

## **Habermas on Human Rights: Law, Morality, and Intercultural Dialogue**

In *Between Facts and Norms*, Jürgen Habermas stresses the essential role of modern law for social integration within modern complex societies. Tied to this modern concept of law is the notion of actionable individual rights. While *Between Facts and Norms (BFN)* deals primarily with the system of rights within the democratic constitutional state, in recent articles Habermas has addressed the controversial nature of international human rights.<sup>1</sup> There, he argues that human rights are not simply moral rights, but are “Janus-faced,” with one side related to law and the other to morality. In this paper, I draw on several of Habermas’s discussions of human rights in order to construct a comprehensive interpretation of his position. While *BFN* deals explicitly with rights only within the democratic constitutional state, some aspects of that account can also be applied to international political contexts. Therefore, I utilize the theoretical groundwork developed in *BFN* to clarify and further develop the conception of human rights in Habermas’s later publications. This strategy also helps to highlight tensions that must be addressed. This analysis of Habermas’s position on human rights will explain the dualist conception of human rights, the intersubjective foundations of rights within a community of law, and the idea of a discursive elaboration of human rights into a comprehensive system of rights.

I begin by explaining Habermas’s view of the duality in the concept of human rights. In the second section I attempt to clarify his dualist con-

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<sup>1</sup>Habermas’s most extensive remarks on international human rights are found in Jürgen Habermas, “Kant’s Idea of Perpetual Peace: At Two Hundred Years’ Historical Remove,” in *The Inclusion of the Other: Studies in Political Theory*, ed. Ciaran Cronin and Pablo De Greiff (Cambridge, Mass.: MIT Press, 1998), pp. 165-202, esp. pp. 189-93 on the concept of human rights; and Jürgen Habermas, “Remarks on Legitimation through Human Rights,” in *The Postnational Constellation: Political Essays*, ed. Max Pensky (Cambridge, Mass.: MIT Press, 2001), chap. 5, where he defends human rights against Western and non-Western critics. His reconstruction of the system of rights within the democratic constitutional state is found in “A Reconstructive Approach to Law I: The System of Rights,” chap. 3 of Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: MIT Press, 1996).

ception of human rights and explore some of the problems it faces by looking at objections related to both the moral and the legal side of human rights. The dispute over the legal side of the concept of human rights, which pushes toward the juridification of human rights, has received a great deal of scrutiny in the cross-cultural debate over human rights. Therefore, in the third section I focus on the supposed conflict between the individualism inherent in the concept of individual rights and the communitarian claims made on behalf of non-Western cultures. I argue that Habermas's emphasis on the intersubjective structure of law and rights reduces this conceptual tension. In the fourth section I conclude with some reflections on Habermas's conception of human rights in relation to the global realization of human rights.

### 1. The Duality of Human Rights

Habermas appeals to more than simply moral theory in his conception of human rights. He refers to the dual nature of human rights in relation to law and morality: the concept of human rights "does not have its origins in morality, but rather bears the imprint of the modern concept of individual liberties, hence of a specifically juridical concept."<sup>2</sup> That is not to say that human rights are *merely* positively enacted legal rights. He argues that human rights, like moral norms, claim universal validity. Indeed, it is the "mode of validity" that moral norms and human rights share that leads some to view human rights as simply moral rights. But human rights are not simply moral norms, for they "belong structurally to a positive and coercive legal order."<sup>3</sup>

In the essay "Kant's Idea of Perpetual Peace," Habermas takes as the paradigm of human rights the basic or fundamental rights (*Grundrechte*) that are constitutive of the legal orders of constitutional democracies. It is no accident that he begins this discussion of human rights by saying that human rights in the modern sense can be traced back to the late eighteenth-century French and American declarations of rights. This is already to favor a particular reading of human rights, seeing them through the prism of constitutional democracy. According to Habermas, the connection between human rights and democracy is not merely a historically contingent one. Rather, he argues that there is an internal relation between human rights and democracy: human rights legally institutionalize the communicative conditions for reasonable political will-formation. I

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<sup>2</sup>Habermas, "Kant's Idea of Perpetual Peace," p. 191. He refers to the "Janus-faced" nature of human rights, "looking simultaneously toward morality and the law," in Habermas, "Remarks on Legitimation through Human Rights," p. 118.

<sup>3</sup>Habermas, "Kant's Idea of Perpetual Peace," p. 192.

will explain this further in the next section, but it should be noted here that taking basic constitutional rights as the paradigm for human rights does not necessarily limit them to this form. That is, his position on their justification is open to a global version of basic rights as well.

Habermas points to two aspects of universal validity that human rights, in the form of basic rights, share with moral norms. First, he claims that basic liberal and social rights within a constitutional framework are addressed to persons as human beings and not merely as citizens of the state. Like moral norms, they refer to “human beings as such,” and thereby claim a universal range of application. Certainly the history of the implementation of human rights within the West involves a long history of political struggle by groups excluded from enjoying supposedly universal rights. Still, human rights, like moral norms, bring with them a universal range of application, even if in both cases they have not always been equally applied. Habermas points to an example from the German context, which displays the continuing process of universalizing this range of application: “the further normal legislation exhausts the human-rights content of the German Basic Law, the more the legal status of resident aliens comes to resemble that of citizens.”<sup>4</sup>

The second aspect of universal validity that basic rights share with moral norms is related to justification—both are justified by moral arguments. Habermas claims that basic rights are “equipped with a universal validity claim because they can be justified *exclusively* from a moral point of view.”<sup>5</sup> While other legal norms are justified by moral arguments in conjunction with what Habermas refers to as “ethical-political” and “pragmatic” considerations, basic rights, like moral norms, require only moral arguments for their justification. Basic rights, such as the right to bodily integrity, are not couched in terms of what is consistent with our self-understanding as a people, nor can they be set aside in the name of efficiency or some other pragmatic considerations. In that sense, basic rights

regulate matters of such generality that moral arguments are *sufficient for their justification*. These arguments show why the implementation of such rules is in the equal interest of all persons *qua* persons, and thus why they are equally good for *everybody*.<sup>6</sup>

Habermas is claiming that the same or similar moral arguments that are put forward in favor of moral norms (in moral discourses) come into play in support of basic rights (in legal-political discourses). It is this aspect of

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<sup>4</sup>Ibid., p. 190, translation modified slightly. Habermas makes the same point in the Postscript to *Between Facts and Norms*, p. 456, where he also notes that there are still serious problems with Germany’s citizenship law.

<sup>5</sup>Ibid., p. 191.

<sup>6</sup>Ibid.

his position that reveals the clearest connection between the basic rights that he starts with and the idea of universally valid human rights. Arguments for basic rights, though put forward in a constitution-making or amending process, take the form of moral arguments, that is, that their implementation is in the equal interest of all. If such arguments are valid, then their validity would not be limited to the national context in which they are set out. They establish the moral grounds for implementing those rights in that particular legal order. But if they are valid moral arguments, then they establish moral reasons for implementing those rights in any legal order.<sup>7</sup>

In sum, human rights are similar to moral norms insofar as both (1) make reference to all persons and (2) rely only on moral arguments for their justification. However, this similarity does not mean that human rights are constituted solely by morally valid claims. Moral arguments are necessary for the justification of human rights, but they do not fully account for what is inherent in the concept of human rights. Habermas argues that human rights share structural features with legal norms in general that have important consequences for their form and function. As he puts it,

human rights belong structurally to a positive and coercive legal order which founds actionable individual legal claims. To this extent, it is part of the meaning of human rights that they claim the status of basic rights which are implemented within the context of *some* existing legal order, be it national, international, or global.<sup>8</sup>

Thus, the structure of human rights is determined by the structure and form of modern law.

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<sup>7</sup>This dualist conception of human rights is not itself dependent upon the success of discourse theory. At the conceptual level, the idea of the “moral point of view” does not commit one to a discourse theory of morality, only to some version of a “critical morality.” As for Habermas’s discourse theory of morality, unlike Kant’s theory it does not rule out consideration of consequences, values, and interests within the justification procedure of moral norms. The “principle of universalization” (U) that Habermas introduces as a rule of argumentation for justifying moral norms states: “A norm is valid when the foreseeable consequences and side effects of its general observance for the interests and value-orientations of *each individual* could be *jointly* accepted by *all* concerned without coercion.” Jürgen Habermas, “A Genealogical Analysis of the Cognitive Content of Morality,” in *The Inclusion of the Other*, p. 43. A valid moral norm—one that could successfully pass the rigorous justification required by U—can provide well-grounded support for a basic right, i.e., it would trump other ethical and practical considerations that might be brought against it.

<sup>8</sup>Habermas, “Kant’s Idea of Perpetual Peace,” p. 192. As he argues in *Between Facts and Norms*, the institutionalization of rights, including the sanctioning, organizing, and executive powers of the state, are “not just functionally necessary supplements to the system of rights but *implications* already contained in rights.” Habermas, *Between Facts and Norms*, p. 134.

This has particular consequences for human rights, since Habermas claims that the formal characteristics of law are uniquely suited to its role as a functional complement to post-traditional morality. According to this mainly sociological line of argument, morality alone cannot meet the demands for regulation and organization in societies that can no longer rely on a common ethos for purposes of social integration. Modern law, on the other hand, has a number of features that make up for the weaknesses of morality in very specific and functionally necessary ways.<sup>9</sup> Law is positive, coercive, reflexive, and individually actionable. As *positively* enacted, law makes up for the cognitive indeterminacy involved in justifying and applying a morality based on abstract principles. The sanctions of *coercive* law make up for the motivational uncertainty of morality in a way that stabilizes behavioral expectations. The *reflexivity* of law allows it to produce a system of accountabilities by creating institutions and defining jurisdictional powers.<sup>10</sup> This is vitally important because the positive duties associated with morality often exceed the powers of individuals acting alone, and can only be managed and met by institutions. Finally, modern law is also based on *individually actionable* rights, which serve to establish and protect a sphere of individual freedom of choice free from moral obligations. That is not to say that law only protects the sphere of individual freedom—political and social rights protect political activity and attempt to meet basic needs. Habermas claims that modern law must have these formal characteristics in order to fulfill the functional imperatives of a modern society, which cannot be met directly by morality. This account of the complementary relation between law and morality demonstrates to some extent what is at stake in his claim that human rights are legal norms rather than moral norms. I return to this point in the next section.

In sum, Habermas holds a position like this: human rights are most clearly represented by the basic rights legally institutionalized within constitutional democracies, since such basic rights are the only rights that fully realize both the legal and the moral sides of the concept of human rights. Beyond this level, human rights “remain only a weak force in international law and still await institutionalization within the framework

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<sup>9</sup>On the formal characteristics of law and the complementary relation between law and morality, see *Between Facts and Norms*, 3.2.2, pp. 111-18. See also Jürgen Habermas, “On the Internal Relation between the Rule of Law and Democracy,” in *The Inclusion of the Other*, pp. 253-64, esp. pp. 254-58.

<sup>10</sup> “[M]oral demands that can be fulfilled only through anonymous networks and organizations first find clear addressees only within a system of rules that can be reflexively applied to itself. Law alone is reflexive *in its own right*; it contains secondary rules that serve the production of primary rules for guiding behavior.” (Habermas, *Between Facts and Norms*, p. 117.)

of a cosmopolitan order that is only now beginning to take shape.”<sup>11</sup>

Within Anglo-American political philosophy, this position on the concept of human rights appears to be quite similar to that of Rex Martin. Martin is highly critical of the widely accepted view that human rights are simply moral rights; in particular, he argues against Joel Feinberg’s influential account of moral rights (and human rights) defined solely in terms of valid moral claims.<sup>12</sup> Martin sounds much like Habermas when he argues that there is an

irreducible duality to human rights. *On the one side they are morally validated claims to some benefit or other. Each claim is ... in effect, a set of good moral reasons why a way of acting open to all ought to be recognized, of reasons why it ought not be prevented and ought, indeed, be maintained ... On the other side such rights require recognition in law and promotion by government of the way of acting claimed; the addition of these features, which serves to constitute the claim a right, also serves to maintain the integrity of the political-legal element. Neither side is indispensable in a human right.*<sup>13</sup>

According to this conception, both the legal and the moral side are indispensable to the concept of a human right, and neither one alone constitutes a human right. Human rights are not simply moral claims, and moral claims by themselves, even if valid, do not properly count as human rights. It is the combination of a morally valid claim with legal recognition within an existing legal order that constitutes a human right. According to Habermas, both the *form of justification* and the *structure*

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<sup>11</sup>Habermas, “Kant’s Idea of Perpetual Peace,” p. 192.

<sup>12</sup>See, for example, Joel Feinberg, “The Nature and Value of Rights,” reprinted in *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), pp. 143-55, and Joel Feinberg, “In Defense of Moral Rights,” *Oxford Journal of Legal Studies* 12 (1992): 149-69.

<sup>13</sup>Rex Martin, “Human Rights and Civil Rights,” in Morton E. Winston (ed.), *The Philosophy of Human Rights* (Belmont, Cal.: Wadsworth, 1989), p. 83, emphasis added. It is also interesting to note that when Martin attempts to elaborate his analysis of rights into a systematic political theory in his book, *A System of Rights* (Oxford: Oxford University Press, 1993), he argues, like Habermas, that there is a strong connection between the idea of civil rights and the idea of democratic institutions. Moreover, he and Habermas both use the phrase “system of rights” to refer to the systematic realization and mutual coordination of civil rights and democratic institutions. Martin ultimately justifies both civil rights and democratic institutions in terms of “mutual perceived benefit.” Particular civil rights are justified by some form of mutual acknowledgement; that is, whether a civil right “can plausibly be said to be, and could be perceived to be upon reflection, in the interest of each and all” (p. 103). In that book, he again argues that “a human right is defective, not as a morally valid claim but as a right, in the absence of appropriate practices of recognition and maintenance. The absolute difference between morally valid claims and human rights, then, is that rights do, and claims do not, include such practices in their concept” (p. 85). A more systematic comparison of these two works would certainly be fruitful. For an account of the debate between Martin and Feinberg, see Derrick Darby, “Feinberg and Martin on Human Rights,” *Journal of Social Philosophy* 43 (2003): 199-214.

of human rights need to be accounted for in the concept of human rights. But if he in fact holds the same position as Martin, then he will also have to respond to criticisms of that position, as we will see in the following.

## 2. Critical Challenges

In this section I will look at several potential objections to Habermas's position and consider whether and to what extent his account of human rights has the necessary resources to respond. The first part focuses on the moral side of human rights in determining whether he has neglected important moral features of human rights. The second part focuses on the legal side of human rights in considering whether juridification of human rights is essential.

### *a. Moral Dimensions of Human Rights*

It is important to understand the motivation behind Habermas's attempt to avoid giving a strictly "moral reading of human rights." He addresses the issue in relation to both national and international political contexts, in both cases resisting the placement of human rights solely under the category of morality. Regarding the national case, one of the main objectives of *Between Facts and Norms* was to provide a discourse-theoretic reconstruction of the system of rights within the democratic-constitutional state that would alleviate the classic tension between popular sovereignty and human rights, or the "freedoms of the ancients" and the "freedoms of the moderns." One source of this tension is found in the opposition between the moral reading of human rights given by classic liberalism (Locke) and the substantive ethical reading of popular sovereignty given by classic republicanism (from Aristotle to Rousseau).<sup>14</sup> According to Habermas, each side ultimately gives primacy to either human rights or popular sovereignty. The moral reading of human rights cannot avoid the idea that human rights are externally imposed on the sovereign legislator, thereby threatening any robust notion of popular sovereignty. On the other hand, the republican reading of popular sovereignty tends to grant human rights only instrumental value. To overcome the problem, Habermas attempts to establish an internal connection between human rights and popular sovereignty by arguing that human rights are essentially presupposed in the idea of the legal institutionalization of the practice of self-determination. In this version of his "co-

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<sup>14</sup>I introduce Habermas's account of the contrast between liberalism and republicanism only in order to explain the motivation behind his reading of human rights. I do not claim that this rather stylized contrast is entirely accurate.

originality thesis," he claims that the legal institutionalization of popular sovereignty requires that the private autonomy of legal persons be secured via human rights, in the form of basic constitutional rights.

Before addressing Habermas's concerns about a moral reading of human rights in the international case, I will consider an objection in the national case, namely, that the moral side of human rights is undervalued within this conception.<sup>15</sup> Habermas's emphasis on law is not a version of legal positivism; quite the opposite, his deontological conception of law aims at establishing the complementary relation between morality and law, and the way that morality comes into the law-making process. Yet his understanding of human rights might be criticized for not doing justice to, or failing to preserve the integrity of, the moral element of human rights. It may be argued that the notion of human rights is intended to capture the idea of morally valid claims attached to each person, regardless of whether those claims are recognized by others or in any legal form. Though many are averse to the idea that human rights somehow inhere in the nature of persons as natural rights, one may still want to argue that human rights are, as Rainer Forst puts it in his criticism of Habermas, something that moral persons *must* grant one another—as moral rights that we *owe* one another.<sup>16</sup> This criticism provides an opportunity for further clarification. Habermas's position must be clarified in terms of the interrelation between (1) his rational reconstruction of the logical genesis of the system of rights and (2) the way that moral arguments operate in the elaboration and justification of particular rights or schedules of rights. Even so, a more fundamental criticism arises even after this clarification is made.

To begin with, the conceptual analysis of human rights offered thus far must be supplemented with Habermas's rational reconstruction of the system of rights. He provides an interpretation of the system of rights in which nothing is "given" (as, for example, pre-political natural rights) prior to the "citizens' practice of self-determination other than the discourse principle, which is built into the conditions of communicative as-

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<sup>15</sup>I am not primarily concerned here with whether Habermas's co-originality thesis, in its several forms, is ultimately successful. Rather, with this conception in mind, I ask whether the moral side of human rights is adequately accounted for. For an excellent account of various criticisms of the co-originality thesis along with much-needed clarification, see Ingeborg Maus, "Liberties and Popular Sovereignty: On Jürgen Habermas's Reconstruction of the System of Rights," *Cardozo Law Review* 17 (1996): 852-82, abbreviated version published in René von Schomberg and Kenneth Baynes (eds.), *Discourse and Democracy: Essays on Habermas's Between Facts and Norms* (Albany: State University of New York Press, 2002), pp. 89-128.

<sup>16</sup>See Rainer Forst, "The Basic Right to Justification: Towards a Constructivist Conception of Human Rights," *Constellations* 6 (1999): 35-60, esp. p. 50.



sociation in general, and the legal medium as such.”<sup>17</sup> Both the discourse principle and the legal medium require some further explanation. The discourse principle (“D”), which states that “just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses,” embodies the “post-conventional” requirements of justification, namely, the requirement of impartiality.<sup>18</sup> The legal medium, or the “form of law,” on the other hand, is neither epistemically nor normatively justified, but can be given a functional explanation in terms of the formal characteristics that I described in the first section. Habermas claims that the inter-penetration of the discourse principle and the form of law results in the logical genesis of the system of rights. The idea of a *logical* genesis refers to the notion of a conceptual reconstruction, which begins initially from the point of view of the political theorist. It is not intended as a historical depiction of the actual process of constitutional rights-granting. Rather, it is an elaboration of the conceptual presuppositions inherent within the idea of a legitimate rule of law, or a reconstruction of the “rights” inscribed within the legal code itself. The logical genesis only gives rise to five *categories* of rights (rather than specific rights), or as Habermas says in a better formulation, “legal principles that guide the framers of constitutions.”<sup>19</sup>

In brief, the first three categories—(1) equal individual liberties, (2) rights determining the status of political membership, and (3) rights to equal protections under law—are conceptually presupposed by the enterprise of generating a legal code to govern an association of citizens as

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<sup>17</sup>Habermas, *Between Facts and Norms*, p. 128.

<sup>18</sup>*Ibid.*, p. 107. I do not presume that the discourse principle is itself uncontroversial. But I restrict myself here to a clarification and extension of Habermas’s position, which starts from the discourse principle. The question I pose in this section is whether and how Habermas’s interpretation of the system of rights, which assumes only “D” and the “legal form” can still give an adequate account of the moral side of human rights. The literature on discourse theory in general is immense. For a recent and illuminating critical account of the role of the discourse principle in *Between Facts and Norms*, see Matthias Kettner, “The Disappearance of Discourse Ethics in Habermas’s *Between Facts and Norms*,” in Schomberg and Baynes (eds.), *Discourse and Democracy*, pp. 201-18. For criticism of discourse theory and deliberative democratic theory in general, see Iris Marion Young, “Communication and the Other: Beyond Deliberative Democracy,” in Seyla Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996), pp. 120-35; and Iris Marion Young, “Difference as a Resource for Democratic Communication,” in James Bohman and William Rehg (eds.), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass.: MIT Press, 1997), pp. 383-406. Even Young, who criticizes discourse theory for a bias toward “critical argument” over other forms of communication, does not ultimately dispute that argumentation is in fact necessary. Rather, she presses the case for a more “communicative democracy” that also includes forms of communication such as greeting, rhetoric, and narrative.

<sup>19</sup>Habermas, *Between Facts and Norms*, p. 126.

free and equal. A fourth category—(4) rights to equal political participation—is necessary in order to legally institutionalize the democratic elaboration of the specific content of basic rights within these four categories and a further one. The four categories, Habermas argues, imply a fifth—(5) social and economic rights—insofar as such rights are necessary to guarantee the equal opportunities of citizens to exercise the rights in categories (1) through (4). Of course, these categories are abstract and still lack specific content as basic rights. Any system of rights, in order to be effective as a system of actionable rights, must be given in terms of concretely specified rights, as all existing systems of rights are. Yet, the elaboration of the abstract categories into an actual schedule of rights is—as a matter of democratic principle—secured by the fourth category and, therefore, left to citizens themselves.

The conceptual genesis of the system of rights, as a framework of legal principles, does not exhaust Habermas's account of human rights. As discussed in the first section, the justificatory procedure for any set of basic rights requires moral arguments. This may seem to conflict with the idea that the logical genesis of the system of rights does not presuppose any moral rights. Indeed, Habermas claims that

when citizens interpret the system of rights in a manner congruent with their situation, they merely explicate the *performative meaning* of precisely the enterprise they took up as soon as they decided to legitimately regulate their common life through positive law.<sup>20</sup>

In fact, this description is somewhat misleading and may lead critics to claim that this understanding of basic rights does not do justice to the moral side of basic rights. In order to avoid that objection, the account of the conceptual genesis of the system of rights needs to be clarified in relation to the moral justification of the content of basic rights.

In order to establish the consistency between the two, I propose the following. First, we should not lose sight of what Habermas was attempting in his rational reconstruction of the system of rights. He was trying to show that the *framework* of a system of rights can be reconstructed in terms of the discourse principle and the form of law. In a sense, citizens have no choice but to elaborate the content of those basic categories in explicating the system of rights. But those constraints are not the constraints of pre-political moral rights. They are the performative constraints created by or inherent within the very activity in which they are engaged, that is, an attempt to legitimately regulate their common life through the medium of law. However, these performative constraints do not stipulate which interpretation of the system of rights must result. What citizens do in reality, when discursively justifying a par-

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<sup>20</sup>Ibid., p. 129, emphasis added.

particular interpretation of the system of rights, is make moral arguments, claiming that legal enactment of particular rights to life, liberty, property, and so on are morally valid and “equally in the interest of all.” In that sense, it is not correct to say, as quoted above, that citizens interpreting the system of rights “merely explicate the performative meaning” inherent within this enterprise. In fact, they must make moral arguments. In a more recent formulation, Habermas says:

of course, they cannot produce basic rights *in abstracto* but only particular basic rights with a concrete content. For this reason, the participants who thus far were engaged in inward reflection, focused on a kind of philosophical clarification, must step out from behind the veil of empirical ignorance ... Only when they are confronted, we say, with the intolerable consequences of the use of physical violence do they recognize the necessity of elementary rights to bodily integrity or to freedom of movement.<sup>21</sup>

The case for why physical violence is intolerable certainly has to be made in moral terms. To be sure, the form of such arguments might be claims that we *owe* one another such rights. But that does not turn the claims at issue into strictly moral rights, given the legal-political context in which the rights-granting process occurs. In this way, Habermas can explain how moral arguments are central to the justification of human rights in the form of basic rights without relying on or appealing directly to pre-political moral rights that would change the character of human rights as legal norms. The logical genesis of the system of rights does not exclude or preclude the moral justification for specific rights—indeed, it requires it—but it does get the system of rights off the ground, so to speak, without first appealing to pre-given moral rights.

Even if adequate consideration of the moral dimension of human rights can be achieved in the sense just outlined, a more basic objection arises. The further significance of Forst’s argument is that moral arguments are relevant to the discussion of human rights at two levels: (1) the moral arguments made on behalf of particular rights *within* the rights-granting process, and (2) the moral arguments made for *entering into* a rights-granting process at all (what might be termed a “right to effective human rights”). Regarding the latter, Forst argues for a “basic right to justification” as the first or primary human right. The challenge to Habermas is whether he can avoid giving any moral arguments for entering into the rights-granting process. He has argued that philosophers should be content with the fact that there is no functional equivalent to positive law for stabilizing behavioral expectations within complex societies, and so there need be no moral argument for entering into the

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<sup>21</sup>Jürgen Habermas, “Constitutional Democracy: A Paradoxical Union of Contradictory Principles?” *Political Theory* 29 (2001): 766-81, p. 778.

rights-granting process.<sup>22</sup> Once the rights-granting process has begun, the interpretation I outlined above shows how moral arguments are then brought to bear *from within* the process. Yet, even if this response were adequate in the context of a single state, the challenge takes on greater salience when considered in the international context, which I turn to now. A central question here is whether the account in *BFN* creates problems for the idea of universally valid human rights that would govern the international context.

In the international context, Habermas has different reasons for avoiding a “moral reading of human rights.” In fact, the exposition of the duality of human rights that I laid out in the first section is primarily based on Habermas’s attempt to respond to the objection to a global politics of human rights based on the claim that it would be a direct “moralization” of international relations. The general point of this objection, based on an argument of Carl Schmitt, is that applying the “moral humanism” of human rights to the international arena would be a moralization of what are essentially “political” relations among states. Morality brings in the categories of “good” and “evil,” which can be used to dehumanize enemies in support for their total annihilation. As Schmitt puts it, “when a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but rather a war wherein a particular state seeks to usurp a universal concept in its struggle against its enemy.”<sup>23</sup> In response, Habermas argues that human rights have a legal structure and thus their implementation does not amount to an unmediated moralization of international relations. The juridical nature of human rights points to the need for a juridification of international relations, which would require an impartial judiciary and a fair system of enforcement. Agreeing with Schmitt about the danger of an unmediated moralization of politics, Habermas still criticizes him for ignoring the juridical alternative. “Human rights fundamentalism is avoided not by renouncing the politics of human rights, but only through a cosmopolitan transformation of the state of nature among states into a legal order.”<sup>24</sup> While there is always the risk that wars will be cynically carried out in the name of human rights, even within a global legal order, independent legal procedures for interpreting and applying human rights at least create procedural barriers against the unmediated use of one state’s human rights record against another. Perhaps such wars could only be avoided with certainty within a cosmopolitan world state, which leads to the

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<sup>22</sup>Habermas, *Between Facts and Norms*, Postscript, p. 460.

<sup>23</sup>As quoted in Habermas, “Kant’s Idea of Perpetual Peace,” p. 188. Translation modified from Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 1996), p. 54.

<sup>24</sup>Habermas, “Kant’s Idea of Perpetual Peace,” pp. 200, 201.

question of whether such a state is itself desirable. In any case, Habermas's response to Schmitt indicates why he attempts to avoid a moral reading of human rights in the international context.

A potential objection to Habermas that must be raised at this point has been raised by David Boucher, specifically in response to Rex Martin's dual conception of human rights. He argues that Martin's conception of human rights precludes justifiably using the language of human rights in precisely those cases in which it is most needed, that is, the use of human rights claims to describe violations that occur in the absence of a legal system designed to protect them. As he puts it, "it is precisely in circumstances where there is a systematic refusal to acknowledge valid moral claims, or a breakdown of the capacity to do so, that we are most likely to want to talk about violations of human rights."<sup>25</sup> Or, to put it in terms outlined above, in the absence of a constitutional democracy, is there any reason to speak of human rights at all? If Habermas's position is really no different from Martin's—that there are no human *rights* in the absence of legal recognition—he must respond to this objection.

The challenge for Habermas is how to reconcile his account of human rights as basic rights within constitutional democracy with the idea of morally valid human rights within the international community. If he allows for human rights as valid moral claims or as moral constraints on legitimacy in the latter context, then it becomes difficult for him to uphold his co-originality thesis in the former context. Habermas himself has advocated a global "politics of human rights" as a response to the destructive power of economic globalization.<sup>26</sup> Yet, it may be asked, what is the moral force or moral point behind a global politics of human rights? Can he answer the question, "Why should we have a global politics of human rights?" and still avoid providing moral arguments for entering into a rights-granting process? The issue is whether Habermas can simultaneously maintain a strong co-originality thesis and a strong defense of the universal validity of human rights, whether they can mutually reinforce one another or whether making them consistent simply leads to a mutual weakening of each that may be unacceptable or remain full of tensions.

A preliminary suggestion would be to argue that the co-originality thesis is only intended to show—the moral validity of human rights notwithstanding—a way in which human rights can be made consistent with popular sovereignty. Even though human rights have a moral validity

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<sup>25</sup>See David Boucher, *Political Theories of International Relations: From Thucydides to the Present* (Oxford: Oxford University Press, 1998), pp. 382-83. I thank Derrick Darby for bringing this criticism to my attention.

<sup>26</sup>See Jürgen Habermas, "The Postnational Constellation and the Future of Democracy," chap. 4 of *The Postnational Constellation*.

that transcends any particular political context, citizens of a democracy must still be able to understand them in a way that is consistent with their ideal of popular sovereignty.<sup>27</sup> In a move that would distance his position somewhat from that of Martin's, Habermas would then have to argue that defining the concept of human rights in terms of a legal and a moral side does not rule out using the language of human rights in those contexts in which legal recognition is lacking. That is, the duality of human rights does not mean that the absence of legal recognition in any way detracts from their moral validity. Under this reading, his position on the *concept* of human rights would not be critical of the use of human rights as the language in which claims are made in the absence of legal recognition.<sup>28</sup> His point about legal recognition as a necessary part of the concept of human rights can be interpreted as claiming that without a settled, legally institutionalized interpretation, human rights have only the weak force of morality and not the strong force of law. In the absence of an effective legal order, they are weak in being highly indeterminate and relatively ineffective in comparison with law. It is not entirely clear to me whether moving in this direction can really do justice to both the co-originality thesis and the need to develop an adequate view of the universal validity of human rights, but it is clear that Habermas will have to address the issue more directly.

In sum, Habermas avoids a strictly moral reading of human rights, first, in order to remove the conceptual tension that arises with the idea that moral rights are externally imposed on the constitutional legislator—an idea that would diminish the force of the notion of popular sovereignty. Second, in the international context he finds a moral reading of human rights to be both “too strong” in its potential leeway for misuse and “too weak” because it offers only weak protection for individuals, bringing with it the deficiencies of morality in comparison with law. I address the latter point further in the following.

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<sup>27</sup>The following quote from the Postscript to *BFN* seems to support such a reading: “Human rights might be quite justifiable as *moral* rights, yet as soon as we conceive them as elements of *positive* law, it is obvious that they cannot be paternalistically imposed on a sovereign legislator. The addressees of law would not be able to understand themselves as its authors if the legislator were to discover human rights as pregiven moral facts that merely need to be enacted as positive law.” Habermas, *Between Facts and Norms*, Postscript, p. 454.

<sup>28</sup>This would help to make his theoretical account consistent with his more political remarks, e.g.: “human rights, despite ongoing cultural controversies over their correct interpretation, speak a language in which dissidents can express what they suffer, and what they demand from oppressive regimes—in Asia, South America, and Africa no less than in Europe and the United States.” Jürgen Habermas, “Conceptions of Modernity,” in *The Postnational Constellation*, p. 149.

*b. Juridification of Human Rights*

In turning from the moral side of human rights to the legal side, another objection might be raised. For those who consider human rights to be moral rights, or morally valid claims, the legal dimension of human rights may appear in some ways to be unnecessary. Some argue that while legal rights are the preferred instruments for implementing human rights in Western constitutional democracies, there are other methods for protecting human rights. If human rights specify certain basic human needs, then “secure access” to the objects specified by human rights is surely more important than whether or not legal rights are used to do so. Thomas Pogge has recently put forward this objection to Habermas’s conception of human rights in offering an alternative formulation of human rights.

In several recent papers, Pogge attempts, like Habermas, to characterize the institutional aspect of the concept of human rights. He agrees with Habermas on the importance of viewing human rights in terms of institutions; the disputed issue is whether this must involve law. Human rights, according to Pogge, are “moral claims upon the organization of one’s society.”<sup>29</sup> Most important to fulfilling this moral claim is that a society ensures “secure access” to certain goods, which are the objects of human rights. Therefore, to postulate a human right to X is to declare “that every society (and comparable social system) ought to be so organized [or reorganized] that, as far as possible, all its members enjoy secure access to X.”<sup>30</sup> The fact that it is official deprivation or violation of rights that is central to human rights claims points to the institutional aspect. In contrast to Habermas, who identifies human rights with basic rights within a legal order, Pogge seems to identify human rights with the moral claims themselves. That is, while Habermas argues that human rights require moral claims in their justification, Pogge equates the two.<sup>31</sup>

First, I want to address the main point of contention between Haber-

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<sup>29</sup>Thomas Pogge, “How Should Human Rights Be Conceived?,” *Jahrbuch für Recht und Ethik* 3 (1995): 103-20, p. 114. See also Thomas Pogge, “The International Significance of Human Rights,” *The Journal of Ethics* 4 (2000): 45-69, and Thomas Pogge, “Human Rights and Human Responsibilities,” in Pablo De Greiff and Ciaran Cronin (eds.), *Global Justice and Transnational Politics: Essays on the Moral and Political Challenges of Globalization* (Cambridge, Mass.: MIT Press, 2002), pp. 151-95.

<sup>30</sup>Pogge, “The International Significance of Human Rights,” p. 52.

<sup>31</sup>Pogge adopts this understanding of human rights after rejecting what he identifies as three of the more prominent competing understandings. The first position conceives of human rights as moral rights that every human being has against every other human being. A second conception of human rights sees them as moral rights that human beings have specifically against governments. The third is the one focused on here, for which Habermas is taken to be representative. See *ibid.*, pp. 47-49.

mas and Pogge, regarding the legal aspect of human rights. Dealing with this issue provides another opportunity to clarify Habermas's position, since Pogge leaves out an important aspect of Habermas's overall position. Pogge argues that one of the problems with Habermas's position is that particular human rights do not always require juridification, and therefore, this conception of human rights is too strong. Here, Pogge focuses on the human right to adequate nutrition. He claims a legal right would be superfluous in a society that secures adequate nutrition without recourse to the legal system. Secure access is what is really important when it comes to human rights. Therefore, Pogge concludes that the juridification component is not really essential to the concept of human rights.

To address this, we should look to Habermas's argument for juridification, which is further related to his account of the complementary relation between law and morality. An understanding of human rights as simply moral claims places human rights at the level of morality, and this attributes to human rights the same *cognitive, motivational, and organizational* deficits associated with morality. I spelled out the formal characteristics of law in the first section, but the deficits that hinder morality should be emphasized here. The "cognitive indeterminacy" of morality is based on the abstract nature of general moral norms, which are always difficult for individuals to apply to particular cases. The "motivational uncertainty" of morality is apparent in its dependence upon individual strength of will to carry out morally prescribed actions. This might be summed up with Habermas's statement that "legal norms have the immediate effectiveness for action that moral judgments as such lack."<sup>32</sup> Finally, fulfillment of many of the positive duties associated with morality requires cooperation and organization on a scale that involves institutions that can only be created through law. This is particularly clear in the case of social and economic rights, which is what Pogge focuses on when he questions the need for juridification. As Habermas puts it, "in complex societies, morality can become effective beyond the local level only by being translated into the legal code."<sup>33</sup> Moral claims do not, by themselves, have the force to secure such institutional effectiveness. Pogge tries to alleviate this weakness by building into his conception the idea that societies ought to be institutionally organized such that access to the objects of human rights is secured. But as Habermas argues, it is really law and not morality that is suited to this task. If human rights obey only a moral logic, then human rights display all of the deficiencies of morality in comparison with law. Only legal norms can bring in the

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<sup>32</sup>Habermas, *Between Facts and Norms*, p. 114.

<sup>33</sup>*Ibid.*, p. 110.



positive level of effectiveness that moral norms lack.<sup>34</sup>

Pogge's first objection to Habermas purports to show that a Habermasian conception is too demanding. In a second objection, Pogge asserts that in another way the conception is not demanding enough. He argues that even when a particular right is juridified and enforced within the legal system, citizens may be in no position to make such legal claims, due to their being illiterate or uneducated. In response I would say, first, the issue of whether people are not educated well enough to understand their rights would clearly fall under a right to education. In addition, it is not clear why this point needs to be involved in the *definition* of human rights, rather than as answering the additional question of how and under what circumstances human rights are really secure. Furthermore, both objections overlook an important aspect of Habermas's position on human rights, namely, his emphasis on the idea of a *system* of rights.

Pogge uses the following formula to characterize Habermas's position: "human rights are basic or constitutional rights as each state ought to set them forth in its fundamental legal texts and ought to make them effective through appropriate institutions and policies."<sup>35</sup> In objecting to the juridification component as overly demanding, Pogge focuses on social and economic rights and singles out the right to adequate nutrition. This general strategy of isolating one basic human need and asking whether it requires recognition as a legal right is problematic: the answer will always depend on the state of the institutions and legal protections already in force in a given society and how and to what extent basic human needs are being fulfilled. As I argued above, social complexity generally renders such moral demands ineffective without legal backing. In fact, Habermas's account of the system of rights, rather than rigidly insisting on the juridification of a particular schedule of rights, is well designed to accommodate flexibility here.

Again, an adequate understanding of Habermas's interpretation of

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<sup>34</sup>Pogge himself admits that in the case of most human rights, secure access to their objects will require a legal right identical in content. He says that he assumes "that secure access to the objects of civil and political human rights generally requires corresponding legal protections ... It is hard to imagine a society under modern conditions whose members are secure in their property or have secure access to freedom of expression even while no legal right thereto exists." Pogge, "The International Significance of Human Rights," p. 51 n. 12. The reason I focus on this point is that Pogge criticizes Habermas's account because it provokes "communitarian and East Asian criticism" that human rights lead persons to view themselves as atomized, self-interested individuals. Whether or not this is true, Pogge's own account is supposed to be superior because it does not make juridification essential in principle, but he does, in fact, see it as fundamental in many cases. I deal with the general issue further in the third section.

<sup>35</sup>Ibid., p. 49.

human rights is incomplete without looking back to his discourse-theoretic reconstruction of the system of rights in *BFN*. As I discussed earlier, this reconstruction gives rise to categories of rights or “unsaturated” legal principles.<sup>36</sup> In light of this, Pogge’s formulation of a Habermas-type position appears one-sided. The actual basic rights within national constitutions are, in Habermas’s view, particular interpretations of the system of rights, but there is no detailed schedule or set of rights that makes up *the* system of rights that every state must enact as basic rights. “No one can credit herself with access to a system of rights in the singular ... ‘The’ system of rights does not exist in transcendental purity.”<sup>37</sup> That is not to say that we have no idea what rights to include under the heading human rights. We have 200 years of constitution-making, the Universal Declaration, and the many already-ratified international human rights conventions. But the abstract categories Habermas lays out each require “politically autonomous elaboration” as a specific set of rights through democratic procedures.

To take a specific example, the “right to adequate nutrition” that Pogge focuses on would fall under Habermas’s fifth category of basic rights, namely:

Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances makes this necessary if citizens are to have equal opportunities to utilize their basic civil [and political] rights.<sup>38</sup>

The reference to “current circumstances” builds into this conception of human rights an element of flexibility that responds to Pogge’s objection. If adequate nutrition is already secure outside of the legal system, then a legal right, in that particular case, might be superfluous. Moreover, this category would include rights to education, which are intended to alleviate the other weakness that Pogge pointed to—the lack of means to bring claims.

Yet, it may still be asked whether, according to Habermas, there is a “human right to adequate nutrition” as such, in the absence of legal recognition.<sup>39</sup> In line with what I argued above, Habermas might respond that there is a standing moral argument for adequate nutrition, which may be claimed by any human being. That claim may be put forward in the language of human rights. Yet, under a strict reading of his dualist conception, perhaps he would be limited to saying that prior to its implementation as a basic right within a legal system, it does not amount to a human right as such. Again, Habermas’s answer here would depend upon

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<sup>36</sup>Habermas, *Between Facts and Norms*, p. 126.

<sup>37</sup>*Ibid.*, p. 129.

<sup>38</sup>*Ibid.*, p. 123.

<sup>39</sup>I thank Rainer Forst for pressing this point.

how strictly he holds to a position like Martin's, and how he reconciles the moral validity of human rights with the co-originality thesis of *BFN*.

It does, however, seem clear that Habermas's position has the resources to respond to Pogge's specific objections. I would also argue that his account has the further advantage of stressing that human rights entail a democratic elaboration of a system of rights. This emphasizes both the need for democratic institutions and for a comprehensive realization of human rights. Habermas wants to avoid a "human rights foundationalism" that begins with moral rights and threatens to sideline democracy. Therefore, he builds in the democratic elaboration of each category of rights from the start. Defining the concept of human rights outside of its relation to democratic institutionalization can lead to a "democratic deficit" within a theory of human rights. The result tends to look like a set of morally grounded human rights that stand as the sole grounds for legitimacy, prior to any account of politics or popular sovereignty.

### 3. Individualism, Individual Rights, and Intercultural Dialogue

The dispute over the concept of human rights is not merely a debate among theorists. The last decade of the twentieth century, in particular leading up to and following the 1993 Vienna Conference on Human Rights, witnessed a surge in the debate over the cross-cultural validity of human rights.<sup>40</sup> In this section, I want to bring attention to a further aspect of Habermas's conception of human rights—their intersubjective foundations—as an important contribution to this debate. In the cross-cultural dialogue over human rights, one of the central questions, in general terms, is whether human rights have any validity outside of the Western cultures in which they originated. In particular, it is charged that the individualism inherent in the idea of individual rights is a foreign imposition on more communally oriented cultures. In criticizing Habermas's conception of human rights, Pogge characterizes the objection to individualism specifically in terms of a rejection of the juridification of human rights:

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<sup>40</sup>The dispute was primarily reflected in the preparations for the 1993 conference, which led to documents such as the "Bangkok Declaration," which emphasized unique Asian cultural values, the requirements of economic development, and the importance of sovereignty. Here, I focus only on one aspect of Habermas's response to these issues, one which is relevant to the issue of human rights in relation to both morality and law. Two excellent sources on the Asian Values debates are the introductions and articles found in Michael C. Davis (ed.), *Human Rights and Chinese Values: Legal, Philosophical, and Political Perspectives* (Oxford: Oxford University Press, 1995), and Joanne R. Bauer and Daniel A. Bell (eds.), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999).

Insistence on the juridification of human rights ... provokes the communitarian and East Asian criticism that human rights lead persons to view themselves as Westerners: atomized, autonomous, secular and self-interested individuals ready to insist on their rights no matter what the cost may be to others or the society at large.<sup>41</sup>

This version of the criticism focuses on the legal aspect of human rights as the most objectionable aspect of human rights, as if the moral ideals behind human rights might themselves be more acceptable if they were not linked to juridification.<sup>42</sup>

The problem with such claims is that they often conflate the individualism within the concept of human rights with the individualism of particular ideals attributed to Western culture, such as individual self-sufficiency or self-interest. Rather than discarding the legal aspect of human rights in the hope of securing wider agreement from non-Western traditions, we might do better to distinguish two different aspects of individualism related to rights. We can distinguish the concept of individual rights from the "culture of individualism" that influences the legal culture of many Western societies. Following Habermas, we can then see how the concept of individual rights is based upon the intersubjective foundations of law and rights rather than the ideal of individualism present in various forms in Western cultures.

Whether the *exercise* of individual rights within a legal system is atomizing depends on numerous factors. The system of rights in the abstract does not, by itself, dictate how these rights should be utilized, how rights should be viewed by legal persons, or how persons should view themselves. Individuals can exercise their rights to speak, organize, and participate in government in order to cooperate in bringing about changes in their common life. Or they can choose to individually defend their rights against all, in an individualistic spirit of antagonism, with only self-interest in mind. There are aspects of the legal culture of the United States in particular that both non-Western and Western critics object to, but they are not necessarily inherent in the very idea of an egalitarian rule of law. Even limiting our focus to Western societies, there are significant differences in constitutions (e.g., the more recent constitutions of Western European countries contain many economic and social rights

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<sup>41</sup>Pogge, "The International Significance of Human Rights," p. 51.

<sup>42</sup>Charles Taylor pursues a similar strategy in "Conditions of an Unforced Consensus on Human Rights," in Bauer and Bell (eds.), *The East Asian Challenge for Human Rights*, pp. 124-44. He argues that a global consensus on human rights might be more achievable if it is focused on the disputed norms at issue rather than the particular legal form they take or whether or not we agree on their underlying cultural or philosophical justification. For an account that deals with both Habermas and Taylor on this issue, see Thomas McCarthy, "On Reconciling Cosmopolitan Unity and National Diversity," *Public Culture* 11 (1999): 175-208.

not included in the U.S. Constitution), legal systems, and general cultural and historical influences on people's attitudes toward their legal rights (e.g., the way that restrictions on freedom of speech based on hate speech are viewed in the U.S. versus Germany or Canada). All of these differences come together to form the legal culture of a society.

Strong cultural currents emphasizing democratic participation or communal solidarity result in articulations of the system of rights that are different from those emphasizing individualistic competition or self-sufficiency. Of course, these ideals can also co-exist in the same society, and the legal culture may reflect this. If people living in non-Western societies value community and order, then they may choose to exercise their rights in a way consistent with those values. Contemporary Japan may provide a good example. While the current Japanese constitution was modeled on that of the United States, there are also strong currents within Japanese culture emphasizing solidarity and consensus, which discourage individuals from asserting individual rights.<sup>43</sup> This indicates ways in which the very idea of a system of individual rights is not necessarily atomizing. The issue cannot be determined at the theoretical level; rather, it is a matter for citizens to work out themselves, in the project of realizing the system of rights in a manner consistent with their cultural ideals. Distinguishing the concept of individual rights from the surrounding culture—which together contribute to the legal culture—can at least help to answer culture-based criticisms of human rights that conflate the concept of human rights itself with a culture of individualism.

Even if critics accept that a culture of individualism is not a necessary outcome of implementing a system of rights, they may still question the presuppositions underlying the concept of individual rights. They may see the very idea of rights-bearing individuals as an overly atomistic conception. Yet, a central aspect of Habermas's account of the system of rights provides a response to this criticism. He places the system of *individual* rights on *intersubjective* foundations:

*At a conceptual level, rights do not immediately refer to atomistic and estranged individuals who are possessively set against one another. On the contrary, as elements of the legal order they presuppose collaboration among subjects who recognize one another, in their reciprocally related rights and duties, as free and equal citizens. This mutual recog-*

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<sup>43</sup>See Adamantia Pollis, "Cultural Relativism Revisited: Through a State Prism," *Human Rights Quarterly* 18 (1996): 332-34. She discusses this aspect of Japanese society, though she views it as validating the East Asian contention that their societies are at odds with Western ideas. For an account that disputes the abstract dichotomy between the "individualist West" and "communitarian Asia," see Tatsuo Inoue, "Liberal Democracy and Asian Orientalism," in Bauer and Bell (eds.), *The East Asian Challenge for Human Rights*, pp. 27-59.

dition is constitutive for a legal order from which actionable rights are derived.<sup>44</sup>

Thus, although actionable rights are attributed to individuals, the discourse-theoretic understanding of rights places them on the intersubjective foundations of a legal order. It does not start with the moral rights of isolated individuals. The above criticism of the individualism of rights depends heavily on viewing rights in terms of “possessive individualism.” But that is not the only strain of Western political thought. Habermas rejects that interpretation of rights because it fails to account for the “community of law” that is presupposed by the moment of mutual recognition in the granting of rights. He argues that

possessive individualism fails to recognize that legally protected individual rights can only be derived from the pre-existing, indeed intersubjectively recognized norms of a legal community. It is true that individual rights are parts of the equipment of *legal* persons; but the status of legal persons as rights-bearers develops only in the context of a legal community [*Rechtsgemeinschaft*] which is premised on the mutual recognition of its freely associated members.<sup>45</sup>

One of the main lines of argument of *Between Facts and Norms* focuses on the intersubjective foundations of rights in arguing that individuals only appear as rights-bearing legal persons in the context of a “community of law.” This reading of rights, which attempts to reconcile individual and community at the conceptual level, offers an alternative to both atomistic individualism and a strong version of communitarianism.<sup>46</sup>

A further question, however, is why non-Western societies should accept the individualistic form of law as it developed in Western societies. That is, in spite of this account of the intersubjective foundations of law, the idea of individual rights may still be viewed as an import from Western traditions. Habermas relies on the functional argument in this context. Relying on the formal aspects of law that I addressed earlier, he argues that the individualistic form of law is functionally necessary in

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<sup>44</sup>Habermas, *Between Facts and Norms*, p. 88.

<sup>45</sup>Habermas, “Remarks on Legitimation through Human Rights,” pp. 125-26.

<sup>46</sup>One might raise the further objection that Habermas’s idea of mutual recognition still depends on the ontological priority of individuals over social groups. Habermas anticipates this objection by emphasizing the dialectical relation between individuation and socialization: “The choice between “individualist” and “collectivist” approaches disappears once we approach fundamental legal concepts with an eye toward the dialectical unity of individuation and socialization processes. Because even legal persons are individuated only on the path to socialization, the integrity of individual persons can be protected only together with the free access to those interpersonal relationships and cultural traditions in which they can maintain their identities” (ibid., p. 126). For more on Habermas’s dialectical account of individual and society, see Jürgen Habermas, “Individuation through Socialization: On George Herbert Mead’s Theory of Subjectivity,” in *Postmetaphysical Thinking: Philosophical Essays* (Cambridge, Mass.: MIT Press, 1992). I thank Ciaran Cronin for raising this issue.

complex modern societies. One aspect of individual rights is that they protect the individual's private conduct from the moral scrutiny of others. This form of law is

tailored to the functional demands of modern economic societies, which rely on the decentralized decisions of numerous independent actors ... Legal certainty, for example, is one of the necessary conditions for a commerce based on predictability, accountability, and the preservation of trust. Consequently, the decisive alternatives lie not at the cultural level but at the socioeconomic level.<sup>47</sup>

By locating the argument here, Habermas is able to deflect, to some extent, criticisms that rely on culture-based arguments that claim individual rights are contrary to certain cultural traditions.<sup>48</sup> With an appeal to the individualist form of law as functionally necessary, he can defend it without appealing to this system of law as somehow normatively superior. Granted, this argument relies to some extent on the empirical claim that this particular form of law is functionally necessary for the success of any modernizing society. Yet, even without evaluating the empirical claim, this argument shifts the burden of argument back on those who would claim that even though East Asian societies, for example, have rapidly modernized many sectors of their societies, it would still be contrary to their communal traditions to implement a rights-based legal system. Modern labor markets and economies seriously disrupt traditional ways of life. Once the decision to modernize has been made, the grounds for arguing in terms of maintaining communal ways of life quickly disappear.

#### **4. Concluding Remarks: On the Global Realization of Human Rights**

I would like to conclude with some remarks on how Habermas's conception of human rights relates to the global realization of human rights. Habermas differentiates between the system of rights in the abstract, as a set of legal principles, and the context-dependent readings found in historic constitutions. But what does this mean for realizing human rights on a global scale? One way to achieve this aim is through multiple realizations of the same system of rights. How the system of rights, as a framework, gets spelled out as a particular schedule of rights within a given country depends on the political circumstances of a specific society. I began to discuss this issue in the last section. At the global level, it is

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<sup>47</sup>Habermas, "Remarks on Legitimation through Human Rights," p. 124.

<sup>48</sup>After all, individual rights are also contrary in many ways to the premodern cultures of the West, and equal rights for all have only been won within the West through a long history of political struggle, often against ingrained traditions.

important to note that while Habermas's account of the system of rights is an idealization based on 200 years of constitution-making within various Western nation-states, it is not, in principle, limited to national political communities. Presupposing only the discourse principle and the modern form of law entails that the same system of rights comes into play for any political community that attempts to legitimately regulate its common life through the medium of law, be it a national, regional, or global community. This leads to another path for the global realization of the system of rights—some form of global legal order.

On the one hand, Habermas's account of a "community of law" as the foundation for human rights might appear overly idealized at this point, with no real purchase yet in the form of a global community of law, based on the mutual recognition of individuals. On the other hand, some types of law, such as commercial and trade law, already establish a global community of law in another sense. Unfortunately, this form of legal community, with its often-harmful effects upon the excluded and exploited, is outstripping the normative features of a community of law founded upon effective human rights. Rather than refute Habermas's model, perhaps this global extension of law to various spheres of the global economy simply reinforces the need for a global politics of human rights as a response.<sup>49</sup> Furthermore, with the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Social, Economic, and Cultural Rights (1966), the rights of individuals have achieved international recognition—part of the post-WWII "juridical revolution" in international relations. Greater protection of human rights—part of an evolving "enforcement revolution"—also depends upon the further development of impartial mechanisms of enforcement (e.g., the International Criminal Court), some of which are tied to supranational forms of governance (e.g., the European Court of Human Rights).<sup>50</sup> From the perspective of a discourse theory of human rights, a key issue here is evaluating the democratic legitimacy of these regional and global human rights regimes. Habermas has already addressed such issues with some specific proposals for institutional reform that might address the "democratic deficit" involved in regional and international governance.<sup>51</sup>

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<sup>49</sup>For more on Habermas's own account of the "politics of human rights" as the necessary political response to the effects of economic globalization, see Habermas, "The Postnational Constellation and the Future of Democracy."

<sup>50</sup>On the juridical, advocacy, and enforcement revolutions as part of the postwar reordering of international relations, see Michael Ignatieff, *Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton: Princeton University Press, 2001), esp. pp. 5-12.

<sup>51</sup>For his suggestions on reforming the international system see Habermas, "Kant's Idea of Perpetual Peace," esp. pp. 171-86. Regarding the European Union see Jürgen Habermas, "Why Europe Needs a Constitution," *New Left Review* 11 (2001): 5-26. For an



Another important question, however, is to what extent does his account of abstract categories of rights offer any guidance in developing actual schedules of human rights? One way to address this is to see how the categories of rights, reconstructed in terms of the constitutional state, relate to the global human rights regime. Any schedule of rights that cannot be read as a specification of these categories or legal principles would violate the performative constraints implied in an attempt to legitimately make use of the medium of law. Since the basic categories include rights to equal individual liberties and political rights, along with social and economic rights, any schedule of rights that implements only one of these categories can be critically evaluated as a one-sided interpretation of the system of rights. Specifically, Habermas is critical of the claim, often made in the context of the Asian values debate, that social and economic rights ought to be granted priority over civil and political rights. In response, Habermas argues that “from a normative standpoint, according ‘priority’ to social and cultural basic rights does not make sense for the simple reason that such rights only serve to secure the ‘fair value’ (Rawls) of liberal and political basic rights, i.e. the factual presuppositions for the equal opportunity to exercise individual rights.”<sup>52</sup> While this may look as if Habermas grants priority to liberal and political basic rights, he would likewise be as critical of a one-sided attempt to implement only the classic liberal rights. He lays out the system of rights such that the content of classical liberal rights can only be justified through political elaboration (and thereby presuppose equal political rights); and since exercising liberal and political rights requires a certain level of material equality, social and economic rights must be guaranteed as well. While Habermas has said that the *category* of social and economic rights “can be justified only in relative terms,” that is not to say that the *implementation* of any one category of rights should be granted priority over the implementation of any other category. That is, a relative priority at the level of justification (or the order of explication) ought not to be reflected at the level of implementation.<sup>53</sup> This conceptual point about priorities does not eliminate the possibility of conflicts between particular rights in practice; but that is an issue to be worked out within the system of rights and not at the level of categories.

Second, Habermas insists that moral arguments be brought into the process of justifying human rights. Therefore, there are clearly moral constraints on the interpretation of human rights and not all interpreta-

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account that argues for the interrelation of human rights and democracy and suggests that their joint promotion is a realistic goal see Ciaran Cronin, “Toward a Realistic Utopia of Human Rights and Global Democracy” (unpublished ms., 2001).

<sup>52</sup>Habermas, “Remarks on Legitimation through Human Rights,” p. 125.

<sup>53</sup>I thank David Ingram for pressing me to respond to this point.

tions of human rights are valid. Taking the first category of basic rights as an example, Habermas states that

the classic liberal rights—to personal dignity; to life, liberty, and bodily integrity; to freedom of movement, freedom in the choice of one's vocation, property, the inviolability of one's home, and so on—are interpretations of, and ways of working out, what we might call a "general right to individual liberties."<sup>54</sup>

The interpretation of the system of rights in the West has a history in which moral arguments have been set out in favor of such rights, which are supposed to be in the equal interest of all. Different, and potentially conflicting, interpretations of the system of rights are not just a matter of debate between the West and the non-West. For example, the dispute over whether the death penalty is consistent with a right to life is a matter of great dispute *within* the West, between the United States and the many European countries that have banned capital punishment. But if cross-cultural dialogue is to add legitimacy to a global human rights regime, then Western interpretations of human rights also need to be evaluated in non-Western contexts in order to see whether such rights can be supported from within various non-Western perspectives as well. Likewise, arguments raised from within non-Western contexts may draw attention to blindspots within Western traditions. This process has actually been underway since at least the planning meetings that were held to draft the Universal Declaration of Human Rights.<sup>55</sup>

Meaningful cross-cultural dialogue must involve more than taking government leaders as sole spokespersons for their cultures. It means that democratic institutions must take root sufficiently to allow those affected the chance to participate in an intra-cultural dialogue in order to develop their own interpretations of what their traditions can or cannot support. In order for *inter*-cultural dialogue to bring legitimacy to a consensus on a broad range of human rights, a variety of *intra*-cultural dialogues need to be undertaken and sustained in a way that protects those who undertake them. Of course, the freedom to carry out such an endeavor requires the implementation of many of the very same rights, such as freedom of expression, that are the object of discussion.<sup>56</sup> As this process of dialogue

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<sup>54</sup>Habermas, *Between Facts and Norms*, pp. 125-26.

<sup>55</sup>For excellent accounts of the drafting process see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999), and Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

<sup>56</sup>Abdullahi An-Na'im proposes such an endeavor to "explore the possibilities of cultural reinterpretation and reconstruction through *internal cultural discourse and cross-cultural dialogue*" in his account of a cross-cultural approach to human rights. See Abdullahi An-Na'im, "Introduction," in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, ed. Abdullahi An-Na'im (Philadelphia: University of Pennsylvania

and interpretation increases at the global level—within an emerging global civil society—it is not yet clear what new insights may be gained. More important at this point, perhaps, is that democratic rights and institutions be established that safeguard those who attempt to reinterpret their traditions, rather than leaving this to authoritarian rulers or religious leaders who claim the sole authority to interpret tradition. This is one of the strengths of Habermas's account of realizing the system of rights as a project of *democratically* elaborating and expanding the content of human rights, whether nationally or globally.

This interpretation of Habermas's position on human rights brings together and extends various strands within his work. In sum, Habermas recognizes a duality in the concept of human rights in relation to law and morality, locates the intersubjective foundations of rights within a community of law, and emphasizes the need for a discursive elaboration of human rights as a comprehensive system of rights.<sup>57</sup>

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Press, 1992), p. 3. Likewise, he argues that the existing international standards of human rights are important, not only as a point of reference for such dialogue, but also as protection for scholars and activists who attempt the process of reinterpreting their own cultural traditions. For An-Na'im's attempt to reinterpret Islam as consistent with human rights and constitutional democracy, see Abdullahi An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, N.Y.: Syracuse University Press, 1990).

<sup>57</sup>I thank Tom McCarthy, Ciaran Cronin, Derrick Darby, Rainer Forst, and two anonymous reviewers for this journal for helpful comments on earlier drafts of this paper. The audience of the 9th Annual Critical Theory Roundtable (California State University, Hayward, 27 October 2001), in particular David Ingram, provided valuable discussion of an earlier version of the paper. I also thank Matthias Lutz-Bachmann and Pablo Gilabert for helpful discussions of various issues raised in the paper.