a difficult but necessary task.<sup>25</sup>

#### 5.5 PART IV: UNDERSTANDING HUMAN RIGHTS CONTEXTUALLY – PLURALISM RECONSIDERED

I began this essay by arguing that the apparent incoherence of the UDHR regarding the moral, political, and legal status of human rights justifies theoretical reconstruction and clarification. Such clarification, however, must be sensitive to the multiple functions and justificatory grounds of human rights. Political and legal theories regarding the function of human rights in international (or constitutional) law should not be condemned for extruding contentious moral premises from their purview, especially insofar as their aim is to secure peaceful cohabitation and social cooperation. However, they should be wary of prematurely dismissing the ecumenical moral content of human rights documents out of hypersensitivity to ethnocentrism or rights

<sup>24</sup> In an unprecedented case initiated by the Nonhuman Rights Project and supported by the Center for Constitutional Rights in an *amicus curiae* letter brief, the New York Supreme Court in April 2015 held that four chimpanzees kept for research at Stony Brook University were legal persons (albeit not bearers of human rights) that had a right not to be held in captivity and a right not to be owned. On July 30 Judge Barbara Jaffe reversed her preliminary ruling that would have granted *habeas corpus* relief, citing conflicts with legal precedent.

<sup>25</sup> Buchanan (2013, pp. 286–92) mentions seven ways this might be done, emphasizing three especially promising options: introducing institutional filters for proposed treaties, distinguishing rights from administrative directives for their realization, and allowing human rights courts to refuse to hear cases. Notably less promising are: current strategies that encourage states to include reservations and understandings in treaties; and the proposal to restrain expansive judicial interpretation of human rights.

inflationism. Indeed, adjudicating human rights claims in courts of law or even determining when sanctions and military interventions are needed to protect against gross human rights violations might require appealing to this very content.<sup>26</sup> The case for doing so becomes even stronger as the current humanitarian legal order evolves from a state-centered system of duties to a system that imposes duties on GEMs, TNCs, and all agents that contribute to human rights deficits originating in the global economic structure as a whole.

For their part moral theories about human rights will be irrelevant to the degree that they do not consider legal practice. This becomes apparent once we recall the limits attached to the concept of human dignity. Grounding human rights exclusively on this contested concept runs the risk of excessively narrowing (or broadening) the range of institutional legal human rights relative to the possession (or exercise) of philosophically favored agential capabilities. By contrast, the much scorned concept of human dignity to which the authors of the UDHR appealed in fashioning a workable, non-binding and all-inclusive compromise also functioned as an historical cipher of personal indignities whose remedy, they realized, required legal social reform. Such indignities imply something morally basic about what makes *any* human life *equally* valuable. They designate a *status* on behalf of which moral *claims* can be asserted demanding *equal* legal protection and promotion of each individual's vital interests.

Vital human interests and human practicalities combine to explain the different moral grounds underwriting distinct categories of human rights. Moral psychology coupled with knowledge about just and efficient social organization guides our understanding of the institutional means requisite for satisfying these interests. Such means need not assume the form of legal human rights, but if they do their justification will likely extend beyond protecting individual agency to include provision of education, welfare, medical care, security, political association, and other public goods (Buchanan 2013).

This explains how human rights function as *moral aspirations* for institutional reform. However, given that social policies do not have to be legally formulated as human rights (see note 7), we still need to understand the special role that human rights play as justiciable claims in courts of law. Only by being incorporated into a body of case (or constitutional/statutory) law can human rights achieve a practically effective degree of prescriptive

<sup>26</sup> See notes 6 and 7.

determinacy<sup>27</sup> that once again brings into play the vital moral interests of the individual.<sup>28</sup>

Thomas Pogge explains two ways in which this might be done. According to the *interactional* model, human rights are claims against a discrete individual who wields official or unofficial police and administrative power over the rights claimant. Here, failure to respect the claimant's right entails a straightforward human rights *violation*, typically involving the commission of a serious humanitarian *crime* on a massive scale (such as genocide) which issues in criminal prosecution conducted under the auspices of a national or international criminal court.

The second, *institutional* model of human rights responds to a weakness in the first model, namely a failure to conceptualize non-criminal but foreseeably negligent human rights infractions caused by the normal, legal functioning of domestic or international institutions.<sup>29</sup> Pogge has in mind international trade agreements, lending practices, and resource extraction privileges that prevent

<sup>27</sup> I defend transforming juridical human rights into justiciable (determinate and prescriptive) human rights in Ingram (2003).

<sup>28</sup> However, as Johan Karlsson Schaffer argues in this volume, the use of courts to air human rights complaints is sometimes intended to raise non-justiciable human rights claims with the intent to publicize a cause, exercise political leverage, and reshape public opinion.

<sup>29</sup> Seven of the nine core international human rights treaties have instituted individual complaint mechanisms for addressing the failures of states to adhere to the three pillars of human rights responsibilities (to respect, protect, and promote human rights); The Optional Protocol of the ICESCR (in force since May 2013) specifically allows the UN Committee on Economic, Social, and Cultural Rights to hear complaints from individuals or groups who claim their rights under the ICESCR have been violated and it also allows the Committee to investigate, report upon and make recommendations regarding "grave or systematic violations" of the Convention (Lafont 2014, p. 9). Less formal complaint mechanisms have been adopted by states to protest rights-infringing policies of GEMs. After the UN committee exercising oversight of the ICESCR issued a statement in December 2001 asserting that global agreements on trade and property rights (such as TRIPS) could not conflict with states' human rights obligations – including the duty not to adopt "retrogressive measures" – the WTO ratified a declaration, *put forth by twenty developing nations*, that affirmed "the WTO members' right to protect public health and, in particular, to promote access to medicines for all" (WTO, Doha Declaration on the TRIPS Agreement and Public Health). To be sure, neither the WTO nor the IMF/WB has entrenched international human rights law in their operational mechanisms. The Special Rapporteurs commissioned by the HRC and OHCHR have proposed operational human rights standards that could be applicable to both GEMs and TNCs in line with John Ruggie's 2009 Report to the HRC. This report enjoins TNCs to exercise "human rights due diligence" by (a) adopting a human rights policy, (b) undertaking and acting upon a human rights impact assessment, (c) integrating human rights policy throughout all company divisions and functions, and (d) tracking human rights performance to ensure continuous improvement" (see "Report to the Human Rights Council of the Special Representative of the Secretary General On the Issue of Human Rights and Transnational Corporations and Other Business Enterprises" adopted by the HRC on July 2011 and the more recent "United Nations Guiding Principles on Business and Human Rights" [2013]. Both documents are discussed by Lafont 2014, p. 16). Currently, TNCs

the poor from gaining secure access to their fair share of the world's resources, including potable water, uncontaminated land, adequate food and shelter, etc. According to this model, a failure to respect the claimant's right entails a human rights *deficit*, whose severity is proportional to the number of those (discriminately) harmed as well as to the foreseeability of the harm inflicted.

Both models for understanding how human rights are justiciable bring into play the vital interests of specific individuals. However, in cases where plaintiffs seek to enjoin harmful institutional conduct judges are often required to balance the harm done to an individual's vital interests (protection of which is guaranteed by human right) against competing rights and legitimate institutional needs. Human rights are not unconditional – they do sometimes conflict with each other and with other important institutional values. But the dignity accorded individual persons should endow their human rights claims with presumptive priority in comparison to not only the human rights of corporate persons<sup>30</sup> and groups but also the rights of sovereign states, especially insofar as these rights have been reinterpreted to align with the R2P principle.

Let me conclude by briefly noting the relevance of discourse theory to what I have said above. The juridical construction of human rights law through official declaration, binding treaty, or judicial interpretation raises concerns about that law's legitimacy. The law succeeds in coordinating interaction legitimately to the extent that those affected by it converge in believing that the benefits of coercion outweigh the costs, viz., that the law functions in a reasonably just and efficient manner in procuring a generally desired social good. This general standard of legitimacy comports with different criteria of legitimacy depending on institutional context (Buchanan 2013, 178–96). Within the context of constitutional law the moral idea of equal human dignity finds expression in the idea that each should enjoy equal protection under the law in such a way that securing that protection requires holding those who make the law accountable for the content of that law. Therefore, in

can only be held accountable for human rights violations that count as international crimes as defined by the Rome Statute of the ICC. TNCs domiciled in Europe can be sued for civil human rights violations only in European Courts. The sole country that has provided recourse to plaintiffs who wish to seek extraterritorial relief is the United States. Recently the Seventh, Ninth, Eleventh, and DC Circuit Courts have upheld corporate liability under the Alien Tort Statute (1789), which allows aliens to file civil suit against TNCs for violations of the customary "law of nations" or a treaty entered into by the US government. However, the 2013 US Supreme Court's dismissal of the *Kiobel* case, involving a suit brought by twelve plaintiffs against Royal Dutch Shell alleging collusion with the Nigerian government's sponsorship of torture and murder, held that the ATS does not provide relief for extraterritorial civil harms.

<sup>30</sup> Article 34 of the European Convention of Human Rights recognizes applications put forth by "any person, non-governmental organization or group of individuals."



this context a *prima facie* moral argument can be made for democracy. Because judges who serve on constitutional courts where basic rights are adjudicated are not elected, a question arises how proceedings at this level can be made democratically accountable.

I have argued elsewhere (Ingram 2014a, 2014b) that this legitimation problem can be theoretically and practically mitigated. But does a similar problem of democratic legitimacy arise at the level of international law? Should procedures for making and applying humanitarian law be subject to the same criteria of democratic legitimacy that apply to the constitutional state?

There are plausible reasons for thinking not. An “ecological” account of legitimacy of the sort proposed by Buchanan appeals instead to a symbiotic division of labor whereby states and international organizations derive their legitimacy from each other: the international humanitarian regime outsources functions of legislating, adjudicating, and enforcing human rights to states (most of them constitutional democracies), whose own legitimacy (and the legitimacy of the international state system) in turn depends on submission to human rights law. So understood “the lack of representative legislative institutions and a developed, independent judiciary operating within a context of constitutional constraints on legislation” at the international level does not imply a legitimacy/democracy deficit (Buchanan 2013, p. 316).

As Buchanan rightly remarks, this justification of the international order’s legitimacy does not eliminate the tension between constitutional and international law, especially insofar as the latter requires constitutional incorporation of treaties imposing robust welfare duties and sometimes even changes in constitutional law itself. When treaties change the character of the polity by altering constitutional terms of collective self-determination, they must be incorporated through some form of “robust democratic authorization” (Buchanan 2013, p. 48).

This qualification, and Buchanan’s own concern that dependence of humanitarian law on voluntarily assumed treaty obligations weakens the universal scope of human rights, recommends that we consider a more centralized institutionalization of that law in which criteria of democratic legitimacy apply. If, for instance, a supermajority of ratifying states is legally empowered to unilaterally impose a treaty on all nations (Buchanan’s recommendation, 2013, p. 27), then problems of majoritarian tyranny arise that require constitutional solutions – at the international level.

I cannot here address the long-term project of constitutionalizing international law that Habermas and others have pursued to deal with the issues raised by Buchanan (including the weakness of treaty law in dealing with

global economic injustices that impact the exercise of human rights). Suffice it to say, the problem noted above regarding the democratic legitimation of constitutional review resurfaces at this level. Without going into detail regarding the solution to this problem,<sup>31</sup> it is clear that the appointment of large, representative panels of judges who are publicly accountable to one another and to global public opinion marks an important step toward realizing discourse theoretic values at this elite level of technical-ethical theorizing (Ingram 2014a).

But the heart of a discourse theory of law remains political democracy. Few would dispute that the modern, liberal idea of democracy presupposes the constitutional entrenchment of some human rights, most notably those that protect individuals' freedom of (political) association and freedom of (political) speech. Less clear is whether human rights presuppose democracy. Must there be included among the many human rights that are universally recognized by all peoples a human right to participate as an equal in the periodic election of lawmakers and executive officers and, if so, why?

Rawls's worry about the apparent ethnocentrism of this legacy of Western individualism underestimates how widespread personal indignation to global threats posed by modern administrative apparatuses and market economies has become. But although democracy might be the best (and only) empirically effective remedy to these threats, there does not appear to be any conceptual necessity for its being the sole institutional form that a legitimate human rights regime must assume. There is no logical connection between freely deciding upon and carrying out a worthwhile plan of life—which I take to be the central (if not exhaustive) unifying idea underlying the capabilities and interests earmarked for protection by human rights – and casting an equally weighted (albeit insignificantly influential) ballot in electing government officials. Even under the best of circumstances, democratic majoritarian government can threaten individual interests. Furthermore, combining the moral idea of equal individual human dignity with practicalities does not justify the logical necessity of liberal democracy. Supposing that the Habermasian school is correct in its assumption that one of the relevant human practicalities that bears on the specification of human rights is a deep-seated (transcendentally unavoidable) connection between rational suasion and moral consent/dissent, it would seem to follow that the practical institutionalization of human rights – in some

<sup>31</sup> For a more detailed examination of the complexities involved in the democratic constitutionalization of international governance as it impacts the function of judicial review, see chapter six of D. Ingram, *World Crisis and Underdevelopment: A Critical Theory of Poverty, Agency, and Coercion* (Cambridge: Cambridge University Press, 2018).

form of accountable government in which discourse ethical principles permitting *individual* dissent, unrestricted participation in the formation of public opinion, and freedom of political association are supported – is “conceptually” compelling. However, only by expanding our pool of reasons to include empirically contingent practicalities referring, for instance, to the superior historical track records of modern-day liberal democracies in protecting human rights can we make a fully compelling case for including among our universally recognized legally binding human rights a right to (liberal) democracy.

So, a human right to democracy, like many other human rights, might be justified, apart from serving the vital moral interests of individuals, as the best means for procuring social justice and political peace – perhaps the most important factor conditioning the secure and stable enjoyment of all human rights. Indeed, how else should one understand the UDHR’s admonition (A.1) that “All human beings . . . should act towards one another in a spirit of brotherhood,” if not as a call to global democratic solidarity in assuming collective responsibility for progressively realizing the demanding moral aspirations for a minimally humane world?<sup>32</sup>

#### BIBLIOGRAPHY

- Apel, K. O. (2002) “Regarding the Relationship of Morality, Law, and Democracy: On Habermas’s Philosophy of Law from a Transcendental Pragmatic Point of View,” in Aboulafia, M., Bookman, M., and Kemp, C. (eds.), *Habermas and Pragmatism*, New York: Routledge, pp. 17–30.
- Baynes, K. (2009) “Discourse Ethics and the Political Conception of Human Rights,” *Ethics and Global Policy*, vol. 2 no. 1, pp. 1–21.
- Benhabib, S. (2013) “Reason-Giving and Rights-Bearing: Constructing the Subject of Rights,” *Constellations*, vol. 20 no. 1, pp. 38–51.
- Buchanan, A. (2013) *The Heart of Human Rights*, Oxford: Oxford University Press.

<sup>32</sup> While institutional authorities can be held liable in courts of law for (co-)authoring human rights violations and deficits, a global capitalist economy, whose growth dynamics disparately harm the vital interests of the poor, is in important respects *authorless*. This economic system arose not through treaty but through the unintended aggregate effects of billions of market transactions spanning over half a millennium. Although no person or institution is causally responsible for its creation, everyone contributes to its maintenance – from exploited sweat-shop workers in the developing world to affluent consumers in the developed world. The fact that everyone is indirectly connected to everyone else through the global economy implies shared responsibility for its structural injustices. In the absence of shared *liability*, where juridical notions of agent causation no longer apply, shared *responsibility* can only be forward-looking, oriented toward fostering grass-roots social movements that have as their aim democratic reform of global institutions.

- (2006) "Taking the Human Out of Human Rights," in Martin, R. and Reidy, D. A. (eds.), *Rawls's Law of Peoples: A Realistic Utopia?*, Oxford: Blackwell Publishing Ltd, pp. 150–68.
- Cohen, Jean. (2004) "Whose Sovereignty? Empire versus International Law," *Ethics and International Affairs*, vol. 18 no. 3, pp. 1–24.
- Cohen, Joshua. (2004) "Minimalism About Human Rights: The Most We Can Hope For?," *The Journal of Political Philosophy*, vol. 12 no. 2, pp. 190–213.
- Finlayson, J. G. and Freyenhagen, F. (eds.) (2011) *Habermas and Rawls: Disputing the Political*, New York: Routledge.
- Flynn, J. (2014) *Reframing the Intercultural Dialogue on Human Rights*, New York: Routledge.
- Forst, R. (2011) "The Justification of Justice: Rawls and Habermas in Dialogue," In Finlayson, J. G. and Freyenhagen, F. (eds.), *Habermas and Rawls: Disputing the Political*, pp. 153–180.
- (2012) *The Right to Justification*, New York: Columbia University Press.
- Gilabert, P. (2015) "Human Rights, Human Dignity, and Power," In Cruft, R., Liao, M., and Renzo, M. (eds.), *Philosophical Foundations of Human Rights*. Oxford: Oxford University Press. pp. 196–213.
- Griffin, J. (2008). *On Human Rights*, Oxford: Oxford University Press.
- Habermas, J. (1988) "Law and Morality," in McMurrin, S. M. (ed.), *The Tanner Lectures on Human Values*, vol. 8, Salt Lake City: University of Utah Press, pp. 217–279.
- (1995) "Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism," *Journal of Philosophy*, vol. 92 no. 3, pp. 109–131.
- (2001) *The Postnational Constellation: Political Essays*, Cambridge, MA: MIT Press.
- (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, MA: MIT Press.
- (1998a) *The Inclusion of the Other: Studies in Political Theory*, Cambridge, Mass: MIT Press.
- (1998b) "Reasonable versus True, or, the Morality of Worldviews," in Finlayson, J. G. and Freyenhagen, F. (eds.), *Habermas and Rawls: Disputing the Political*, pp. 75–101.
- (2006) *The Divided West*, London: Polity Press.
- (2010) "The Concept of Human Dignity and the Realistic Utopia of Human Rights," *Metaphilosophy*, vol. 41 no. 1, pp. 464–480.
- (2011) "A Reply to My Critics," In Finlayson, J. G. and Freyenhagen, F. (eds.), *Habermas and Rawls: Disputing the Political*, pp. 283–304.
- Hedrick, T. (2010) *Rawls and Habermas: Reason, Pluralism, and the Claims of Political Philosophy*, Palo Alto: Stanford University Press.
- Ingram, D. (2003) "Between Political Liberalism and Postnational Cosmopolitanism: Toward an Alternative Theory of Human Rights," *Political Theory*, vol. 31 no. 3, pp. 259–291.
- (2010) *Habermas: Introduction and Analysis*, Ithaca: Cornell University.
- (2014a) "Pluralizing Constitutional Review in International Law: A Critical Theory Approach," *Revista Portuguesa de Filosofia, special issue: Law and Philosophy: Foundations and Hermeneutics*, vol. 70 no. 2–3, pp. 261–286.

- (2014b) "Reconciling Positivism and Realism: Kelsen and Habermas on Democracy and Human Rights," *Philosophy and Social Criticism*, vol. 40 no. 3, pp. 237–267.
- Lafont, C. (2014) *Human Rights, Sovereignty, and the Right to Protect. Critical Theory in Critical Times*, New York: Columbia.
- Letsas, G. (2014) "Review of Allen Buchanan's *The Heart of Human Rights*," Notre Dame Philosophical Reviews [Electronic Journal], May 5th 2014.
- Macleod, A. (2006) "Rawls's Narrow Doctrine of Human Rights," in Martin, R. and Reidy, D. A. (eds.), *Rawls's Law of Peoples: A Realistic Utopia?*, Oxford: Blackwell Publishing Ltd, pp. 134–149.
- Martin, R. and Reidy, D. A. (eds.) (2006) *Rawls's Law of Peoples: A Realistic Utopia?*, Oxford: Blackwell Publishers.
- Nickel, J. (2006) "Are Human Rights Mainly Implemented by Intervention?," in Martin, R. and Reidy, D. A. (eds.), *Rawls's Law of Peoples: A Realistic Utopia?*, Oxford: Blackwell Publishing Ltd, pp. 263–77.
- Nussbaum, M. (2000) *Women and Human Development*, Cambridge: Cambridge University Press.
- Pogge, T. (2006) "Do Rawls's Two Theories of Justice Fit Together?," in Martin, R. and Reidy, D. A. (eds.), *Rawls's Law of Peoples: A Realistic Utopia?*, Oxford: Blackwell Publishing Ltd, pp. 206–225.
- (2008) *World Poverty and Human Rights*, 2nd Edition, London: Polity Press.
- Rawls, J. (1993a) *Political Liberalism*, New York: Columbia University Press.
- (1993b) "Political Liberalism: Reply to Habermas," *Journal of Philosophy*, vol. 92 no. 3, pp. 132–80.
- (1999) *The Law of Peoples*, Cambridge, MA: Harvard University Press.
- Sen, A. (1999) *Development as Freedom*, Oxford: Oxford University Press.