LEGITIMACY AND STABILITY IN THE ERA OF GLOBALIZATION: TOWARD A POLITICAL CONCEPTION OF HUMAN RIGHTS

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by
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Abbreviations Used in Text and Notes

BFN	Habermas *Between Facts and Norms*
DA	Seyla Benhabib *Diginty in Adversity*
IHR	Charles Beitz *The Idea of Human Rights*
LoP	Rawls *The Law of Peoples*
PL	Rawls *Political Liberalism*
PNC	Habermas *Post National Constellation*
RTJ	Rainer Forst *The Right to Justification*
RO	Seyla Benhabib *The Rights of Others*
TCA	Habermas *Theory of Communicative Action*
TJ	Rawls *A Theory of Justice*

DEDICATION

In memory of Burliegh Wilkins

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Megan Foster

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CHAPTER 1

Human Rights

"Ours is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance."

Louis Henkin, *The Age of Rights,* 1990

"Our Age is the age of criticism to which all must submit. Religion through its sanctity and legislation through its majesty may seek to exempt themselves from it. But they then awaken just suspicion and cannot claim honest respect which reason only grants to that which has been able to sustain the test of its free and public examination."

Emmanuel Kant, *Critique of Pure Reason,* 1871

We live in an era marked by globalization. Whether or we view this as a positive thing, it is now an undeniable fact. The era of globalization is characterized by an unprecedented interaction and interdependence among people across the world. We are brought together as geopolitical distances are shortened through technology, and the world's economies become more and more interconnected. We are now increasingly subject to the same risks from new forms of war and terrorism, volatile environmental conditions brought on by global warming and the spread of infectious disease. These may truly seem like volatile times, as the scope of inequality in the global space continues to

widen, and the mass migration of individuals fleeing war and poverty has forced those in affluent countries to confront the realities of our deeply unjust world head on. But globalization has brought positive changes as well: the spread of international human rights has provided a powerful tool for marginalized individuals and groups in the fight against illegitimate forms of oppression around the world. New civil society organizations and NGOs are able to connect interest groups across national borders, giving a voice to the formerly voiceless. It may well be the case that we are on the precipice of a turning point in history, which James Roseneau once powerfully described as "a juncture where the opportunities for peaceful cooperation, expanded human rights, and higher standards of living are hardly less conspicuous than the prospects for increased group conflicts, deteriorating social systems and worsening environmental conditions."[1] Either set of arrangements, or both could evolve as the international community comes to terms with the changing global order.

This dissertation is a contribution to the political philosophy of human rights, and is motivated by two observations. The first is that the processes of globalization have elicited the need for institutional human rights in a manner that the drafters of the treaties and covenants of international law most likely could have never imagined. While human rights played an important role in maintaining the peace and security of the international order in the post war period, until recently international human rights (as legal entitlements) did relatively little to impact the lives of citizens. This remark may sound cynical and needs to be qualified. While the language of human rights has had an emancipatory effect on countless individuals and groups, allowing them to demand recognition and fight against unfair social practices, it was their national governments on which they put pressure and their governments who finally granted them their rights. Rights in general protect the important interests of individuals and shield them from arbitrary domination by illegitimate

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[1] James N. Rosenau and Ernst Otto Czempiel, *Governance without Government : Order and Change in World Politics*. Cambridge University Press, (1992) 1

power. In a world of largely independent separate states, constitutional rights served this important function. However, with the erosion of clear borders separating markets, states, and political communities, both the factors that threaten individual interests and the ability to protect them escape the confines of the national apparatus.[2] Something like international human rights are needed to ensure that individuals interests remain protected and to put a check on arbitrary power. In the international treaties and covenants, the rights that could mitigate threats that individuals face in the global era are formally available to all citizens everywhere, but in practice the international enforcement mechanisms still rely almost entirely on the state. In order for international human rights to better compliment the function of national constitutional protections, the human rights regime must move in a more cosmopolitan direction.

This means a theory of human rights, which starts from an observation of the balance of power in the global arena must take the perspective of cosmopolitan realism. *Realism* in international relations (IR) and political theory came into discourse in reference to the need to study international politics as they are, not as we feel they should be.[3] So this may seem like a questionable starting point for a conception of human rights. Many contemporary definitions of realism in IR and political theory tend to associate it with two primary features: a central focus on the state and a general repugnance toward talk about 'political morality'. Neither of these assumptions is entirely correct. While early realists certainly did place methodological and analytic primacy on the state, this emphasis was

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[2] Niklas Luhmann, 'Globalization or World Society: How to Conceive of Modern Society?', *International Review of Sociology*, 1997 <https://doi.org/10.1080/03906701.1997.9971223>; Ulrich Beck, 'Reframing Power in the Globalized World' (Springer, Cham, 2014), pp. 157–68 <https://doi.org/10.1007/978-3-319-04990-8_13>; Florian. Wettstein, *Multinational Corporations and Global Justice : Human Rights Obligations of a Quasi-Governmental Institution* (Stanford Business Books, 2009).

[3] Hans J. Morgenthau, 'Politics Among Nations. The Struggle for Power and Peace', *Politics Among Nations. The Struggle for Power and Peace*, 1960 <https://doi.org/10.2307/2086875>; Eh Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations*, *The Twenty Years' Crisis*, 1964 <https://doi.org/10.1057/978-1-349-95076-8>. GRAYSON KIRK, The Study of International Relations in American Colleges and Universities. New York: Council on Foreign Relations (1947)

grounded in empirical observation. [4] The need to be more realistic about politics in the first place, has everything to do with power. When Morgenthau and Carr wrote their influential theories, states were the locus of power in the international arena. But in the global era, power and politics have moved beyond the state. Thus the methodological-normative approach of cosmopolitan realism takes the interconnectedness and interdependency of the global arena as given. As Ulrich Beck—who coined the term—writes:

> Cosmopolitan realism focuses not only on the crucial role of global economic power and global business actors in relations of cooperation and competition among states, but also on the strategies of transnational civil society movements.[5]

Because realist theory is particularly attuned to the way that power tends to cloak itself in moral language and use ideology to advance its ends, it is sometimes assumed that morality has no place in international relations. In Carr's words [6]''it is an unreal kind of realism which ignores the element of morality in any world order.'' Power is the essence of any political order (domestic or international), but power that lacks a moral backing is futile. This is because humans are moral beings, which leads us to demand that power be backed by moral reasons. We are, in Rainer Forst's words "essentially justificatory beings".[7] In this sense we can regard human rights as a vital component in a realistic conception of global justice.

This leads me to the second motivating observation, that if international human rights are to take up this important function of protecting individual interests and mediating power in the global arena, then the issue of their legitimacy deserves careful consideration. Legitimacy goes beyond a mere *de facto* acceptance of authority—the laws and customs of the international human rights regime must be understood as deserving of respect.

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[4] Samuel Barkin, *Realist Constructivism*, *Realist Constructivism*, 2010 <https://doi.org/10.1017/CBO9780511750410>.

[5] Ulrich Beck, *Power in the Global Age : A New Global Political Economy* (Polity, 2005).

[6] Carr. 235

[7] Seyla Benhabib and others, 'The Right to Justification by Rainer Forst', *Political Theory*, 2015 <https://doi.org/10.1177/0090591715607259>.

Legitimacy has both a normative and a sociological component which go hand and hand. To say that an institution is legitimate in the normative sense means it has the right to rule, an institution is legitimate in the sociological sense when it is perceived as having the right to rule by those individuals and groups under its authority.[8] Public justification is the link between the normative and sociological components of legitimacy, in so far as it seeks to offer widely acceptable reasons why laws and institutions are deserving of respect. It is exactly in the area of public justification in which the international human rights regime is lacking. This is not only a problem for philosophers, but in so far as it is a vital component of political legitimacy threatens to undermine the stability of the international human rights regime at a time when we desperately need it. It is not only that the political and legal infrastructure that supports human rights needs to be seen as legitimate, but the global order itself which may be legitimated through human rights.

Philosophers have recently begun to respond to the so called "justification deficit"[9] in international human rights by proposing various philosophical theories of the nature of human rights. The most interesting of these theories take a 'political' approach to theorizing about human rights, in which issues of their institutional realization and ability to effect real change in the global arena are given significant weight in the theory. These theories are often contrasted with the 'traditional' approach to human rights, which relies on significantly weighty moral reasons for their justification. There are good reason for avoiding a moral notion of human rights, especially one which doesn't take real world considerations into account. The the reasons usually cited are that this approach tends to be parochial—relying on a moral theory that may not be acceptable from the standpoint of the diverse cultural and philosophical perspectives we find around the globe. It is also claimed traditional accounts of human rights focus on what should be, at the expense of

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[8] Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions', *Ethics & International Affairs*, 2006 <https://doi.org/10.1111/j.1747-7093.2006.00043.x>.

[9] Allen Buchanan, 'HUMAN RIGHTS AND THE LEGITIMACY OF THE INTERNATIONAL ORDER', *Legal Theory*, 2008 <https://doi.org/10.1017/S1352325208080038>.

what is actually possible. To be sure, when philosophers advance these more realistic conceptions they don't think we should resign ourselves to the present circumstances of injustice, they aim to do what we can, given present circumstances, with the hope that this will set in motion a positive change over time. The tend to be, in Rawls' words, 'realistically utopian'. [10]

1.1 The Justification for Human Rights: some preliminaries

The preamble to the Universal Declaration of Human Rights begins with the assertion that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". This wording is strongly suggestive of the understanding of human rights as 'natural rights' which was popularized in the context of the European Enlightenment. Human rights grounded in the essential dignity of the individual were vital to the Enlightenment project of rebuilding the social order in the decline of the traditional social hierarchies in Europe. In traditional societies the monarch was sovereign, his authority vested by god, the ultimate sovereign. The norms of society and the structure of collective organization depended on his decree alone. The decline of the traditional social hierarchies opened up a space for a critical evaluation of the structure of social organization. The political legacy of the Enlightenment lies in the attempt to uncover a rational basis for life in collective society—one ordered not by the arbitrary whim of a hereditary sovereign but one which is premised on the dictates of logic and reason. To this end the giants of liberal thought—Kant, Rousseau, and Montesquieu for example—imagined a social order in which the autonomous individual is sovereign, an equal author in the laws that bind him and the ultimate source of authority corresponded to the will of the people as *pouvoir constituant*. A social order founded on autonomy—one where each individual is an equal

[10] LoP 6

author of the laws that bound him—depended on rights to guarantee the equal basis of authorship. As enabling conditions for autonomy, rights secure the rational basis for collective life in society. Given the importance of fundamental rights for life in a collective society if it is to be ruled in a non-arbitrary way the language of dignity, and equal rights inherent in nature provided the strong basis on which to secure this construction.

The idea that every man was born equal and worthy of concern, meant no longer would he be subject to arbitrary rule and all the legal infrastructure of a constitutional democracy made sure of this—his rights secured his authorship of the general will. The drafters of the revolutionary documents—The French *Déclaration des droits de l'Homme et du citoyen* and the American *Bill of Rights* —that codified rights justified them in reference to our dignity, and equality by birth. The appeal to the nature of things was authoritative, there no need for qualification was perceived. Although liberal rights and constitutions set the stage secularism[11] the reference to nature is by most accounts a tacit reference to god.

The transformative social movements paralleled scientific and technological advancements of unprecedented magnitude as the same reflective and creative spirit which lead us to question the traditional social order drove us to explore every aspect of the physical and spiritual universe. Scientific and technological advancement as well as colonial expansion brought new experiences that would fundamentally alter the way the Western world understood itself, as science continued to explain phenomena once thought to be the provenance of religion and the and the expansion of the horizons of the European universe to a plurality of belief systems and values. The philosophical legacy of the enlightenment, with its utopian vision of a rational basis for social cooperation began to falter and wane. As Habermas has observed, the forces of critical reflection unleashed by the Enlightenment turned back on themselves—even the reason itself was called into

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[11] in Europe with the aim quelling religious warfare and wrest control away from the Catholic church and in America where the memory of religious persecution was a foundational value of the republic

question. With the holocaust any hope of a teleological conception of history in the form of a Kantian democratic peace or a Hegelian unfolding seemed hopelessly naïve. Positivist philosophy fell into decline, replaced by hermeneutics on one side and analyticity on the other, and grand moral projects gave way to the modest hopes of pragmatism or the hopelessness of skepticism and all out nihilism. This philosophical crisis was paralleled by an ever widening plurality of value systems as new political orders entered into the global political arena. These new states, many of them former colonies had not had time to grow disenchanted with the Enlightenment narrative—some embraced it (some had no choice) others were suspect from the beginning. Many were too busy surviving to give it much concern.

It was precisely in this context that the UNDHR was drafted, affirming that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Its drafters relied on the same Enlightenment language of natural rights as if several centuries of societal experience and intellectual development had never occurred and our inherent dignity grounded in 'nature' could still be taken for granted. This observation is precisely what lead James Griffin to the controversial claim that there has been no substantial theoretical development of the idea of human rights since the enlightenment. [12] The framers of the revolutionary documents and constitutions of the 18th century used the language of dignity and nature because because they recognized the fundamental importance of rights for collective life in a liberal society, and the language that suggested their presocial and inalienable nature gave them the conceptual and normative force they required. Their drafters described a world where, if human beings found their civil and political rights as citizens were taken away, they could still appeal for protection on the basis of their rights as human beings. Beneath the civil and political, in other words, stood the natural.[13]

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[12] Griffin 13-14

[13] Ignatieff *Human Rights as Politics and as Idolatry* 338

There is considerable debate surrounding the question of why the UN Commission on Human Rights chose to use natural rights language in its foundational document and what, if any impact this should have on the way we understand international human rights today. Was the Enlightenment language simply a convenient reference to well known documents or should we read further into the moral import of the Enlightenment legacy? Whatever the reason the language of natural rights and their legacy in the European Enlightenment has been both a blessing and curse for the international human rights movement.

The natural rights legacy is a blessing because it has provided a widely accepted moral language to critique existing social practices. The language of human rights has been taken up in the struggles of marginalized individuals and groups across the globe, as a language of emancipation and demand for recognition. The the language of human rights poses political demands—to be recognized as rights holders with institutional protections—it also points beyond the law. This is why, for example, blacks in the American South prior to the civil rights revolutions or in South Africa under apartheid, could claim meaningfully a right to be treated equally, even when their governments didn't recognize such a right. The universalizing language of human rights has allowed individuals everywhere to shed light on unfair social practices, and helped to bring local struggles against oppression into the international spotlight. In this way the language of human rights has become an invaluable tool to critique unfair social practices and illegitimate forms of domination everywhere.

The Enlightenment legacy is a curse for human rights because in some areas of the globe, where colonial domination is still a raw and recent memory it will always harken back to the 'civilizing missions' of Christianity that accompanied colonial expansion. Further, the focus on autonomy embodied in the Enlightenment ideal is distasteful to many people, either because they don't experience or value it in the same way as we 'Europeans', or because they generally associate it with the other biggest Western export: the (value) free market. The latter goes to a second point that is important to stress here—much of the

skepticism about the values of freedom and equality that underpin human rights is not skepticism about those values as such. It is rather, a wariness of how those values are *used*.

1.2 Liberalism: Political, Economic and Philosophical

Political liberalism is often associated with its economic variant and of course there are several points of overlap. They share in the methodological starting point of the self interested rational actor and the idea that sphere of individual activity should be cajoled, rather than coerced toward collective goods. The most persistent form of skepticism about political liberalism— in public opinion as much so as in academic circles— is its link with free market liberalism and consumer capitalism. Neo-nationalist and neo-protectionist movements around the globe, form Orban's Hungary to Trump's America, propose patently illiberal social policies (in combination with economic ones) as a stalwart against the detrimental effects of the unfettered forces of global capitalism.[14] In the context of the philosophical discourse on international political theory and global politics, communitarian, post modern and post colonial critiques of political liberalism[15] all point to its atomization and its emphasis on property rights as the harbingers of global capitalism. Philosophical liberalism even in its most austere form doesn't escape this harsh critique. In the wake of the successful spread of both political and economic liberalism, philosophical liberalism is unmasked as nothing more than an ideology: with its pretense to neutrality and toleration it conceals the political and economic objectives of the dominant group.[16] These criticisms have not entirely missed the mark— since the end of the Cold War, both the liberal democratic model of political organization and free-market capitalism have spread like wildfire to the farthest reaches of the globe. While the world has witnessed the

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[14] http://theconversation.com/how-anti-globalisation-switched-from-a-left-to-a-right-wing-issue-and-where-it-will-go-next-90587; https://www.project-syndicate.org/commentary/trump-protectionism-no-help-for-workers-by-kaushik-basu-2017-02?barrier=accesspaylog

[15] I am using 'political liberalism' here not in the Rawlsian sense but as a broad term to refer to liberal orders. For an overview of what makes a political or economic order liberal see: Michael Freeden, 'Ideology and Political Theory', *Journal of Political Ideologies*, 2006 <https://doi.org/10.1080/13569310500395834>.

[16] See the section 'Forms of Scepticism' in the next chapter

emancipatory and transformative effects of liberal democracy, it has also born witness to failed processes of nation building, violent and ultimately stillborn revolutions and military interventions carried out in its name. At the same time the world has witnessed the spread of global capitalism, and the starkly contrasted impacts of improved economic conditions in some areas and devastating environmental and social degradation in others. Contradictions like these seem to be almost inherent in the liberal global paradigm: as the percentage of the world's population living in abject poverty appears to have decreased in recent decades, global inequality is on the rise as more and more of the world's economic resources become concentrated in the hands of fewer and fewer powerful people. As economic globalization continues to widen the gap between the haves and the have-nots, innovations in communication technology— the widespread availability of smartphones and social media— allow the have-nots to look on as the so-called "winners of globalization" enjoy their spoils. Can we really blame them for their frustration with the dominant political and economic paradigm?

Philosophically this crisis in liberalism was anticipated from a long way off by communitarians, critical theorists and Marxists of all variety, who warned that liberalism was doomed to subvert itself: its insistence on freedom at all costs would ultimately be its undoing. Already in the 1940s Max Weber, argued that increased rationalization of social life in Western capitalist societies subsumed individuals in systems ruled by efficiency and technological control. The ordering of modern societies had become "bound to the technical and economic conditions of machine production which to-day determine the lives of all the individuals who are born into this mechanism" trapping them in the "iron cage" of rationality.[17] Max Horkheimer and Theodore Adorno, identified a central problem of modern society in the unbalanced expansion of purposive rational agency and the technical interest in control. "The individual" they warn in the *Dialectic of Enlightenment, "*is entirely nullified in face of the economic powers [which are] taking society's domination

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[17] Max Weber *The Nature of Social Action* (1922) 7

over nature to unimagined heights. While individuals as such are vanishing before the apparatus they serve, they are provided for by that apparatus and better than ever before."[18] Why then, should we even consider a political conception of human rights as a way to mediate power and protect individual interests? Given that the insistence on equality and universalism tends to flatten differences in a world that is pervades by unequal distributions of power, might it not be better to abandon the project all together and take up instead a radical social critique?[19] To understand why a political conception of human rights is still a valuable project is to rethink the relationship between the political, economic and philosophical aspects of liberalism. I want to argue that the political and philosophical component are not, respectively, the harbinger of and apology for economic liberalism, but its necessary corrective.

With his Hegelian account of a teleological unfolding, Francis Fukuyama triumphantly announced 'the end of history' in 1992 with the arrival of global Capitalism. Twenty-five years later we've stopped holding our breath, and even the author himself admits his position was deeply flawed.[20] He was, however, correct about the pervasiveness of global capitalism if not its utopian outcome. Addressing the US Chamber of Commerce in 2013, Managing Director of the IMF Christine Lagarde discussed the interconnectedness of the global economy. She noted that since 1980, the volume of world trade had increased fivefold. She also discussed "the rapid acceleration of financial integration", and pointed out that immediately prior to the crisis in 2008, "global capital flows were more than triple

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[18] Horkheimer, M., Adorno, T. W., & Cumming, J. (1972). *Dialectic of enlightenment*. New York: Herder and Herder. xvii

[19] S Zizek, 'Against Human Rights', *New Left Review*, 2005; Kenneth Baynes, 'Rights as Critique and the Critique of Rights: Karl Marx, Wendy Brown, and the Social Function of Rights', *Political Theory*, 2000; Wendy Brown, The Most We Can Hope for ?: Human Rights and the Politics of Fatalism', in *Wronging Rights?: Philosophical Challanges for Human Rights*, 2012

[20] https://www.newyorker.com/magazine/2018/09/03/francis-fukuyama-postpones-the-end-of-history

their level in 1995".[21] With this report Legarde stressed the possibility to take advantage of the interconnectedness of the global economy, suggesting that according to IMF analysis of 'spillovers'[22] if the world's "five major economies were to work together to adopt a more rigorous, comprehensive and compatible set of policies, it would increase global GDP by about 3 percent over the longer run." But the integration of the global market carries risks as well. Markets are notoriously unstable and prone to downturns, this is no less true of the global economy as the 2008 crisis and its aftermath are a testament. In the global economy, as in all economic arrangements actors are prone to cheat.[23] Unlike in domestic societies however, it is easier for 'cheaters' to escape regulation. This can be done by shifting operations around to exploit tax loopholes, or take advantage of lax labor or environmental regulations. This exploitation of minimal regulatory standards also has the unfortunate outcome of inciting states into a global 'race to the bottom' which harms their individual citizens.[24] In 2000 the widely acclaimed political economist Robert Gilpin wrote

> The international capitalist system could not possibly survive without strong and wise leadership. International leadership must promote international cooperation to establish and enforce rules regulating trade, foreign investment, and international monetary affairs. But it is equally important that leadership ensure at least minimal safeguards for the inevitable losers from market forces and from the process of creative destruction; those who lose must at least believe that the system functions fairly[25]

The widespread skepticism about globalization, and the populist and national protectionist movements in Europe and America can be interpreted in light of this insight:

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[21] I mention Legarde's analysis here because cosmopolitan philosophers and sociologists are often accused of overstating the interconnectedness of the world's economy.

[22] How actions taken by one country effect another

[23] A. G. Malliaris, Leslie Shaw, and Hersh Shefrin, *The Global Financial Crisis and Its Aftermath : Hidden Factors in the Meltdown*

[24] Ronald B. Davies and Krishna Chaitanya Vadlamannati, 'A Race to the Bottom in Labor Standards? An Empirical Investigation', *Journal of Development Economics*, 103.1 (2013); David Ingram, 'Of Sweatshops and Subsistence: Habermas on Human Rights', *Ethics and Global Politics*, 2009.

[25] Robert. Gilpin and Jean M. Gilpin, *The Challenge of Global Capitalism : The World Economy in the 21st Century* (Princeton University Press, 2000).

the losers of global capitalism do not feel the system functions fairly. The problem with the international law as it relates to the global financial market, is that while it provides the necessary assurances for economic actors (governments and powerful corporations) to promote international cooperation and facilitate trade, the safeguards that might protect individuals, especially those in poor nations, against the 'negative externalities' global economic cooperation are completely lacking. While companies can sue national governments with relative ease, individuals who have grievances against multinationals which degrade their lives and environments often have difficulty finding a court with jurisdictional authority to hear their claims.

1.3 The problem with the status quo

In an episode that is now widely discussed as exemplary of the morally unacceptable consequences of the state-centric distribution of human rights responsibilities,[26] President Clinton—while testifying before the Senate Foreign Relations Committee in 2010—publicly apologized forcing dramatic tariff cuts on imported subsidized U.S. rice to Haiti during his time in office. The impact of this action, which Clinton in the speech referred to as a "mistake" whose consequences he will have to "live every day with", wiped out Haitian rice farming almost entirely, seriously damaging the country's ability to be self-sufficient and feed its people .[27] His explanation for this trade policy move, which ended up in undermining Haitians' human rights (to food and economic subsistence) was that is stood to benefit rice growers in his home state of Arkansas. Intuitively, and as Clinton's need to publically apologize seems to suggest, the US appears to bear some responsibility for the policy choices which directly contributed to a humanitarian crisis the effects of which are still felt today. Yet Paradoxically, as Christina Lafont points out, "from the perspective of international human rights law, there is no specific legal obligation that Clinton failed to

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[26] Lafont 11, see also Zizek *Against the Double Blackmail*

[27] https://www.democracynow.org/2016/10/11/bill_clinton_s_trade_policies_destroyed

discharge."[28] In the language of international human rights, states have the primary obligation to respect protect and fulfill the rights of their citizens, although there are provisions for the treatment of non-citizen aliens within their territory, There are no specified obligations corresponding to individuals in other states. Despite his emphatic apology, there was actually no one to whom he was legally accountable for this mistake. We are equally unable to make sense of his apology from a political perspective, as he was in no way politically accountable to the Haitian people and therefor bore no responsibility to consider their interests.[29] With respect to the American people, and specifically his constituency in Arkansas, he did exactly what was expected of him as their political representative and struck a 'deal' that was in favor of their economic interests. Furthermore, as Lafont points out, Clinton's actions were well within the legal parameters established by the WTO.[30]

There are at least two human rights of many Haitian citizens which were compromised by the flooding of the Haitian market by cheap American rice, and while both a prima facie analysis of the situation at hand and Clinton's apology seem to suggest a moral wrong and consequent responsibility, "neither can be made sense of within the standard state-centric ascription of responsibilities for human rights protections currently recognized by the international community."[31] At this point the defender of the state-centric status quo might argue that the responsible party in this unfortunate scenario was in fact the Haitian government, who failed to protect the economic interests of its citizens thus leading to the human rights catastrophe. Here we might recall the argument from John Rawls' *LoP* where he considers whether there should be any global economic redistribution beyond that of a mere 'duty of assistance' to burdened societies. His answer is no, partially

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[28] Lafont 12
[29] Ibid
[30] Lafont 11
[31] Lafont 12

on the justification that the economic success or failure of a society is due largely to the political organization of a society.[32] If this is the case then the Haitian rice case is unfortunate, yet unproblematic from the perspective of the state-centric ascription of human rights responsibilities. Yet, in actual political practice, the straightforward assignment of responsibility is extremely unrealistic. The conditions leading up to Clinton's apology go back to the 1980s, when US policy initiatives (lobbied for by the American rice industry) "turned [an] impoverished nation of 7 million people into one of the largest markets for American rice anywhere in the world."[33]

Rice is a basic staple of the Haitian diet that can be traced back to West Africa, and has been cultivated in Haiti since its independence in 1894. At one time, Haiti had a strong rice industry, and until the 1980s most of the rice the nation consumed was produced by Haitian farmers. Amidst political turmoil, Haiti was pressured by the US and other international creditors to undertake trade liberalization in the 1980s. This coincided with the 1985 passage of the US Food Security Act, which heavily subsidized the U.S. rice industry. A the same time, Ronald Reagan's "Caribbean Basin Initiative" prompted a major increase in US food aid to Haiti. The Initiative aimed at integrating Haiti into the global market by redirecting 30% of Haiti's domestic food production towards export crops.[34] On the realization that this would impact the ability of rural farmers to produce food for themselves and their community as the land was converted to grow crops for exports, food aid was supposed to compensate them for their loss. The result was that as the market became increasingly flooded with cheap US rice, it was no longer economically sustainable for Haitians to farm their staple crop. This created the condition of dependency which was only made worse during the Clinton

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[32] *LoP* 108 although it is not clear whether Rawls might consider Haiti in this situation to be a burdened society

[33] https://www.washingtonpost.com/archive/politics/2000/04/13/us-haiti-trade-the-politics-of-rice/84e92c8d-6941-486a-9e32-f399b2b3259f/?utm_term=.5deb8e14ec53

[34] E Gibbons and R Garfield, 'The Impact of Economic Sanctions on Health and Human Rights in Haiti, 1991-1994.', *American Journal of Public Health*, 89.10 (1999), 1499–1504.

administration. The situation in much of Haiti became so bad that one activist observed "we are all living under a system so corrupt that to ask for a plate of rice and beans every day for every man, woman and child is to preach revolution."[35]

This situation highlights a serious problem with the global institutional structure, because, as Lafont observes, "[t]he actors who have the legal obligation to protect the human rights of their citizens – individual states – may not have the effective capacity to do so and the actors who do have the effective capacity – the WTO, IMF or the World Bank – do not have the obligation."[36] But also because it speaks to the way that economic power is so unequally distributed in the global arena that it prevents countless individuals from advancing their interests in any meaningful way. The lobbyists for the American rice industry (one of whom was directly in charge of food aid in Reagan's Cariban Basin Initiative) had no problem advancing the interests of the major agricultural conglomerates they represented. The Haitian farmers, and Haitian people generally, had no say in the matter whatsoever. [37]

1.4 The element of global justice

In so far as political and economic liberalsm are the dominant poitical ideology end economic system in the world today an investigation into rights from the perspective of a philosophical liberalism is valuable. For this reason I will begin with an investigation into the major liberal philosophical concepions of human rights, from those 'traditional' conceptions grounded in rationality, to the now widely popular 'political' conceptions which aim at a more realistic interpretation of the practice of human rights and rely on a

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[35] Jean Bertrand Aristide, https://haitisolidarity.net/in-the-news/how-the-united-states-crippled-haitis-domestic-rice-industry/

[36] Lafont 13

[37] Farmer, P. (2003), Pathologies of Power: Health, Human Rights, and the New War on the Poor. North American Dialogue, 6: 1-4. doi:10.1525/nad.2003.6.1.1

procedural method of justification grounded in public reason. These later family of conceptions are more self-conscious about their liberal leanings and take the desire to avoid the type of parochialism that has raised suspicions of both liberal philosophy and human rights. To this end, this group of theories are admirable. But as will become clear throughout the course of the discussion, in their desire to avoid parochialism they This new minimalism relaxes the claim of human rights by "cutting them off from their essential moral thrust".[38] There is a great deal of suspicion about the link between human rights and global capitalism (which I discuss in chapter 2) both in the philosophical literature and more and more often in public discourse. Human rights tend to be associated with a style of moral individualism which has a close affinity with the economic individualism of the global market. Both are suspected to advance hand in hand. [39] Very often the response to the worry about global capitalism is illiberal in a political and philosophical sense, as it involves closing off borders, taking away rights, and curtailing the free flow of information. I want to purpose another link between human rights and global capitalism, one which understands it the other way around. This point has been articulated beautifully by Michael Ignatieff (who albeit defends a wholly different account of human rights than I will set out here) who writes that the relationship between human rights and money, between moral and economic globalization, is actually one of antagonism "as can be seen, for example, in the campaigns by human rights activists against the labor and environmental practices of the large global corporations."[40] Going beyond this point, I will argue that the function of rights generally is to protect us from arbitrary forces of domination, and these must be understood as political as well as market forces. This is as true for domestic society as it is for the international one.

The standard institutionalist argument against global justice misconstrues the key insight it takes from Rawls. The institutions of the basic structure are the subject of justice

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[38] Habermas (2010) 474

[39] Ignatief human rights as politics 290

[40] Ignatief human rights as politics 290

because of the profound effect they have on the lives of individuals. It is this reason why justice is limited to institutional questions and not those of private morality. In a system of separate sovereign States the emphasis on the institutions of the state is pragmatic: it is here where the normative institutions that distribute the benefits and burdens of collective life in society are situated thus it is here that justice matters. The Rawlsian-inspired institutionalist argument against global distributive justice claims that the question of global justice simply does not arise at the global level because global distributive institutions are absent making the question of justice void. Whet these authors tend to overlook is Rawls initial starting point for focusing on institutions generally, and this is the profound effect that institutions have on the lives of individuals. Arbitrary differences in nature are not unjust, what is unjust is when these differences are perpetuated by the social organization of society.

Political/institutionalist conceptions of justice are correct that consideration of the institutional reality should constrain normative thinking from the very beginning: principles of justice are worth little if they could not, at least in theory, effect or inspire real world change. They are also correct that the appropriate justification for the ordering of institutions is tantamount to the success of this endeavor. We cannot however, pretend to be 'realistic' about justice and at the same time go on ignoring the fact that for an ever growing percentage of the world's population the problem of global *injustice* is perceived as a very real and present concern.

CHAPTER 2
Background

2.1 Literature Review

In the literature on human rights, the state of the art is to articulate various conceptions of human rights, aimed essentially at providing an answer to the related

questions of 'what are human rights? and 'what human rights are there?'. As Thomas Pogge points out, a standard conception of human rights comprises two main components:

(1) the *concept* of a human right used by this conception, or what one might also call its understanding of human rights, and
(2) the substance or *content* of the conception, that is, the objects or goods it singles out for protection by a set of human rights[41]

The first component pertains to the question of what human rights are, or in other words what the meaning of human rights, what type of object we are referring to with the words 'human rights'. The second level component is deduced from the first, as Jack Donnelly explains, "one's definition of the concept prescribes the content of one's list."[42]

In order to begin to draw the contours of the philosophical debate on human rights, it is important to draw the distinction between the *concept* of human rights and the various *conceptions* advanced in the literature. The distinction between concept and conception helps explain how many theorists are able to agree on certain core features of human rights—that they are universal in so far as being owed to every individual in every political society, especially urgent,[43] and constitute standards of international political legitimacy—yet disagree on all manner of other subjects such as which rights are to count as human rights or how obligations are to be distributed.

What virtually every scholar who undertakes a philosophical investigation of the concept of human rights agrees about is that human rights are a complex phenomenon.[44]

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[41] Thomas Pogge, 'The International Significance of Human Rights', *The Journal of Ethics*, 2000 <https://doi.org/10.2307/25115635>.47

[42] Donnely 303

[43] See….. yet it should be pointed out that not all theorists agree with the designation of HRs as especially urgent: Raz (2007:3) for example argues that "why they must be important is not clear. Neither being universal, that is rights that everyone has, nor being grounded in our humanity, guarantees that they are important."

[44] Forst (2010): 711, Flikschuh 655, Douzinas *Human Rights and Empire* 8-9

What should be stressed here, is this is not, at first blush due to deep-seeded philosophical disagreements about the nature of human rights, or the appropriate means to their realization, but rather stems from the semantic and semiotic openness of the term.[45] As the critical legal scholar Costas Douzinas explains, the 'human' in human rights is a 'floating signifier', resulting in a broad and underdetermined concept .[46] Due to its broad scope and reach, the term's semantic value and field of reference are able to accommodate diverse practices and discourses, some of which may even be in conflict with one another. As Katrin Flikschu, who has also undertaken a conceptual analysis of human rights writes with an air of frustration "the practical concept of human rights appears at times to be treated as infinitely capacious. "[47] In fact, we might even say that human rights fall into the category of what Gallie referred to as an essentially contested concept.[48] This is because human rights, in theory as well as in practice mean so many different things. Human rights are discussed in different ways in the literature in areas of, international law, jurisprudence, international relations, development studies, sociology, environmental and biomedical ethics, and many other related fields.[49]

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[45] Douzinas 8, Flikschuh 655

[46] Douzinas 8

[47] Flikschuh 655

[48] W B Gallie, 'Essentially Contested Concepts', 1956 <https://academic.oup.com/aristotelian/article-abstract/56/1/167/1793543>

[49] Edward H. Allison and others, 'Rights-Based Fisheries Governance: From Fishing Rights to Human Rights', *Fish and Fisheries*, 2012 <https://doi.org/10.1111/j.1467-2979.2011.00405.x>; Shannon Kindornay, James Ron, and Charli Carpenter, 'Rights-Based Approaches to Development: Implications for NGOs', *Human Rights Quarterly*, 2012 <https://doi.org/10.1353/hrq.2012.0036>; Y. M. Barilan and M. Brusa, 'Human Rights and Bioethics', *Journal of Medical Ethics*, 2008 <https://doi.org/10.1136/jme.2007.020859>; Markus Rothhaar, 'Human Dignity and Human Rights in Bioethics: The Kantian Approach', *Medicine, Health Care and Philosophy*, 2010 <https://doi.org/10.1007/s11019-010-9249-0>; Prince Willem Alexander and others, *Sanitation : A Human Rights Imperative*, *Water*, 2008.

2.1.1 Nature content role

Various conceptions of human rights try to clarify the concept of human rights by providing an account of their nature, content, role, scope, weight and justification.[50] One of the first issues a theorist is expected to address is the nature of human rights and, which in turn pertains to the nature of human rights theory generally. The nature of human rights theory is an important concern, as Samantha Besson has argued, because

> thinking about the nature of human rights theory situates it within a broader set of theories, in particular legal theory, democratic theory, or theories of justice, and can generate beneficial connections between them.[51]

The question of the nature of human rights is basic, because the other elements of a conception will follow from what the theorist takes to be their nature their nature. While it is now popular to understand the task of theorizing about human rights to begin with identifying their 'role' in the international practice[52] and specifying other issues (content, scope, justification) in relation to their functional role, this is not inconsistent: on these formulations the nature of human rights pertains to their functional role.

2.1.2 Traditional and political

In the philosophical literature on human rights, it is common practice to make a distinction between traditional and political conceptions of human rights. The distinction is alternately referred to as moral/practical, orthodox/functional, foundational/non-foundational or any combination of the first and second components. Throughout this

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[50] Joshua Cohen, 'Minimalism about Human Rights: The Most We Can Hope For?', in *Journal of Political Philosophy*, (2004).

[51] Besson (2011) 212

[52] Rawls *LoP,* Beitz *IHR* Cohen (2004)

discussion of the literature, unless otherwise noted, I will be using the term 'traditional' to refer to the class of conceptions usually grouped in the former camp (moral/orthodox/foundational) and 'political' to refer to theories of the later variety (practical/functional/non-foundational).[53] The terms are often used interchangeably, and while sometimes this has no relevant theoretical upshot, in some cases—as we shall see—it has the tendency to flatten important differences among them. For clarificatory purposes, at this preliminary stage I will use a minimalist definition of the traditional conception of human rights as one that sees human rights as universal and fundamental—their existence necessary and not contingent on constrained by institutions or historical circumstance. By political conceptions on the other hand, I mean those theories for which the realities of our contemporary world are ever-present, and considerations about the conditions of possibility for realization of human rights factor in from the very beginning.

Most of the articles in the contemporary philosophical literature on human rights make at least cursory reference to the distinction between traditional and political conceptions, while many others go on to devote a large part of the intellectual endeavor to investigating this topic[54]—if not the entire article.[55] As of 2018 at least one book length

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[53] To give a few examples, Charles Beitz differentiates between the 'naturalistic' view and the 'practical' view of human rights. Joshua Cohen discusses 'traditional' and 'political' conceptions, Christina Lafont uses the terms 'traditional' and 'practical', Fabienne Peter uses 'orthodox' and 'political', Allen Buchanan draws the distinction between 'Orthodox' or 'Moral' theories and 'Political' or 'Practical' theories.

[54] See for example Cristina Lafont *Global Governance and Human Rights*. Universiteit van Amsterdam. Department of Philosophy., Van Gorcum (2012) <https://www.scholars.northwestern.edu/en/publications/global-governance-and-human-rights-2>; Cristina Lafont, 'Accountability and Global Governance: Challenging the State-Centric Conception of Human Rights', *Ethics and Global Politics*, (2010); Jeremy Waldron, *Human Rights: A Critique of the Raz/Rawls Approach*, *SSRN*, (2013) <https://doi.org/10.2139/ssrn.2272745>; Joseph Raz, *Human Rights in the Emerging World Order*, *SSRN*, (2009) <https://doi.org/10.2139/ssrn.1497055>; Samantha Besson, 'The Authority of International Law - Lifting the State Veil', *Sydney Law Review*, 2009; Cristina Lafont and Manfred Frank, 'Global Governance and Human Rights and Human Rights'; Kenneth Baynes, 'Toward a Political Conception of Human Rights', *Philosophy and Social Criticism*, (2009)

[55] Laura Valentini, 'In What Sense Are Human Rights Political? A Preliminary Exploration'; S. Matthew Liao and Adam Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?', *Journal of Moral Philosophy*, (2012)

work has been published on the subject.[56] While the political conception is presently the favored alternative, there remain ardent defenders of the traditional conception as well,[57] and recently there have been an interesting wave of publications challenging the distinction between political and moral conceptions of human rights, asking whether the distinction is really as clean cut as we think it is or whether it exists at all.[58] The moral conception of human rights is usually identified with the claim that "human rights are rights that human beings have simply in virtue of being human."[59] They are said to "understand human rights as fundamental entitlements all human beings hold against every capable agent",[60] and these entitlements are supposed to be grounded in certain salient features of our humanity which "may relate to fundamental interests or basic aspects of human agency."[61] Thus, in literature the traditional conception of human rights is most commonly described as employing an instrumental model of justification, identifying a universal human end worthy of protection such as agency or dignity, and assigning human rights on supposition that they that they further the advancement of that end. As the editors of the volume *Philosophical Foundations of Human Rights* have noted, there are also traditional conceptions of human rights which offer non-instrumental justifications. Thomas Nagel and Francis Kamm, for example have argued for conceptions of human rights which hold them to be a matter of our basic moral status, so we hold them (at least partly)

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[56] Maliks, R., & Schaffer, J. (Eds.). (2017). Moral and Political Conceptions of Human Rights: Implications for Theory and Practice. Cambridge: Cambridge University Press.

[57] John Tasioulas, 'On the Nature of Human Rights', in *The Philosophy of Human Rights: Contemporary Controversies*, 2012. Tasioulas, J. (2015). On the Foundations of Human Rights. In R. Cruft, M. S. Liao, & M. Renzo (Eds.), *Philosophical Foundations of Human Rights* (pp. 45–70). Oxford University Press.

[58] Liao and Etinson.

[59] *Philosophical Foundations of Human Rights*, Introduction by Cruft, Rowan, S M. Liao, and Massimo Renzo, 17

[60] Valentini, Laura *Human rights, the political view and transnational corporations: an exploration.* In Tom Campbell and Kylie Bourne eds., *Political and Legal Approaches to Human Rights* (Abingdon UK: Routledge, 2018).

[61] For example Peter Fabienne, describes them this way in "A Human Right to Democracy?" in Cruft, Rowan, S M. Liao, and Massimo Renzo. *Philosophical Foundations of Human Rights*. Oxford: Oxford University Press, 2015, But Beitz, Lafont, Raz and many other authors tent to characterize the traditional conception in this way

independently of whether and how they protect other human values such as agency or interest. [62] There is also a tendency in the literature to associate all traditional accounts of human rights with a certain 'foundationalism' about morality. The idea of human rights without foundations was popularized by Richard Rorty echoing Bentham's famous claim about universal rights being 'nonsense on stilts',[63] but the association of Raz and other authors of the traditional conception with a type of foundationalism[64] or moral realism is not always warranted. As Tasioulas argues, Rorty's mistake was to conflate foundations and foundationalism. We don't need to accept a robust metaphysical thesis in order to maintain a commitment to objectivity.[65] This leads to the point that not all traditional views are moral, some cite ethical standards of what is required for any good human life and others are more anthological, supposing human rights support certain core 'functionings' that all humans everywhere require.[66]

The political conception of human rights can be thought of as some variation of the thesis that an adequate conception of human rights should start from empirically informed observations about the political-institutional practice human rights. The aim then, is ultimately "to provide the best interpretation of the normative principles underlying the international human rights practice as we know it."[67] Human rights, on this view are not part of an underlying normative or metaphysical system, but rather they pertain to an international political practice which has its own norms and values. According to Joseph

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[62] *Philosophical Foundations of Human Rights* , Introduction by Cruft, Rowan, S M. Liao, and Massimo Renzo, 16

[63] Richard Rorty, 'Human Rights, Rationality and Sentimentality', in *Wronging Rights?: Philosophical Challanges for Human Rights*, 2012 <https://doi.org/10.4324/9780203814031>. Rorty, R., Williams, M., & Bromwich, D. (2018). Philosophy and the mirror of nature.

[64] Raz (2009).

[65] Tasioulas 45

[66] Martha Nussbaum, 'Human Rights and Human Capabilities', *Harvard Human Rights Journal*, 2007 <https://doi.org/10.1080/14649880500120491>.

[67] *Philosophical Foundations of Human Rights* , Introduction by Cruft, Rowan, S M. Liao, and Massimo Renzo, 19, Valentini (2012) 180, Fabienne Peter, 'The Human Right to Political Participation', Journal of Ethics and Social Philosophy 7, no. 2 (2013): 2.

Raz, who holds this view, to articulate a theory of a good human life and call it a 'theory of human rights' is to make a category mistake.[68] As Onora O'niell articulates one of the most commonly cited rationales for setting out a political conception of human rights when she writes "human rights have a specific and recent origin" and schedule of rights declared in the UDHR "reflects the contingencies of that history". While the drafters of the declaration may have drawn on natural rights doctrine, "what they produced reflects a specific historical situation."[69] Furthermore, proponents of the political conception tend to argue, pace Beitz, that "human rights has become an elaborate international practice" with its own set of norms which are influenced by a variety of actors, and these norms may, along with the function and goal of the human rights practice come to evolve over time. As Allen Buchanan has noted, not only do HR activists, lawyers, NGOs and watch groups monitor compliance with human rights norms, in doing so they fill in their content.[70]Thus, as Christina Lafont Argues, any "plausible conception of human rights has to be able to account for their essentially dynamic character."[71] Finally, many—but not all—of the authors who defend the political account point out that as human rights have a very important role as "triggers for international action" in so far as their "actual or anticipated violation" can provide a justifiable reason for the interference (through force or sanctions) in the sovereign affairs of a state. [72] This fact (along with the possibility for states to abuse it for their own gain)[73] they a argue, should enter into consideration from the very beginning wen we start when we endeavor to make a philosophical investigation into the concept of human rights.

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[68] Raz, (2010) 328.

[69] O'Niell 73

[70] Buchanan 119

[71] Lafont (2012) on the 'dynamism' of the human rights practice see also Buchanan (2010),Beitz (2009), 31, 44

[72] Raz, (2010) 327, see also Rawls LoP 80

[73] See especially Raz (2010)

On the grounds of these considerations, most political conceptions begin with a critique of the traditional conception of human rights based on its supposed inability to account for the realities of the human rights practice.[74] It is often argued that, despite their philosophical importance, a weakness of traditional conceptions is that they "fail either to illuminate or to criticize the existing human rights practice."[75] It is assumed that because the traditional conception makes reference to some deeper order of values, it has a 'timeless' quality that doesn't speak to the dynamic nature of the practice.[76] Further, in lending a moral quality to human rights, traditional conceptions of human rights are said to be more susceptible to skeptical critiques about Western origins (the charge of parochialism), and the moralization of warfare.[77]

2.1.3 Political justification

Another important element of the political conception of human right is the procedural method of justification. The justificatory mechanism Rawls applies to human rights and other international principles in *LoP* is analogous to his domestic model in *Theory of Justice.* However, in LoP it is states which come together in the original position under the veil of ignorance to specify the fair terms of the cooperation for a global society of free and equal peoples.[78] In this *Society of Peoples*, affairs are then regulated by a *Law of Peoples*, which defines the content of this society's public reason and serves as a common basis of justification for international political action.[79] The element of public

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[74] Charles R. Beitz, *The Idea of Human Rights*, *The Idea of Human Rights*, (2012).
[75] Raz, (2010) 327, Lafont (2012) 14
[76] Beitz, *IHR*, Raz, (2010) , Lafont (2012)
[77] Beitz *IHR* 3-7, 74, Raz (2010) 329
[78] Rawls ideal conception of the nation state, analogous to the citizen at the domestic level
[79] Beitz (2009) 97

reason here is key— the states' interactions in the Society of Peoples is understood by Rawls to be far more than simply a self interested bargaining scheme. He holds that members in good standing of the Society of Peoples have a "duty of civility requiring that they offer other peoples public reasons appropriate to the Society of Peoples for their actions."[80] These "public reasons" refer to shared principles and norms, of which human rights constitute but one (albeit special) class.

Thus we see that principles of justice are judged not by a (prior existind) moral standard, but must be evaluated in terms of their accordance with the procedure of public reason-giving. We may go further to regard the considerable body of public and legal discourse surrounding human rights as itself a criteria for the elucidation and evaluation of human rights. As Allen Buchanan has articulated this point, the fact that a widely shared conception of human rights is already partially implemented under international law can, with some philosophical refinement, serve as the foundation for a justice-based theory of human rights in international law.[81]

2.1.4 Legalistic and mixed conceptions

There are some conceptions of human rights which are difficult to place in either category. Discourse theories of human rights, for example meet many of the criteria of the political conception but tend to understand political justification in a way that has more of a moral connotation than authors such as Bietz or Raz would likely deem unacceptable from the stand point of their more orthodox understanding of the political view.[82] Thus it is probably safe to assume that while Habermas, and those who have incorporated his discourse ethics into their conceptions of human rights (specifically Rainer

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[80] Rawls (1999), see also Beitz (2009) 97-9

[81] Buchanan 118-9

[82] Ultimately this point comes down to the different understandings Rawls and Habermas have of the political, which will be discussed more in the course of this dissertation

Forst and Seyla Benhabib)[83] tend to consider theirs to be political conceptions of human rights,[84] in being midway between traditional and political conceptions they are difficult to classify, and also might suggest an interesting 'third way'. Habermas' conception is somewhat of an anomaly in another way, in so far as it is a distinctly juridical conception of human rights, but one which also has (via the discourse principle) an important moral component.

The essence of a political conception, on Raz's view, is that it regards human rights as those rights which are to be given institutional recognition—in this sense they are rights which transcend private morality. [85] This explains why certain rights which are universally accepted as good or valuable, the performance of promises for example, are none the less not commonly considered human rights.[86] Similarly, Habermas argues that the concept of human rights "does not have its origins in morality, but rather bares the imprint of the modern concept of individual liberties, hence of a specifically juridical concept."[87] The considerable difference between the two theorists however is that while Raz makes a powerful argument for a conception of human rights which has no relation to moral concepts (besides the moral constraints which the rights themselves impose), for Habermas human rights as legal norms, and human rights as moral norms are inseperable. This is not to say that morality 'grounds' the law (as in the traditional conceptions) or that the law generates moral constraints (pace Raz and many others) but rather that the two are mutually constitutive.[88] On his view, human rights have a dual nature, which he eloquently describes as a 'janus –face', with one side facing the law, the other morality.

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[83] See chapter XXX

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[85] Raz, Joseph, Human Rights Without Foundations (March 2007). Oxford Legal Studies Research Paper No. 14/2007. 17-18

[86] Raz, Joseph, Human Rights Without Foundations (March 2007). Oxford Legal Studies Research Paper No. 14/2007. 17

[87] Habermas, *Kants Idea of Perpetual Peace* 191

[88] Flynn "Habermas on Human Rights" 432

> Only [the] internal connection between human dignity and human rights gives rise to the explosive fusion of moral contents with coercive law as the medium in which the construction of just political orders must be performed [89]

While human rights are more than just moral norms, in so far as they "belong to a structurally positive and coercive moral order" [90] they none the less, like moral norms claim universal validity. In fact, it is this "mode of validity" that human rights share with moral norms that lead some 'traditional' theorists to conflate human rights with moral norms. [91]

2.1.5 Social and economic rights

The interactional understanding of rights corresponding to duties gives rise to the question of what duties human rights entail. The UDHR 30 articles establish over two dozen specific human rights, which are usually grouped in five categories t categories: (1) *security rights* such as the right to life and protections against torture (Articles 3-5); (2) rights of *due process* that guarantee equality before the law and protect against arbitrary arrest (Articles 6-11) ; (3) *Rights of individuals towards their communities* including freedom of movement and the right so asylum (Articles 12-17) ; (4) *liberty rights* protecting spiritual, public, and political freedoms, such as freedom of thought, opinion, consciousness and the right to peacefully assemble. Also included here is the right to participate in democratic governance (18-21) ; (5) *economic and social rights* , including the right established in Article 25 to "a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."(22-27).[92] Of these groups, the last poses the most significant

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[89] "The concept of Human Dignity and the Realistic Utopia of Human Rights" 479

[90] Habermas, *Kants Idea of Perpetual Peace* 192

[91] Ibid, for an excellent overview of this point and a general discussion of Habermas' account of human rights see Flynn "Habermas on Human Rights"

[92] Another group of rights which are not listed in the UDHR but are generally considered as fundamental rights on par with those enumerated and thus should be considered here are minority rights and group rightsSeveral human rights treaties mention minority rights and group rights, beginning with The Convention on the Prevention and Punishment of the Crime of Genocide (1948). See also Nickel

challenge for the relational understanding of rights. Where as liberty and security rights require only *abstinence* on the part of governments and their agents, economic and social rights require positive duties. Although the Declaration doesn't prioritize among categories of rights, it is common place for philosophers to do so. One famous example that readily comes to mind is John Rawls' 'lexical ordering' of the two principles of justice—although he recognizes that the social and economic rights secured by the second principle of justice are vital to individual well-being, he is explicit that first principle (which protects negative liberties) has priority.[93] The idea is that, as Isaiah Berlin, famously argued, the means to subsistence supports liberty rights in so far as the latter may not be valuable to the hungry and needy, but subsistence rights impact the *quality* of liberty, not the liberty itself. [94] Many authors have also challenged this way of prioritizing rights, arguing that some minimum socioeconomic rights are equally basic. Henry Shue popularized this thesis in his book *Basic Rights* where he concludes that enjoying the right to subsistence is "necessary for enjoying any other right."[95] Another common criticism of social economic rights, at least from the perspective of the political approach is that they may pose demands that are realistically unfeasible. James Nickel, who ultimately defends social and economic rights summarizes this objection when he writes "[c]reating grand lists of human rights that many countries cannot at present realize seems fraudulent to many people".[96] Defenders of a more robust conception of human rights that includes social and economic rights might

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[93] *TJ* 220, 38, for a complete discussion of Rawls' ordering of the principles and his reasons for giving priority to negative liberty see Sebastiano Maffettone, *Rawls : An Introduction* (Cambridge: Polity Press, 2010). 54-8

[94] Isaiah Berlin, "Two Concepts of Liberty", in Isaiah Berlin, Four Essays on Liberty (London: Oxford University Press, 1969).

[95] Henry. Shue, *Basic Rights : Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press, 1996) 31 ; Other versions of this argument have been made by: Elizabeth Ashford, 'A Moral Inconsistency Argument for a Basic Human Right to Subsistence', in *Philosophical Foundations of Human Rights* (Oxford University Press, 2015), pp. 515–34; David Ingram, 'BETWEEN POLITICAL LIBERALISM AND POSTNATIONAL COSMOPOLITANISM Toward an Alternative Theory of Human Rights', *POLITICAL THEORY*, 31.3 (2003), 359–91; Thomas Pogge, 'World Poverty and Human Rights', *Ethics & International Affairs*, 2012.

[96] James W. Nickel, 'Personal Deserts and Human Rights', in *Philosophical Foundations of Human Rights* (Oxford University Press, 2015), pp. 153–65 .

respond in two ways. They might claim that there is nothing conceptually inconsistent about positing the existence of a right that we cannot yet realize (an aspiration as it were) or they might also argue, is the responsibility of the international community to step in when governments are unable to realize these rights. I will address the issue of social and economic rights in the context of each of the conceptions I discuss in chapter 3 and 4.

2.1.6 Political rights

Article 21 of the UDHR states that (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives; (2) Everyone has the right of equal access to public service in his country; and (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. Aritcle 25 of the International Covenant on Civil and Political Rights (ICCPR) states that "Every citizen shall have the right and the opportunity (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c)To have access, on general terms of equality, to public service in his country.

In recent debates in political philosophy many have argued against a human right to democracy. Sometimes this argument is leveled on the grounds that it comes into conflict with another important right, expressed in article 1.1 of the ICCPR namely that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." The idea is that a human right to democracy undermines the right to self determination insofar as it would require the implementation of a set of institutional arrangements on a people that they did not or would not freely choose for themselves.

Fabienne Peter has (correctly I believe) pointed out that where one stands in this debate is likely to be determined by which overall conception of human rights one

endorses: traditional or the political, For those who endorse a traditional conception of human rights, the move to an argument for a human right to democracy is easy if it can be shown that it is necessary to promote or protect those important features of humanity. This is essentially the formulation of Thomas Chrisitano's "justice based argument for a human right to democracy" based on the claim that this form of political organization is necessarily to secure and sustain our political equality— a condition which is required by the fundamental moral equality of all persons.

2.2 Do we need a philosophical conception of human rights?

In so far as human rights are enumerated in the treaties and covenants of international law and enshrined in an elaborate institutional network aimed at their protection, it might be supposed that we can answer questions about human rights by referencing the legal code or the decisions of national and international courts that pertain to human rights. There are several reasons why a reference to the law alone is not enough. The first is that there are grey areas where international law lacks jurisdiction, or when it shares jurisdictional authority with the state in an incomplete or incompatible way. If human rights are to be understood solely as positively enacted rights, then an individual has rights in virtue of his national legal infrastructure or through the dictates of international law where applicable. The problem with this formulation is readily apparent in the case of refugees and migrants who's need for protection occurs outside their home country. This group of individuals might have many rights under international law, yet find these rights unrecognized in actual practice, or they may have few rights at all under international law and find themselves falling into 'legal grey areas' in the countries which receive them. One particularly illustrative example is the case of migrant workers—people from other

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[97] The Oxford Handbook of Refugee and Forced Migration Studies
edited by Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, Nando Sigona 282-8

countries either working or looking for work—who are displaced from their adopted country by conflict or natural disaster. During the Arab Spring, for example, migrant workers were by far the largest single category of people forced from their homes by the conflict. This phenomenon was particularly pronounced in Libya where, according to a study by the Brookings Institution, in the three months between March and June 2011, over half a million migrant workers left Libya for Egypt and Tunisia. While the majority of these workers were Egyptians and Tunisians returning to their nations of origins, about 250,000 of the displaced workers were not nationals of Libya, Tunisia or Egypt—most came from sub-Saharan Africa. The legal status of these subsequently displaced migrant workers is uncertain. While their rights are proclaimed under the 1990 UN Migrant Workers Convention, relatively few countries have ratified it , and anyway the Convention does not explicitly extend to cover migrant workers who are subsequently displaced. Furthermore as they cross borders they may not be legally entitled to claim refugee status, as refugee status relates to conditions in their country of origin.

If human rights refer to their positive enactment alone, then the displaced workers who find them selves in host countries not party to the treaty (Tunisia and Egypt are not) and not legally able to secure refugee status simply have no human rights. Intuitively this seems wrong, not only because of the universality usually associated with the concept of human rights but also considering the fact that individuals displaced by war, political conflict, natural disasters and poverty are some of the most vulnerable among the human population and therefore most in need of the protection we generally think of human rights as offering. If it seems wrong to us deny (even at a conceptual level) these vulnerable individual their rights, then we need a convincing account of why this is so.

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[98] https://www.brookings.edu/opinions/migration-displacement-and-the-arab-spring-lessons-to-learn/

[99] Unless they are able to successfully demonstrate that the country where the have been working has become their 'country of habitual residence'

[100] https://www.brookings.edu/opinions/migration-displacement-and-the-arab-spring-lessons-to-learn/

2.2.1 Do human rights require special justification?

There are several features of international human rights which differentiate them from other institutional arrangements, thus making issues relating to their justification more controversial and philosophically challenging. James Nickel and David Reidy identify three main features of human rights that mark them out as requiring special justification. [101]

(1) *Human rights as trumps.* Human rights claim to apply everywhere are said to be salient enough so as to 'trump' contrary cultural and political practices. Equal rights for women for example, might go against entranced cultural customs, and rights to democratic governance might be at odds with long standing political practices in many parts of the world. In so far as the worlds cultures all have their own ideas and values which justify these practices, a particularly strong justification must be given for human rights if they are to be understood to outweigh local norms.

(2) *Human rights as universally binding*. Some human rights purport to be binding whether or not a state recognizes them (either in domestic law or through the ratification of international treaties). This also seems to suggest a particularly strong justification insofar as it seems to suppose the existence of binding universally binding norms that may be at odds with the state's legal framework.

(3) *Human rights and coercion.* Human rights violations provide grounds for the legitimate interference of the international community into the sovereign affairs of a state, through the use of coercive measures including economic sanctions and in the gravest cases, military interventions. This interference stands at odds with the

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[101] Nickel, James and Reidy, David A., Philosophical Foundations of Human Rights (July 11, 2009). Available at SSRN: https://ssrn.com/abstract=1432868 or http://dx.doi.org/10.2139/ssrn.1432868

> principle of sovereignty and the right to collective self-determination, and also may pose a threat to international peace and stability. Therefore, in so far as human rights serve as triggers for the coercive interference in the affairs of national communities, a justification must be provided for them which is salient enough to out weigh both national interest in sovereign inviobility and the interest of the international community in continued peace and stability.[102]

2.2.2 Evaluative criteria

Both David Ingram and Laura Valentini have separately offered criterion for evaluating the merits of a philosophical conception of human rights. Valentini identifies two desiderata, and suggests that any good normative account of human rights must be judged in in accordance with these. The first criterion is that *non-parochialism*, which is to say that a conception of human rights shouldn't try to impose any particular set of values (i.e. Western ones) on other cultures. In so far as it is vital that human rights be perceived as legitimate from the perspective of a plurality of worldviews, parochialism is to be avoided at all costs. The second desideratum she refers to as *plausible action guidance*. [103]In so far as human rights claims comprise a right holder, an object and a duty bearer, a theory of human rights should be able to speak to all three. Ingram advocates for a similar criterion but refers to it as *prescriptive determinacy.* Meeting the criterion of prescriptive determinacy requires that an adequate theory should provide an account of rights that are sufficiently defined in order to be prescriptive and not merely regulative in some vague

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[102] ibid

[103] Laura Valentini, 'Human Rights and Discourse Theory: Some Critical Remarks', *Critical Review of International Social and Political Philosophy*, (2014).

and general way. [104] Ingram also proposes the criterion of *universality* meaning that "an adequate theory must articulate universal rights that any rationally self-interested and reasonably fair-minded person could accept, regardless of cultural allegiance." [105] In my analysis of the various conceptions of human rights, I will use a criteria which combines those suggested by the two authors, and assess the various conceptions according to (1) non-parochialism, (2) universality and (3) prescriptive determinacy.[106] David Ingram also proposes an additional evaluative criterion, that of *completeness.* A theory is complete on his view when all categories of rights (cultural political and economic) are accounted for in the conception. I will not use this metric because, as it will become apparent, doing so would have the result of stacking the deck against many of the political conceptions from the very beginning. I do however find this to be an important desideratum, and so will explore whether the political conception could be made complete in this way in the final chapter.

2.3 Forms of skepticism

There are various forms of skepticism about human rights in general. These range from pragmatic concerns about the efficacy of human rights law, to the extremely troubling thesis that human rights are used by the global hegemon(s) to moralize their wars of expansion. The pragmatic form of skepticism as to the effectiveness of human law stems from a type of realism about the balance of power in international relations and argues that states compete for their interests in an international arena that is largely anarchical, in the famous words of Thucydides "the strong do what they can and the weak do what they must." This theory was popularized by Goldsmith and Posner (who are skeptical about the effectiveness of international law generally) in their book *The Limits of International Law*.

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[104] David Ingram, 'BETWEEN POLITICAL LIBERALISM AND POSTNATIONAL COSMOPOLITANISM Toward an Alternative Theory of Human Rights', *POLITICAL THEORY*, 31.3 (2003), 359–91. 360

[105] Ingram, 'BETWEEN POLITICAL LIBERALISM AND POSTNATIONAL COSMOPOLITANISM Toward an Alternative Theory of Human Rights'. (3003) 360

[106] What Valentini calls 'plausible action guidance'

In the context of their famous game-theoretical analysis of international law they argue that because states don't have compelling interests in citizens of other nations, that "modern multilateral human rights treaties have little exogenous influence on state behavior."[107] While there is evidence to suggest that international institutions are able to constrain state behavior in some policy areas [108] The skeptical position of Goldsmith and Posner has been supported by various empirical studies which suggest that in many cases, the ratification of human rights treaties have little impact on domestic practices. [109]This finding is often attributed to the weak enforcement mechanisms which accompany human rights treaties, [110] as the major factors which seem to impact compliance in international law are largely absent in the field of human rights. [111] Unlike trade trade agreements, which are accompanied by stringent monitoring and enforcement mechanisms, the costs of noncompliance with human rights treaties are relatively low. [112] The problematic nature of international human rights law and its weak enforcement mechanisms need not worry us too much, as there is good evidence to suggest that through the processes of socialization and acculturation—the process by which actors gradually come to adopt the beliefs and behavioral patterns of the surrounding culture, international human rights law does have a

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[107] The limits of international law 108

[108] See, e.g., Oona Hathaway, Do Human Rights Treaties Make a Difference?, IYale *Law Journal* . 1935, 1939 (2002 Beth A. Simmons and Daniel J. Hopkins, 'The Constraining Power of International Treaties: Theory and Methods', *American Political Science Review*, (2005 .); Laurence R. Heifer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 *Yale Law Journal* 273, 337-66 (1997) Ryan Goodman & Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 *Duke Law Journal* 621-703 (2004)

[109] Emilie M. Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises', *American Journal of Sociology*, (2005); Beth A. Simmons, 'International Law and State Behavior: Commitment and Compliance in International Monetary Affairs', *American Political Science Review*, 94.04 (2000), 819–35.

[110] Hill, Daniel W. "Estimating the Effects of Human Rights Treaties on State Behavior." *The Journal of Politics* 72, no. 4 (2010): 1161-174.

[111] Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, Yale *Law Journal* . 1935, 1939 (2002), Louis HENKIN, How NATIONS BEHAVE 47 (2d ed. 1979)

[112] Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, Yale *Law Journal* . 1935, 1939 (2002)

perceptible influence on state behavior[113] that offsets the purely power-interest driven model and provides some hope for change in a positive direction.

The most extreme form of skepticism about human rights is also a type of realism about international law politics, however this version goes far beyond mere pragmatic concerns about efficacy and condemns both the law and ideology of human rights on the grounds that these are just the nefarious workings of power politics in disguise. This view was influentially argued by Carl Schmitt, who argued that the concept of human rights and in particular 'humanitarianism' has the moralizing effect of lending an 'inhuman' quality to the enemy: "Denying the enemy the quality of being human and declaring him to be an enemy of humanity and a war can thereby be driven to the most extreme inhumanity." [114] In his famous words, "[w]homever invokes humanity is trying to cheat."[115] The claim is that in an age where it is no longer acceptable to go to war without justification, human rights missions are a guise for wars of aggression and expansion, the human rights regime and its concomitant normative ideology was created in order to serve just this purpose. Even the concept of humanity itself is an ideological instrument of imperialist expansion.[116] In the context of the invasion of Iraq— justified in part on a humanitarian rational and what Bush took to be the American imperative to 'spread democracy'[117]— many observers saw this as evidence of Schmitt's suspicion made manifest. It is precisely the expressive force of his critiques when applied to contemporary events, as Martti Koskenniemi explains, that has sparked the the recent revival of interest in Schmitt's work:

> [t] he war on terrorism as a morally inspired and unlimited 'total war', in which the adversary is not treated as a 'just enemy'; the obsoleteness of traditional rules of warfare and recourse to novel technologies – especially air power – so as to conduct discriminatory

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[113] Ryan Goodman & Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 *Duke Law Journal* 621-703 (2004) 626

[114] ibid 56

[115] C. Schmitt, The Concept of the Political, trans. G. Schwab (Chicago, 1996) 54

[116] ibid 50-1

[117] http://edition.cnn.com/2005/ALLPOLITICS/01/20/bush.speech/

> wars against adversaries viewed as outlaws and enemies of humanity; Camp Delta in the Guantanamo naval base with its still over 500 prisoners from the Afghanistan war as a normless exception that reveals the nature of the new international political order of which the United States is the guardian – the source of the normative order, itself unbound by it.[118]

There are at least two ways we might respond to this very damning critique. In Habermas' essay "Kant's Idea of Perpetual Peace, with the Benefit of 200 Years' Hindsight" he responds directly to Schmitt's worries over the moralization of international law, arguing that while it is true that *unmediated* moralization of law and politics can lead to dangerous prospects, it is a mistake to assume that such moralization is hindered "only by keeping international politics free of law, and law free of morality". He writes that "establishing a cosmopolitan world order means that violations of human rights are no longer condemned and fought from the moral point of view in an unmediated way, but rather are prosecuted within the framework of a state organized legal order according to institutionalized legal practices." [119] Thus by bolstering up the human rights regime with a strong institutional framework (which for Habermas also entails making it more democratic), we can make it more responsive to the real aims of the practice, making it more difficult for those who would want to "cheat". For those unconvinced by this difficult and seemingly long term solution, there is a more sober response to the realist critique. This is the reply that simply because some people have misused human rights law and discourse as a 'fig leaf' for their power-driven interests, does not give us reason to abandon the project altogether. This point is put nicely by Seyla Benhabib who, citing Kant's distinction between the "political moralist" (who abuses moral principles in order to justify political decisions) and a "moral politician" (who tries uphold moral principles when conducting politics), argues that while "[t]he discourse of human rights has often been

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[118] M. Koskenniemi, 'International Law as Political Theology', Constellations, 11 (2004), 492–511; D.

[119] Habermas Habermas, Jürgen. "Kant's Idea of Perpetual Peace, with the Benefit of 200 Years' Hindsight." *Perpetual peace: Essays on Kant's cosmopolitan ideal* (1997): 113-53, 140

exploited and misused by "political moralists"; its proper place is to guide the moral politician, be they citizens or leaders."[120]

The two other forms of skepticism I will discuss further in this section pertain to the normative content of human rights, particularly their purported universality and the individualistic ontology they seem to support. Skepticism about the universality of human rights stems from a perceived hypocrisy. While the doctrine of human rights paints them as timeless universals, they are in fact the product of a particular historical cultural reality—namely in the US and Europe, at the end of the Second World War. Thus although rights are said to have universal validity, they originate in the West and express Western interests in some way or another. Furthermore, the purported universality and formal egalitarian framework is seen to have the tendency to abstract from real existing power differences.[121]

2.3.1 The harbingers of capitalism

One powerful version of the critique of the universalism and individualism of human rights identifies them with the interests of the West in expanding the free market to the far reaches of the globe. Human rights no only describe a moral way for conducting politics, but also an "ideal for the organization of the social bond." [122] In so far as this ideal pertains to the Western ontology of the rational individual, acting in his own interest, what they universalize is the necessary preconditions for capitalism. The 'human rights as the harbingers of capitalism' argument has been posed by several authors working in the tradition Marxist of ideology critique. [123] These begin their critique with a skepticism—

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[120] Benhabib *DiA* 91

[121] Robert Fine, 1

[122] Douzinas 12

[123] Slavoj Žižek, 'Against Human Rights', *New Left Review*, 2005 <https://doi.org/10.4324/9780203814031>; Wendy Brown, The Most We Can Hope for ?: 'Human Rights and the Politics of Fatalism', in *Wronging Rights?: Philosophical Challanges for Human Rights*, 2012 <https://doi.org/10.4324/9780203814031>; Wendy Brown, 'Suffering Rights as Paradoxes', *Constellations*

supposedly shared with Marx— about the particular understanding of individualism associated with human rights. In *On the Jewish Question*, in a context of the discussion of the Rights of Man, Marx writes:

> None of the so-called rights of man goes beyond egoistic man, man as a member of civil society, namely an individual withdrawn into himself, his private interest and his private desires separated from the community. The practical application of the right of man to freedom is the right of man to private property[124]

Marx's interpreters have read a great deal into this piece, who's overall aim was a to defend the emancipation of the Jews in Germany, against the view of Bruno Baur who believed they should not be granted full citizenship rights on the grounds that their first allegiance was to their religion. There is ongoing debate about the significance of the piece and Marx's view on human rights in general,[125] but none the less his association of the Rights of Man with the egoistic individual withdrawn into himself has had a lasting influence.

In the 20th century, the link between rights and a certain type of individualistic social ontology was influentially elaborated by C.B. MacPherson. MacPherson criticized the liberal giants of the 17th century (especially Locke and Hobbes) as perpetuating the bourgeois ethos of 'possessive individualism' in their theories of liberal rights. For MacPherson, the essencialized starting point of man who is naturally free and equal was

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Volume, 2000 <https://doi.org/10.1111/1467-8675.00183>. Costas Douzinas, The End of Human Rights, (Hart Pub, 2000);

[124] K. Marx, "On the Jewish Question. in McLellan" (D.(Ed.) Karl Marx—Selected Writings . Second ed. (Oxford, Oxford

University Press 2000), 60

[125] See Steven Lukes, "Can a Marxist believe in human rights?", *Praxis International*, 1(4), 1982, 334-45 (344). Lacroix, Justine, et Jean-Yves Pranchère. « Karl Marx Fut-il vraiment un opposant aux droits de l'homme ? Émancipation individuelle et théorie des droits », *Revue française de science politique*, vol. vol. 62, no. 3, 2012, pp. 433-451.

nothing but than the imperatives of their early modern commercial society projected back onto the hypothetical 'state of nature'. These theories of natural rights naturalized the conditions of capitalism: the self-reliant man autonomously pursuing his own interests, and the the negative rights that secured these conditions. The emphasis on ownership and property rights in these theories is a focus of McPherson's (and many Marxists') critique: the idea of self-ownership was crucial to legitimating bourgeois property relations and the inequalities that these necessarily entailed. The framing the buying and selling of labor power as an exercise one's inherent freedom lent it a moral weight that could outweigh any concerns that might arise from the degradation of the laborers themselves .[126] Costas Douzinas has sums up this critique when he writes "In this bourgeois hall of mirrors, natural rights support selfishness and private profit."[127]

In contemporary debates this argument is sometimes articulated in terms of Fucault's notion of biopolitics, to describe the ways in which human right are supposedly used to manipulate individuals into subjugation to the ends of the global market. Anne Orford for example, argues that that the human rights agenda advanced by international monitory organizations like the World Bank—programs relating to health, sanitation and social safety nets for children and the elderly—is aimed at nothing more then protecting "the 'human capital' necessary to reproduce markets". [128] Thus she writes:

> Bodies become the ground of political control, now exercised globally, and calculations of population control, the measurement of human development, the promotion of human capital, and public health policy are all capable of reformulation as human rights questions.[129]

For Douzinas, this point is made evident in the treatment of populations and groups

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[126] CB. McPherson, The Political Theory of Possessive Individualism, (Oxford: Oxford University Press, 1962).

[127] Douzinas 102

[128] Anne Orford, 'Beyond Harmonisation: Trade, Human Rights and the Economy of Sacrifice'18 Leiden Journal of International Law, 32 (2005).

[129] ibid

considered 'surplus' to the needs of capitalism—refugees stranded at sea in sinking ships or crowded into refugee camps which often resemble concentration camps in every way but the name, victims of tsunamis and earthquakes left to fend for themselves amidst the rubble.[130]

Another form of this critique simply associates the universalism of human rights with the opening up of national markets to the forces of global neoliberalism. Kenneth Anderson for example writes, "the claim to universalism is a sham. Universalism is mere globalism and a globalism, moreover whose key terms are established by capital."[131] This critique is equally alive in political and media discourse, where the specter of 'globalism' has been the boogey man of the revitalizing far-right's nationalist and neo-protectionist rhetoric.[132] This logic (along with xenophobic and anti-Semitic rhetoric) was utilized in Orban and his Fidesz party in the systematic smear campaign against George Soros and his 'Open Society Organization'—the stated mission of which is to "strengthen the rule of law; respect for human rights, minorities, and a diversity of opinions".[133] While much of the conspiratorial rhetoric involved the narrative of a shady globalist plot to open up the Christian nation of Hungry to an onslaught Muslim migrants, it was also strategically focused on Soros as the billionaire who 'broke' the Bank of England. Thus Soros was held up as all that Hungarians might have reason to fear about the global era, multiculturalism as well as economic globalization.[134] In the section above I argued that we must separate the value of the human rights discourse itself from the question of its misuse on the part of powerful actors who coopt it to justify the pursuit of their own

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[130] Douzinas 100

[131] Kenneth Anderson, "Secular Eschatologies and Class Interests," in Carrie Gustafson and Peter Juviler (eds.), Religion and Human Rights: Conšicting Claims (Armonk, N.Y.: M. E. Sharpe, 1999), p. 115.

[132] https://www.nbcnews.com/think/opinion/bannon-s-revenge-how-globalism-went-mainstream-ideology-far-right-ncna860221

[133] https://www.opensocietyfoundations.org/about/mission-values

[134] https://www.theatlantic.com/international/archive/2018/05/orban-european-union-soros/560480/; https://www.theguardian.com/world/2018/apr/20/crackdown-prompt-soros-open-society-budapest-viktor-orban

interests. Following this line of reasoning, it is also important to separate the that idea human rights may advance or in some way support the interests of powerful actors (especially as they pertain to the global market) to the detriment of the world's vulnerable and economically disadvantaged, from the way the critique has been operationalized in political rhetoric. There is no doubt that the likes of Trump and Orban abuse this logic to limit civil liberties in an attempt to consolidate power. Yet the very fact that the 'anti-globalist' rhetoric has proven so politically motivating (regardless of the true aims of those who invoke it), should be taken seriously when we think about the justifying reasons for a conception of human rights. If human rights are not to be perceived as hollow, or advancing interests of the powerful, then they must have the ability to reign in power, making it accountable to those whose lives it impacts.

2.3.2 Human rights as parochialism

Another type of skepticism about human rights is often referred to as the 'post-colonial' objection, although I must admit a degree of discomfort with this label. As many authors have pointed out, the term post-colonial seems misapplied, in so far as it seems to suggest a break with the colonial past that never actually took place. [135] In any this critique is articulated in the perspective of the global south, and like the ideological and biopolitical critiques, takes off from the Western Legacy of human rights. In fact, the post-colonial critique has much in common with the critiques discussed above, and often authors will advance a combination of both narratives. Again theses authors are skeptical about the ontology of the egoistic individual conceived in isolation from family and cultural ties, as well as the purported universality of human rights which obscures their Western origins. The more mild form of this critique claims that the distinctly Western origin of human rights result in their being ill-suited for application in non-Western countries, either

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[135] Due to the ongoing and widely felt effects of the colonial legacy in many parts of the world, some scholars have chosen the handle 'de-colonial' to refer to the group of theories that try to deconstruct and critically reflect on the intellectual legacy of colonialism or to construct all together novel theories in its wake.

because of their embodiment of norms that conflict with those important to other cultures, or their being simply out of touch with the goals and of this part of the world. Importantly these views are generally not opposed to the idea of human rights as a normative concept, but challenge certain elements of their ideological underpinning—usually their ethical egoism—as unsuitable for universal application. The stronger form of the critique sees human rights as a rearticulating of the same Western exceptionalism that justified colonial expansion in the first place. Like the 'civilizing' missions of Christianity that accompanied colonial expansion, the human rights movement assumes 'the West knows best', purporting to bring morality and civilization to parts of the world who have not yet 'developed' to the superior standard of Western society. This logic, discussed in Said's famous *Orientalism* relies on a faulty teleological view of history that assumes that all societies necessarily follow a path of progressive development at which Europe and America are simply at a higher stage.[136] What's worse, the logic tends to obscure or ignore the circumstances that created unfavorable conditions in which individuals in the global South now find their dignity in need of protection: centuries of domination and oppression at the hands of those who now offer them human rights. This point was made nearly two hundred years ago by Alexis D'Toqueville (1835) when he observed:

> The Europeans ... first violated every right of humanity by their treatment of the Negro, and they afterwards informed him that those rights were precious and inviolable

There is a broad consensus among post-colonial writers that the concept of human rights is a Western construct. Still, some authors have sought to identify proto-human rights or similar universal moral notions in non-Western cultures, while others have stressed the considerable contributions of African and Asian countries in the establishment of the

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[136] Makau. Mutua, *Human Rights : A Political and Cultural Critique* (University of Pennsylvania, 2002)

contemporary human rights regime.[137] None the less, many authors representing the perspective of the global South remain concerned by the fact that the generally accepted understanding of human rights as primarily negative liberties and the way that they have been institutionalized in international law and practice bears a distinctive legacy of Western individualism. As one author put it, "perhaps it is the individualist postulate of natural rights theory that raises the most suspicions about the Western view of human dignity and liberty." [138] Both Western and non-Western scholars alike acknowledge the strong linkage to the concretization of the modern concept of universal rights in the context of the European enlightenment and the political philosophy of liberalism. In the context of the European Enlightenment, "the sovereignty of the State and the Sovereignty of the Individual ... steadily [became] the two central axioms from which all theories of social structure would proceed, and whose relationship to each other would be the focus of all theoretical controversy." [139] A common criticism among authors advancing a critical non-Western perspective on human rights is similar to the Marxist critique that human rights tend to abstract the individual away from his personal and cultural commitments. The political philosopher Josiah Cobbah, for example argues that the exclusive emphasis on the sovereign individual and his relationship to the state leaves no room for a meaningful role of intermediate groups like the family or community.[140] It is this feature that according to Cobbah and others puts human rights at odds with many deep-rooted values in non-Western societies. Cobbah Explains, that unlike the Western concept of family, which is understood as a nuclear family and is often carried out in isolation from other kin, African families rend to operate in a much broader arena and often do not make a clear distinction between the nuclear and the extended family. The concept of family (which often includes ancestors

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[137] Tola Olu Pearce, 'Human Rights and Sociology: Some Observations from Africa', *Social Problems*, 48.1 (2001), 48–56 <https://doi.org/10.1525/sp.2001.48.1.48>.

[138] Cobbah 316

[139] Otto Friedrich von Gierke, Political Theories of the Middle Ages, trans. Frederic William Maitland (Cambridge: Cambridge University Press, 1900), 87

[140] Josiah A. M. Cobbah, 'African Values and the Human Rights Debate: An African Perspective', *Human Rights Quarterly*, 1987 <https://doi.org/10.2307/761878>.

and future generations) plays a vital role in African society, and tempers the conception of the individual within society, as well as other moral notions like responsibility and obligation.

> Within the organization of African social life one can discern various organizing principles. As a people, Africans emphasize groupness, sameness, and commonality. Rather than the survival of the fittest and control over nature, the African worldview is tempered with the general guiding principle of the survival of the entire community and a sense of cooperation, interdependence, and collective responsibility..[141]

This importance of cooperation and collective responsibility creates an emphasis on reciprocity (which has the force of a duty), is one of the areas in which Cobbah finds African values to differ significantly from the perspective of Western individual rights which "denies the existence of the needy's right to economic sustenance and society's obligation to satisfy this right."[142] The African sense of community obligation, demands more in the face of economic inequality than mere charity. Another important difference between African and Western culture which has implications for the human rights debate regards the ownership of private property. Again this part of the critique echoes the Marxist claim that the rights to private property and self ownership are at the heart of human rights culture as it seeks to legitimate inequalities that arise in the context of capitalism. Of course, the Universal Declaration maintains in Article 17 that "everyone has the right to own property. ..." Yet as many authors have noted, the emphasis on notions of 'group' rather than individual in many cultures as well as strong conceptions of communal obligation and reciprocity lead to much different notions of property ownership then those lauded in Western thought. For many cultures, including the Gojami Amhara of Ethiopia, there is no such thing as a 'right' to individual ownership of holdings and all land is communally owned. [143]

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[141] Cobbah 321

[142] ibid

[143] ibid.

These considerable challenges to the individualism of human rights are all too often dismissed offhand by Western scholars. Rhoda Howard, for example associates this type of criticism with political elites who make "[c]onstant references to communal society... to mask systematic violations of human rights in the interest of ruling elites." [144] In an almost identical mode, Jack Donnely complains that "arguments of cultural relativism are far too often made by economic and political elites that have long since left traditional culture behind." [145] There is no question that argument for 'traditional values' and against the Western hegemony of human rights culture have long been used by ruling elites to justify domination and oppression in the Africa and elsewhere. But once again we must separate the way these narratives have been coopted as rhetoric from the genuine worries and concerns of the individuals who are disenchanted with the human rights discourse. The response on the part of human rights defenders like Donnely and Howard, well -meaning as they may be is often seen from the non-Western perspective as itself a type of Chauvinism.

As Pollis and Schwabb argue, the irrelevance of the Western conception of human rights rooted as it is in the doctrine of natural rights and private property is not only ill-suited to many non-Western cultures because of traditional cultural patterns: it is also ill-suited to the "articulated modernization goals of Third World countries." In much of the the global South, the authors argue, "the ideology of modernization and development… has come to be be understood primarily in terms of economic development." [146] The experience of centuries of economic exploitation under colonialism has given rise to a notion of human dignity which is interpreted differently from the manner in which it tends to be understood in the west. The concept of dignity was understood in terms of throwing

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[144] Rhoda Howard, "Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons," Human Rights Quarterly 6 (May 1984): 175

[145] Donnelly 412

[146] Pollis and Schwab 60

off the yolk of colonial oppression. Thus rather that prioritizing civil and political rights in the manner of the West, this notion of dignity requires the protection of social and economic rights above all else. Thus, freedom from starvation and the right to partake in the material benefits of a 'developed' economy became the articulated goals of many states in the global South. The role of the state, then was primarily seen as securing these goals for its individual citizens, as well as protecting them from the forces of colonial oppression. Thus, Pollis and Schwabb argue, "[d]emocratic government is perceived as an institutional framework through which the goals of the state are to be achieved, and if it fails or becomes an impediment it can be dispensed with impunity." [147]

The authors discussed in this section are not, like Schmitt and his contemporary followers, skeptical about the project of human rights generally. Rather with the concerns that they raise, they point to a certain disconnect between the universalizing and emancipatory language of human rights and the realities of its biased legacy and incomplete application. Interestingly, many liberal philosophers I will discuss during the course of this dissertation who advance a 'minimalist conception' of human rights limit them to negative liberties out of a purported concern for the political cultures of non-Western peoples.[148] But it is clear that what drives skepticism about human rights is precisely their association with negative rights and the imperatives of the global market. Although a full schedule of social and economic rights is guaranteed in the various covenants and regional agreements, the inability of national governments to make good on these rights renders them empty promises. At the close of his article Josiah Cobbah makes a suggestion for a way in which a philosopher of human rights writing from the Western perspective might meaningfully incorporate a concern for non-Western world into a conception of human rights. He proposes that we take what he calls the 'Africentric' perspective seriously in our discourse on human rights. Rather then assuming an inevitable progression of non-Westerners toward Western values, we should investigate the ways in which our

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[147] ibid

[148] Particularly Beitz., Rawls and Cohen

perspective might be enriched by the non-Western view. For example Cobbah asserts that "Africentric approach is particularly suitable for taking economic rights seriously."[149] Ultimately, he argues, "what is important to an international community of cultures is for all peoples to feel that all voices are genuinely being heard in the human rights discussion." Only when this takes place can we "begin to formulate authentic international human rights norms". [150]

CHAPTER 3
Competing Conceptions

In the previous chapter I discussed three features of human rights which mark them out as needing special justification. These all have to do with their application to a world in which a diversity of cultures and legal systems coexist. Because human rights are often seen as moral trumps, we must be able to justify why they are supposed to outweigh local cultural or political norms, domestic legal norms (when the two conflict) and a people's interest in collective self determination. The various philosophical conceptions of human rights in the literature attempt work out the justifying reasons for human rights which are strong enough to hold up against these challenging and controversial features. One way to provide a justification for human rights that would outweigh the above mentioned considerations for local customs, national political and legal architecture and interest in sovereignty would be to argue that these things are all to some degree contingent, whereas what human rights protect is something which is somehow more basic. This is the approach taken by traditional conceptions of human rights, which start from universal moral qualities

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[149] Cobbah 330
[150] ibid.

or certain features common to all of humanity that are worthy of universal protection. In so far as these pertain essentially to all humans as such, they aim to offer the strong justification human rights seem to require. The political approach takes the opposite approach, considering the political-institutional arrangements at the the national and international level as basic. They remain largely agnostic about any universal moral notions which might be said to ground rights beyond the very basic assumption that human rights protect individual interests.[151]. Rather than the question being what grounding justification of human rights could be strong enough to outweigh political considerations, the question is reversed: given the current institutional political realities, which human rights can be considered universal? How these institutional and political realities are interpreted and what weight they are given in theory construction varies from author to author.

3.1 Gewirth: human rights and rationality

Alan Gewirth constructed a simple yet incredibly ambitious argument for universal human rights, which purports to rely solely on unassailable facts about humans and the requirements of logical consistency. The argument moves from my fundamental interest in freedom wellbeing to the 'dialogical necessity' that I will recognize the same interest in others. My fundamental interest in freedom and wellbeing derives from these being the necessary conditions that must obtain for me to have any kind of agency at all. The I c— for the combination of both is required for me to be able to act at all. Simply put, insofar as I claim, as I inevitably will, that others must respect my freedom and well-being, I commit myself to respecting the freedom and well-being of others. Gewirth's conception of human rights is a reaction against contextualist and positivist understanding of human rights which were widely popular at the time, which held that questions about human rights (and jurisprudence in general) could be answered in reference to the law alone or to the historical patterns of its interpretation and application. Against the positivist and contextualist position Gewirth argued that "if the existence or having of human rights

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[151] Beitz *IHR* 134

depended [only] on such recognition, it would follow that prior to, or independent of, these positive enactments, no human rights existed."[152] Gewirth's attempt to provide a more substantive justification for human rights is an essential part of his overall philosophical project, which sought to prove a rational foundation for normative ethics that would be valid for all rational agents regardless of their subjective preferences or cultural context. [153] This was project was largely a response to the mid to late 20th century vogue of skepticism about objectivity in general, which lead theorists to abandon grand theories grounded in rationality in favor of more sober hermeneutic, interpretive and pragmatic accounts of the law and morality. Gewirth's work attempts to revitalize the strong foothold morality once had when anchored in the rationalist tradition, when for thinkers like Spinoza, Leibniz, and Kant the immanence of rationality grounded the objectivity of morality. His theory, which he described as "modified naturalism" took up the rationalist project of attempting to provide morality with a strong foundation in the empirical world of human agency and formal logic.[154] Gewirth criticizes naturalistic foundations for moral theory and offers an alternative moral account grounded in rationality. In this way the account is not supported by essentialist claims to human nature, but rather but rather to *human action*. To this end Gewirth posits a "supreme principle of morality" which he calls the Principle of Generic Consistency (PGC) which he describes as similar to the 'golden rule' or Kant's categorical imperative.[155] The PGC. according to Gewirth, is derivable as a requirement of "agential self-understanding". This means that although the PGC is derivable from human agency, it derived only trough a "dialectically necessary" mode of argumentation. The mode is "dialectical" because the argument leading to the PGC is presented in the form of inferences made by the agent herself, rather than relying on truths or facts that are external to the agent's point of view. The mode of argumentation is

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[152] Gewirth 120

[153] Gewirthian perspectives on human rights 3-4

[154] Gewirthian perspectives on human rights 4

[155] Alan Gewirth, 'The Epistemology of Human Rights', *Social Philosophy and Policy*, 1984 <https://doi.org/10.1017/S0265052500003836>. 14

"necessary" according to Gewirth in two senses: first, the initial premise about the conditions for agency should be such that an agent cannot deny them without contradiction (since they are the conditions requires for agency as such) and secondly, it is necessary in the sense the subsequent steps of the argument follow logically from the premise.[156]

Gewirth's argument for the dialectical necessity of the PGC begins with what he identifies as the fundamentally normative structure of human agency:

> Because of its genetic features, action has what I shall call a 'normative structure,' in that evaluative and deontic judgments on the part of agents are logically implicit in all action; and when these judgments are subjected to certain rational requirements, a certain normative moral principle logically follows from them. To put it otherwise: any agent, simply by virtue of being an agent, must admit, on pain of self-contradiction, that he ought to act in certain determinate ways.[157]

The structure of purposive agency, according to Gewirth is of the form "I do X for purpose E", followed by the assertion "E is good."[158] These two assumptions must be accepted by all agents, provided their actions are voluntary, or they risk contradicting the very idea of their agency.[159] In recognizing the necessity of agency, Gewirth argues that agents must also recognize certain 'proximate necessary conditions' for agency. These proximate necessary conditions (PNCs) of agency—which he identifies as freedom and well-being—identified as such since were they not to obtain it would preclude the possibility of agency at all. His argument for the dialectical necessity of the PNCs can be paraphrased as follows:

(1) All moral precepts, regardless of specific content, are concerned (either directly or indirectly) with how persons ought to act

(2) In this way, moral precepts are like most (if not all) practical precepts

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[156] Ibid.

[157] Ibid.

[158] ibid

[159] Alan Gewirth, *Reason and Morality*. Chicago: University of Chicago Press (1981) 25-6

(3) In so far as actions are the possible objects of these precepts, they are performed by purposive agents

(4) Every agent regards his purpose as *good* according to whatever criteria (not necessarily moral) are involved in his acting to fulfill them

(5) The necessary conditions for fulfillment of her action (and its success) are freedom and well-being, "where freedom consists in controlling one's behavior by one's unforced choice , while having knowledge of the relevant circumstances, and well-being consists in having the other general abilities and conditions required for agency."[160]

According to Gewirth, we involve ourselves in agency for the sake of something that we *want* to achieve and in that sense our action leads to a positive evaluation of its purpose (I do X for purpose E, E is good).[161] This is simply to say that in rationally endorsing some end, we must logically endorse the means to that end. Thus we will also regard as necessary goods the "proximate general conditions" of our acting to fulfill our purposes.[162] This does not mean that our goals of our actions, or the conditions for carrying them out are necessarily pleasant to us, or that we prefer them out of hedonistic motivations. For example, if I wish to travel to a certain in Africa I may to present documentation to transportation authorities that I received a vaccination against malaria. Although I may be scared of needles and find the prospect of getting a shot highly unpleasant, I none the less recognize it as a means to achieving my goal of pursuing my trip and thus regard it as something good. While the shot I need in order to travel to Africa is a proximate condition that must obtain it is not yet a necessary condition on Gewirth's understanding of the concept. While I might say in the course of everyday conversation that it is "necessary" for me to receive a shot in order to travel to Africa, it is not logically necessary in the strict sense—I could bribe a doctor to forge documents or stow away on a

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[160] Gewirth "The Content and Basis of Human Rights" 125

[161] GPHR 4

[162] Gewirth "The Content and Basis of Human Rights" 125

freight ship if I was so determined to avoid the needle. However, I could not achieve my goal of traveling to Africa without my ability to control my behavior by my unforced choice (freedom) and my life, health and mental and bodily integrity (wellbeing). These are the necessary conditions that must obtain before I can be said to have anything like a choice and a perceived ability to act upon it. Hence, in so far as I am rational, I must value my freedom and well-being, for to not do so would undermine my ability to purposive rational action generally.

3.1.1 From binding reasons to binding rights

Gewirth's argument for human rights follows from the dialectical necessity of the PNCs of agency to the dialectical necessity of human rights generally. Again, the steps in the argument are supposed to follow necessarily from the premise. The difficulty will be to show how he imagines the reasoning agent gets from the interest in freedom and well-being, to the logical necessity of binding rights for herself and all others. The first five steps in the argument proceed as follows.

(1) My freedom and well-being are necessary goods.
(2) I, as an actual or prospective agent, must have freedom and well-being
(3) All other persons must at least refrain from removing or interfering with my freedom and well-being
(4) I have rights to freedom and well-being.
(5) All other persons ought at least to refrain from removing or interfering with my freedom and wellbeing.

Premises (1) follows from the earlier argument about the inescapability of agency and the PNCs. My acceptance of (1) also entails (2) since recognizing myself as an agent requires I also accept the PNCs, means I will also recognize that other agents must have freedom and well-being as well. This also entails (3), that "All other persons must at least refrain from removing or interfering with my freedom and well-being", because I will also

recognize that if other persons remove or interfere with my freedom and well-being, I won't have what's necessary to be an agent. Gewirth moves directly from step (3) to (4) the claim that "I have rights to freedom and well-being." It is here that the language of rights enters the construction, but there is still a considerable amount of theoretical work to be done in order to show how to the compelling interest in freedom and well-being logically entail the assertion that one has rights to them. Furthermore, even if we accept the assertion that the rational agent who "must have freedom and well-being" will claim her rights to them, we still need to explain the move from this 'prudential right claim' on behalf of herself to a moral commitment to the rights of others. The argument for moving from step (3) to (4) follows a pattern of *Reductio ad Absurdum*.[163] If an agent denies premise (4) "I have rights to freedom and well-being", then Gewirth argues she must also deny (5) that "All other persons ought at least to refrain from removing or interfering with my freedom and wellbeing." Denying (5) however, commits the agent to accepting (6) "It is *not the case* that all other persons ought at least to refrain from removing or interfering with my freedom and well-being". Hence the agent must also accept (7) "Other persons may (are permitted to) remove or interfere with my freedom and well-being." Yet (7) clearly contradicts contradicts (3), and since (3) follows necessarily from (1) and (2) as a premise which every agent must necessarily accept, the agent cannot consistently accept (7). Because (7) is entailed by the denial of (4), "I have rights to freedom and well-being," it follows that in denying that she has rights to freedom and well-being the agent contradicts herself. This leads Gewirth's agent to the conclusion that (8) "I have rights to freedom and well-being because I am a prospective purposive agent." From this point Gewirth's agent moves from her prudential rights to recognizing the rights of all others like herself. Since all other agents are in exactly the same position as the agent herself, consistency requires that she logically accept premise (9) that "All prospective purposive agents have rights to freedom

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[163] *Reductio ad Absurdum* arguments begin by assuming the negation of what one intends to prove and proceeds by showing that a contradiction (absurdity) follows from the initial assumption

and well-being." The agument ends up in Gewirth's Principle of Generic Consistency, which implores us to "respect the freedom and well-being of all other persons...". Gewirth's argument to provide dialogically necessary foundation for human rights is impressive in both its ambition and rigorous argumentation. It has served as an inspiration for many of the other moral conceptions of human rights in the literature such as Griffin's and Tasioulas'. Its claims to logical necessity are of course not unproblematic and have been repeatedly challenged in the literature. I have chosen to include it here, both as an example *par excellence* of the traditional conception of human rights but also because of the unique way it integrates the conditions of human well-being into the definition of agency itself.

3.1.2 Critical Remarks

Two important problems confront a traditional conception of human rights when they encounter the real world circumstances where human rights need protection. The first is the problem of whether or not a conception of human rights grounded in such a strict understanding of purposive rational agency would be broadly accepted. As we have seen a great deal of the skepticism about human rights, on the part of philosophers as well as the global public, pertains to their association with a particular individual ontology grounded in self-interested action. Not only is of purposive rational agency associated with consumer capitalism and accused of having a distinctively Western bias, but it also might simply be at odds with how individuals understand themselves in other parts of the world. Although Gewith understands the internal perspective of the goal oriented individual as universal, it might be the case that in the international arena we may encounter cultures in which the experience of autonomy as we know It is unavailable to them, where individuals do not perceive themselves as rational actors in the sense in which Gewirth intends. Even the meaning of the term 'autonomy' might be, as Charles Taylor put it, "opaque to them because they have a different structure of experiential meaning open to them."[164] On such

[164] Charles Taylor, Philosophy and Social Science 36

consideration, some theorists have tried to provide justifications of human rights which don't rely on such stringent definitions of purposive rational agency. James Griffin, for example, proposes to ground human rights in "personhood". Although, like Gewirth he identifies personhood with normative agency , his version is less rooted to the purposive rational action model. Personhood for Griffin has three components (1) *autonomy*, defined as the capacity to "choose one's own path through life—that is, not be dominated or controlled" (2) "minimum provisions" required for one to choose and act effectively, which include education, information, capabilities, and resources and (3) *liberty* in the most basic sense of not being blocked in acting by the forcible interference of others. Even this les stringent definition of autonomy is problematic, in so far as it prioritizes the stand point of the first person singular, assuming that all individuals will experience autonomy (and value it) in the same way as I do. Both Gewirth and Griffin recognize that a necessary step in moving from the subjective position of the rights holder to the universal ascription of moral rights to all others require that I view them as agents like myself. But agency itself is not a fixed notion, but one which is but one which is deeply linked to cultural and social practices. Thus, as Seyla Benahbib argues that "the weakness of all agent-centric accounts of human rights" is that they "abstract from the social embeddedness of agency… and instead focus on the isolated agent as the privileged subject for reasoning about rights."[165] In terms of the evaluative criteria I have laid out, this means that while traditional conceptions satisfy the standard of *universality,* they tend to do so at the expense of *non-parochialism.* Even as Gewirth and Griffin try hard to avoid a grounding in natural law in in the metaphysical sense that might carry a Western bias by appealing to rationality alone, they none the less rely on a notion of purposive rational agency that is in ttself problematic in this regard.

Another problem that traditional theories like Gewirth's and Griffin's encounter

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[165] Benhabib *DA,* 68

when it comes to questions of their applicability to the real world circumstances in which rights need protection is their inability to speak to the institutional circumstances in which the rights they posit might obtain. What is attractive about both accounts is that they are able to justify rights beyond those of mere negative liberty. Social and economic rights are justified on the grounds that they are somehow necessary to for any type of agency, on the basis of being PNCs (Gewirth) or "minimum provisions" (Griffin). Thus, on these views, social and institutional arrangements will be seen as unjust if they fail to provide for individual welfare and meet basic needs. The problem with traditional rights theories like Gewirth's is that they fail to specify who exactly holds the duty correlative to these rights. In terms of the evaluative criteria, we can say that these theories lack *prescriptive determinacy*. If we accept Gewirth's argument as logically sound, and our interests in freedom and well-being ground moral rights which are binding all other agents, then these rights give rise to universal obligations. This may be fully acceptable from a moral point of view, but in so far as the fulfillment of these rights will require the provision of resources, institutional arrangements will be necessary to carry this out. Thus while Gewirth and other 'traditional' theorists assume that the counterparts to universal rights are universal obligations, certain aspects related to the fulfillment and enforcement of these rights must be allocated to specific institutions and agencies.[166] In the case of negative-liberty rights (such as the right not to be tortured or held in servitude) the corresponding obligations are negative and require only abstinence. In the case of social and economic rights, which may require positive action for their fulfillment, the corresponding duties require a high level of institutional coordination. Onora O'neill puts this point as follows:

> Suppose we think that there are both rights not to be tortured and rights to food. If, in the absence of enforcement, A tortures B, we are quite clear who has violated B's right; but if A does not provide B with food, not even with a morsel of food, we cannot tell whether A has violated B's rights. For nothing shows that it is against A that B's claim to food holds and should be enforced.[167]

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[166] O'Niell (2000) 134

[167] O'niell, *Bounds of Justice* 185-6

Thus, we can conclude that although Gewirth's and other traditional conceptions offer robust philosophical justification for human rights that should put them on solid enough footing to apply to individuals everywhere thus proving more basic than the contingencies of local political and social arrangements, their reliance on the autonomous individual as a starting might make the justification unacceptable from the perspective of the individuals themselves. Furthermore, while these conceptions are attractive in their ability to provide justification for the social and economic rights that might serve to protect individuals against the harmful effects of economic globalization, their lack of institutional awareness makes them ineffectual in offering real-world solutions.

3.2 The Political Turn: Rawls

Rawls is generally credited as the inventor of the political conception of human rights, and it was his work that largely initiated the institutional and political turn in liberal theory generally. In order to discuss his conception of human rights it will be necessary to give a brief overview of his relevant works, in so far as they impact the discussion on political-institutional theories of justice and human rights, but also as away of situating his theory of human rights within the context of his larger body of work. I begin by discussing Rawls' highly influential work *A Theory of Justice,* which introduces his influential concepts of the 'basic structure' of society as the subject of justice and his novel, yet distinctly Kantian conception of justification. The latter involves the representational device of an 'original position' in which hypothetical contractors agree on the principles for the just ordering of society's institutions. The influence of both made a lasting impact on the literature in political philosophy, inspiring a new wave of deontological and institutional theories and sparking off debates between institutional and non-institutional theories of justice which are reflected in the debate over the philosophical foundations on human rights I will discuss the evolution of Rawls' thought and his 'political turn' in

Political Liberalism and his later works, in which considerations of legitimacy and stability motivated a shift from the more robust liberalism that characterized *TJ,* to a distinctly political liberalism, one who's normative source could be found in the 'freestanding' sphere of political ideas and values found in the public culture of a society. The problems of legitimacy and stability and the related issues of 'pluralism' and 'toleration' remain a central focus of Rawl's theory on international relations in *LoP,* where they have a considerable impact on shaping Rawls' conception of human rights.

The political-institutionalist branch of liberal political philosophy has its roots in the work John Rawls. The institutionalist turn is attributed to his earlier works, most notably *A Theory of Justice,* and embodies the idea that the subject of justice are the institutions of the basic structure in society. While all political philosophy speaks to the institutions of society on some level, Rawls work is differentiated by the fact that the problem of justice only arises in the context of institutions and the individuals who they serve and coordinate, there is no background theory of morality in the absence of the institutional relationship. A second and wholly related point is that the role of these institutions in society constrains the principles of justice that apply to them. Rawl's 'political turn' began in *Political Liberalism* and continued throughout his later works including *The Law of Peoples.* In *PL* he remains committed to the institutional conception of justice and working out the problems of justification that arise within this context, but considerations of stability motivate a shift from a moral to a political form of justification. In *PL* and beyond Rawls' use of the term 'political' refers increasingly to the sphere of 'political values', which provide a shared fund of values for individuals in modern societies which is distinct from the sphere of private or cultural values.[168] In *The Law of Peoples* Rawls expands his institutionalist conception of justice, reinterpreted according to the theoretical developments in *PL*, into a liberal theory of international relations. It is here

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[168] Habermas *Inclusion of the Other* 70

that Rawls articulates his influential conception of human rights, which fills in the content of human rights by identifying the vital role human rights play in the stability of the society of people.

In *Theory* Rawls sets out a liberal theory of justice for the institutions of the basic structure of society. The institutions of the basic structure constitute the subject of justice because they contain the necessary apparatuses for distributing the benefits and burdens of life in a collective society and as such, they have a profound effect on the lives of the citizens who fall under their purview. Rawls tells us that there are natural inequalities existing everywhere in nature, people are born with a variety of different levels of talent and ability. The arbitrary inequalities found in nature are not themselves unjust, what constitutes injustice is when arbitrary inequalities are institutionalized in the basic structure of the society. [169]The end of social justice then, becomes a social structure institutionally ordered in a non-arbitrary way. In order for the institutions in the basic structure to be ordered in a non-arbitrary manner in relation to the individuals who fall under its purview, then they need to be ordered according to principles that the citizens find reasonable. Although Rawls acknowledges that there are likely to be a diversity of opinions as to how to reasonably organize the institutions of society, and thus a variety of ideas as to what would count as a reasonable conception of justice, he believes we can none the less most likely agree about the *role* of a conception of justice in society

> Those who hold different conceptions of justice can, then, still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life. [170]

With the role established Rawls fills in the content through his hypothetical thought

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[169] *TJ* 16, 62-65
[170] *TJ* 5

experiment, the 'original position' in which Rawls' essentialized 'moral persons'—defined by their "sense of justice" and "the capacity to revise and rationally pursue a conception of the good."[171]—select appropriate principle of justice to order the society. In the original position, the hypothetical reasoning agents are placed under a 'veil of ignorance' which deprives them of any knowledge of their private life or background (religion, social standing, etc). The task is designed to abstract away from personal biases that might effect the actors' preferences in order to get at the core of what is reasonable—thus securing principles for the ordering of society which stand in a special relationship of justification to the individual. The actors in the decision procedure arrive at Rawls' famous two principles of justice: (1) "each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all." And (2) "social and economic inequalities are to satisfy two conditions: a)They are to be attached to offices and positions open to all under conditions of fair equality of opportunity; b)They are to be to the greatest benefit of the least-advantaged members of society." [172]

3.2.1 Reasonable Pluralism

The 'political turn' in Rawls theory was introduced in *Political Liberalism,* motivated by an attempt to render his conception of justice more realistic, largely by addressing the issues of the political legitimacy and continued stability of the well-ordered society in the face of what he calls 'reasonable pluralism'.[173] Like in *Theory,* Rawls is concerned with the ordering of a liberal society such that its institutions stand in a non-arbitrary relationship with its citizens. Again, this means the ordering must be justified to them in a way they find reasonable. Yet in a liberal democracy, even one which is 'well-ordered' by the two principles of justice, the free use of reason will likely lead to a plurality

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[171] John Rawls, 'Kantian Constructivism in Moral Theory', *The Journal of Philosophy*, 1980 312
[172] *TJ* 266
[173] Maffettone 220

of metaphysical and epistemological views (what Rawls calls 'comprehensive doctrines'). Given the irreducible plurality of comprehensive doctrines, it would be unreasonable (and illiberal) for democratic regime to impose a particular comprehensive conception doctrine —even the liberal, loosely Kantian one from *TJ*— on its citizens. In *PL,* Rawls thus turns to the shared fund of ideas found in the 'public political culture' of a democratic society. The hope is to show that these might function as a point of overlap between reasonable citizens' comprehensive views.

3.2.2 The International Order

In *The Law of Peoples* Rawls extends political liberalism to the international order, articulating standards for the co-existence of separate nation states in a reasonable 'Society of Peoples'. *The Law of Peoples* is a liberal theory of foreign policy, in that it seeks to articulate the fundamental purposes that should guide the foreign policies of liberal democratic societies.[174] Like *TJ, LoP* has both an ideal and a non-ideal theory component. But as we shall see, institutional considerations—about justification and application—factor in even at the level of ideal theory. Thus with his aim to articulate a "conception of right or justice that applies to the principles and norms international law and practice"[175] Rawls' project in LoP is no less ambitious than to examine the prospect of a "realistic utopia".[176] Political philosophy is realistically utopian, according to Rawls, when it "extends what are ordinarily thought to be the limits of practical political possibly."[177] The *LoP* then, starts from the foundation of a constitutional democracy and envisions a social world that allows for reasonably just, well ordered societies existing together in a fictionalized international order Rawls calls 'The Society of Peoples'. The aim of this Society of Peoples is to achieve conditions in which different peoples (his idealized version

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[174] Beitz 2000

[175] Rawls, The Law of Peoples 3

[176] On p. 5-6 of LoP Rawls discusses his conception of a 'realistic utopia' and p.10 he explains that his basic idea forthe LoP is to follow Kant's lead in Perpetual Peace (1795) his idea of foedus pacificum.

[177] LoP 6

of the nation state) can engage with each other peacefully, while at the same time remaining largely autonomous.[178] Rawls distinguishes between four types of domestic societies, only two of which meet the conditions required for membership in the Society of Peoples. These are *liberal peoples* and *decent peoples*. *Liberal peoples* satisfy all the criteria of political liberalism, they are well-ordered and internally just. *Decent peoples,* are not internally well-ordered according to political liberalism, they may not be democratic and they do not internally embody reasonable pluralism in so far as they may favor a dominant religion or bar certain groups (i.e. women) from holding public office. Yet in so far as their basic institutions "meet certain specified conditions of political right and justice"[179] none the less merit equal membership in the society of peoples. As will become apparent below, considerations for decent, non-liberal societies has a profound impact on the way Rawls conceives human rights. The other two types of societies, which Rawls considers in the non-ideal theory portion are *outlaw states,* who are not internally just and whose actions and policies may be externally aggressive, and societies burdened by unfavorable conditions (*burdened societies*) whose lack of internal well-ordering is largely due to a lack of economic resources.

As in the domestic society considered in *PL,* in the international arena a plurality of comprehensive political and metaphysical world views are likely to coexist. In order to maintain the stability of the Society of Peoples, the Law of Peoples tries to outline a shared basis of political justification grounded in public reason. The hope is that by establishing law that makes recourse to reasons each participating society can accept, all peoples can expect the willing cooperation of other states. Human rights factor into this account as the minimum standards for membership in good standing in the Society of Peoples. [180] In this

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[178] Rawls' defines his peoples as 'autonomous', which overlaps in many ways with the traditional notion of sovereignty, but seems to have an additional moral quality

[179] *LoP* 3

[180] ibid 79

way they set an important criterion for *decency* thereby setting the limit to what is reasonable. Rawls list the three primary functions of human right as follows:

> 1. Their fulfillment is a necessary condition of the decency of a society's political institutions and of its legal order.
>
> 2. Their fulfillment is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force.
>
> 3. They set the limits of pluralism among peoples.[181]

3.2.3 Rawls' Short List

Human rights play another important political role in the Society of Peoples, in so far as the the violation of human rights is, along with self-defense, one of only two reasons that can justify the interference of the international community in the sovereign affairs of peoples— not only through the imposition of diplomatic and economic sanctions but also, as a last resort, military interventions.[182] Thus, a society's observance of human rights is "sufficient to exclude justified and forceful intervention by other peoples." [183] Because they establish minimum conditions for membership in the Society of Peoples, appeals to human rights should be able to provide reasons for action to all members of the Society of Peoples.[184] This fact, combined with the role of human rights in setting legitimate standards for the international community in the sovereign affairs of state have a

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[181] ibid 80

[182] *LoP*: 37f., 81, 93f.n

[183] ibid.

[184] Beitz 99

considerable limiting effect on the list of human rights Rawls lays out for the Society of Peoples.

Rawls' account resembles the most standard accounts of human rights in so far as he understands them as "a special class of urgent rights" which are international and universal in the sense the sense of being binding on all societies regardless of whether they are accepted locally and applying to all people whether or not they are accepted by their governments.[185] The controversial feature of Rawls' conception was the brevity of his list of human rights—limited to negative freedoms and bodily security—which diverged significantly from both the conventional understanding of human rights as well as most philosophical accounts popular at the time.[186] However, the thing that struck readers most, given Rawls claim to be setting out a political theory for the realities of our contemporary world, was its substantial deviation from the list of human rights enumerated in the covenants, especially the UDHR. Although the UDHR is non-binding in international law, it has been characterized as indirectly constituting international treaty law in so far as represents an authoritative interpretation of the term 'human rights' in the UN Charter.[187] As in 1999 when Rawls wrote *LoP,* the vast majority of countries had ratified the UDHR binding themselves to its norms, and many African and Asian states who gained their independence after 1948 refer to to the document in their constitutions, further emphasizing its political and moral significance and acceptance around the world.[188] Although the Declaration is by no means universally complied with, its content is no longer a subject of significant international controversy.[189] The Declaration's 30 articles establish over two

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[185] *LoP* 80-81 Rawls makes this point about universality in his discussion of outlaw states: the political (moral) force of human rights extends to outlaw states (and their citizens) regardless of whether the governments of these states choose to acknowledge them

[186] Like for example Gewirth's

[187] All human rights activities of the HRC and other bodies of the UN, which are directly based on the Charter, refer to the UDHR as standards universally recognized by all states. See. Nowak 76

[188] Nowak 76

[189] Nickel 264

dozen specific human rights, which are grouped in at least five different categories: (1) *security rights* such as the right to life and protections against torture (Articles 3-5); (2) rights of *due process* that guarantee equality before the law and protect against arbitrary arrest (Articles 6-11) ; (3) *Rights of individuals towards their communities* including freedom of movement and the right so asylum (Articles 12-17) ; (4) *liberty rights* protecting spiritual, public, and political freedoms, such as freedom of thought, opinion, consciousness and the right to peacefully assemble. Also included here is the right to participate in democratic governance (18-21) ; (5) *economic and social rights* , including the right established in Article 25 to "a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."(22-27); Another group of rights which are not listed in the UDHR but are generally considered as fundamental rights on par with those enumerated and thus should be considered here are minority rights and group rights.[190]

Compared with the Declaration Rawls' list is considerably shorter. It includes only (1) the right to life—understood as the means of subsistence and security; (2) the right to liberty, by which he intends "freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought"; (3) the right to personal property; and (4) the right to "formal equality as expressed by the rules of natural justice" meaning "similar cases should be treated similarly."[191] Rawls also makes reference to the "right of emigration",[192] and qualifies the right to liberty by adding that it should not be understood as a right to "equal liberty".[193] Noticeably absent from Rawls' list are the many rights listed in the UDHR that have strong liberal, democratic, or egalitarian dimensions.[194] In terms of liberty rights Rawls' account is limited to minimalist

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[190] Several human rights treaties mention minority rights and group rights, beginning with The Convention on the Prevention and Punishment of the Crime of Genocide (1948). See also Nickel

[191] *LoP* 65 Here I have paraphrased Rawls' list of human rights, quoting directly where indicated.

[192] ibid 74 He discusses this right in the context of the characteristics of decent societies

[193] *LoP* 79

[194] Nickel 264

account of negative liberty, leading to a schedule of rights which is far narrower than those typically seen in domestic constitutions or international covenants, which tend to include freedom of expression, peaceful assembly and association. Although the strictures of membership in the Society of Peoples requires that the citizens of a nation state contribute to the political discourse in some meaningful way, there is no requirement that this process be understood in the liberal democratic manner of equal representation.[195] Thus a full set of political rights, such as those listed in the UDHR which establish the right to participate in one's country's governance through periodic and fair elections by universal and equal suffrage do not make it onto Rawls' list either. Although Rawls list contains a right to "formal equality as expressed by the rules of natural justice"[196] this should in no sense be understood as baring any strong egalitarian undertones. There are no human rights guaranteeing equal citizenship, and there is no guaranteed right to equal opportunity.[197] For example, in hypothetical example of Kazanistan, a decent society from the standpoint of the law of peoples (and therefore an upholder of human rights), citizens who do not adhere to the majority religion my be prohibited from holding political and judicial offices.[198] Finally, Rawls identifies no economic and social rights as human rights proper, beyond those which are required for mere "subsistence". The decision to exclude socioeconomic
In so far as human rights constitute legitimate triggers of interference in the sovereign affairs of states and the minimal conditions for membership in the society of peoples there are two distinct, yet related rational for Rawls has for laying out this truncated list. The first is that as triggers for international intervention, the human rights should be grave enough or important enough to justify this interference in state sovereignty. In a footnote Rawls provides a clue that this is at least part of his line of reasoning leading up to the limitation as he proposes a distinction between human rights proper and those which

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[195] See Rawls' discussion of the governance of decent consultation hierarchies *LoP* 71-2
[196] *LoP* 65
[197] I discuss the Kazanistan case below in the section on toleration
[198] ibid. 76

require a certain kind of institutions or those which can only be understood as 'liberal aspirations'. Referring to the UDHR, he describes 3 to 18, especially "Everyone has a right to life, liberty and security of person" (article 3), and "No one shall be subjected to torture or to cruel, degrading treatment or punishment " (article 5) as well as the extreme cases covered in the conventions on genocide as 'human rights proper'. He classifies Article 1 of the Declaration that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" as merely a liberal aspiration, while articles 22 (the to equal pay for equal work) and 23 (the right to social security) as rights that require a certain type of institutions and as such don't count as human rights proper. [199] Although admittedly it is hard to understand how a society that does not recognize its citizens' equal dignity could be considered decent in any sense of the word, the idea that there is a priority among rights and that some require a more serious response than others is not only intuitive but also a standard of international human rights practice.[200] Although Rawls has a broad understanding of non-interference that it is not limited to military intervention, it none the less seems plausible that widespread violations of the right to "frequent holidays without pay"[201] would warrant the attention and resources of the international community. The second reason Rawls has for limiting the human rights involves considerations of 'toleration', which plays a central role not only in Rawls' conception of human rights but in his overall construction of the society of peoples. The importance of toleration to the stability of the international order—as well as the limiting effect that it has upon a list of human rights—is taken up by the by many of the authors who subsequently proposed

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[199] ibid 80 n23

[200] Bracketing the Bush administrations request for UNSC authorization of the invasion of Iraq partially on the grounds of restoring democracy, humanitarian intervention is usually reserved for the gravest cases where life and bodily security are severely at risk

[201] Article 24 of the UDHR establishes "right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay."

Rawlsian-inspired conceptions of human right, especially Charles Beitz and Joshua Cohen.

3.2.4 Toleration in the society of peoples

The importance of toleration for Rawls overall account of human rights (and in LoP generally) can not be underestimated. It was the consideration of toleration which motivated the shift from a 'comprehensive liberal conception' in theory of justice, to the political conception that would inform his later works from Political Liberalism to LoP. Stability for the right reasons—the key element in Rawls' realistic utopianism—demands that political institutions be justified according to principles which agents (Peoples in this instance) can reasonably accept despite their divergent beliefs and value systems on the basis of public reason. Human rights, are thus understood as a fundamental element of any "common good idea of justice"[202] and therefore not to be interpreted as "peculiarly liberal or special to the Western tradition."[203] Consideration for Decent Peoples in the society of peoples is one of the primary determinants of which rights he includes as human rights proper. Not surprisingly, the bulk of Rawls discussion of human rights is found in the beginning of section II of LoP—which begins with a lengthy discussion on toleration—immediately following Kazanastan example. The hypothetical case of Kazanastan, a 'decent consultation hierarchy' —in which in which citizens are represented politically albeit as members of groups and the principle of equal opportunity does not apply to public office due to religious requirements— is strategically constructed by Rawls to explore the limits of liberal toleration. Rawls imagines Kazanistan as an "idealized Islamic people". It's law doesn't recognize a separation of church and state, so it affords some special priorities to the Muslim religion, for example, non- Muslims may be barred from holding upper offices of political authority. Despite this fact, "other religions are tolerated and may

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[202] *LoP 88*
[203] *LoP* 65

be practiced without fear or loss of most civic rights". [204] Politically, Kazanistan is organized as a "decent consultation hierarchy" where individuals are not represented directly as such but rather as members of groups. The political decision process must satisfy the following six guidelines: (1) all groups must be consulted; (2) each member of a people must belong to a group; (3) each group must be represented by a body that contains at least some of the group's own members who know and share the fundamental interests of the group; (4) the rulers of Kazanistan must weigh the views and claims of each of the bodies consulted, and judges must be available to clarify the rulers' decision; (5) the decision should be made according to a conception of the special priorities of Kazanistan (the society's common good idea of justice); and (6) these special priorities must fit into an overall scheme of cooperation, and the fair terms according to which the group's cooperation is to be conducted should be explicitly specified.[205] The example of Kazanastan is strategically constructed to demonstrate how a society might not be fully liberal, yet still "meet certain specified conditions of political right and justice".[206]

The society of Kazanistan, although not liberal or internally just, none the less organized according in a manner that is reasonably respectful of it's citizens and allows their voices to be heard. In so far as recognition of human rights is "sufficient to exclude justified and forceful intervention by other peoples" [207], a society's failure observe them may warrant intervention its internal affairs.

3.2.5 No democratic rights for Kazanistan

The model of Kazanistan, so constructed shows the problematic nature of insisting on a full set of liberal rights such as those found in the UDHR. In a footnote, Rawls is careful to clarify that a full set of liberal democratic rights is a desirable state of affairs,

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[204] *LoP* 77

[205] *LoP* 77-8 here I have paraphrased Rawls guidelines

[206] *LoP* 3

[207] ibid.

and even acknowledges that there is empirical evidence to suggest a link between liberal demogratic rights and a countries human rights performace overall. However, he maintains hat with the hypothetical example of Kazanistan means only to explore the questions of "whether we can imagine such a society; and, should it exist, whether we would judge that it should be tolerated politically."[208] Given that the citizens of they hypothetical Kazanistan are sufficiently well respected and have opportunities for some form of participation in their government—they are not fully dominated or oppressed—can we really justify the interference of the international community in their internal affairs? After all the historical record is rife with examples of failed attempts at democratic nation building, and in some cases (Haiti and Nicaragua for example) brutal dictatorships come to power in the wake of these botched attempts.[209] But in the society of peoples (as in the real world today) military intervention is not the only possible ramification for human rights violations. They may also be addressed by means of economic or political sanction.[210] Economic sanctions, and even persuasion, are unacceptable from the standpoint of political liberalism since, according to Rawls it could jeopardize decent peoples' self-respect. Rawls' idealized peoples, unlike states, have a moral character analogous to domestic citizens. [211] Forcing them through sanctions to adopt a full set of liberal democratic right, would amount to coercion, thus undermining their self respect and thus the stability of the society of peoples.[212] Thus we see clearly that in the formulation of the right to "freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide"[213] the qualifier "but not equal liberty" is put in place with the decent societies in mind.

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[208] *LoP* n16

[209] I discuss this further in the next chapter, see https://carnegieendowment.org/files/Policybrief24.pdf

[210] ibid.

[211] LoP 26

[212] I discuss toleration and the stability of the society of peoples at length in the next chapter

[213] *LoP* 79

3.2.6 No economic rights for Kazanistan?

The exclusion of economic rights from Rawls list is somewhat trickier, and follows from other distinguishing features of his overall theory. If it has not already become apparent from the discussion thus far, Rawls does not endorse any cosmopolitan principles of justice. Thus the rights we hold are against our national governments, rather than the international society at large. A society's economic development is held by Rawls to be largely a matter of institutional design. Citing the examples of Japan and Argentina he argues that a society may be relatively poor in resources and yet economically successful (Japan) or resource poor and yet suffer economically (Argentina). He explains that " [t]he crucial elements that make the difference are the political culture, the political virtues and civic society of the country, its members' probity and industriousness, their capacity for innovation, and much else."[214] Rawls further demonstrates this by way of hypothetical example of two societies both struggling with a high rate of population growth. Both societies are equally free and just, but because society A chooses to stress "the elements of equal justice for women", its women flourish in social and political life, leading to a drop off in population growth and in increase in wealth over time. Society B on the other hand, "because of its prevailing religious and social values, freely held by its women, does not reduce the rate of population growth..." and is therefor eventually far surpassed in economic wealth by society A. Again, according to Rawls, it would be inappropriate to indorse a principle of global egalitarianism that would tax society A for the benefit of society B, since the circumstances of their economic inequality are the product of their own free will.[215] The other reason why Rawls a eschews a global principle of distributive justice presupposes a degree of social cooperation which simply does not exist on the global level. There is no 'global basic structure' in the sense that would be requires to ground a global principles of distributive justice.

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[214] *LoP* 108
[215] *LoP* 117

Being charitable to Rawls, we might assume that the benefits of cooperation in the society of peoples might eventually lead peoples to order themselves in such a manner as to improve the economic conditions of their citizens. Further, the law of peoples does include a 'duty of assistance' to burdened societies which might be understood to cover the minimum economic needs of individuals in these societies. Still the model relies rather naïvely on a conception of the international order in which states' economic performance is a matter of their own choices alone—again the case of the Haitian rice industry stands in direct opposition to this idea. Further, even granting the hypothetical starting point of a world of isolated states, it is difficult to see how a society that doesn't guarantee its members a right to an adequate standard of living could be understood to meet the requisite standard of a consideration for political right and justice.

3.2.7 Critical Remarks

In so far Rawls's formulation of the law of peoples follows from his desire to extend the idea of a real social contract as far as reasonably possible, his conception of human rights reflects his purpose. The pragmatic decision to achieve global stability by being maximally inclusive of various types of regimes thus privileges the toleration of minimally decent, yet otherwise illiberal states.[216] The lasting impact on the philosophical discourse on human rights has been the methodological approach of specifying the content of human rights according to their function. In terms of the evaluative criteria of *non-parochialism, universality* and *prescriptive determinacy,* Rawls model fares well on all three fronts. The degree to which consideration of toleration and respect for decent, non-liberal peoples shape the content of his list of human rights shows that a concern for non-parochialism is built into the model from the very start. In terms of universality, the fact that the basic human rights are binding on 'outlaw states' whether their governments accept these norms

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[216] Ingram, 'BETWEEN POLITICAL LIBERALISM AND POSTNATIONAL COSMOPOLITANISM Toward an Alternative Theory of Human Rights'. (2003) 363-4

or not, is proof that Rawls intends that the rights on his short list are to be understood as universal. Regarding prescriptive determinacy, in so far as the international community may justifiably intervene when a state fails to carry out its duties, all aspects of a valid rights-claim (rights holder, object and identifiable agent against which the claim is held) are satisfied. The drawback of the model is that the limiting of the conception according to the function of human rights as setting the limits to external sovereignty means that Rawls conception of human rights has little potential for application in other areas. It would be difficult, if not impossible, using Rawls' model alone, to work out whether powerful international actors like MNCs and international organizations have human rights obligations. Similarly given the evidence that transnational economic policies can in some instances negatively impact states' ability to provide for the interests of their citizens, would this have any bearing on the distribution of responsibility for social and economic rights? For it seems that if states are sometimes structurally prevented from becoming well-ordered enough to provide their citizens with a decent standard of living, simply leaving them up to their own devices may not be enough. Questions like these are not within the intended scope of Rawls' theory, so this is hardly a theoretical shortcoming of the work. However, in the spirit of realistic utopianism which his work inspires the answers to these questions seem wanting. Rawls conception is also sparse in in that it highlights only one aspect of human rights, their role as standards of legitimacy in international relations. Can we really fully understand the political function of human rights without at least considering the substantial body of law and practice that have developed around them? In the following section I will consider the 'practical conception' of human rights set out by Charles Beitz, who expands Rawls conception considerably. In chapter 4 I will return to Rawls work with an elongated discussion of the role toleration plays in a political conception of human rights.

3.3 Beitz's 'idea' of human rights

In this section I discuss Charles Beitz's highly influential practical conception of human rights laid out in his book *The Idea of Human Rights*. Using an interpretive methodology borrowed from Dworkin and Rawls, Beitz sets out to fill in the content of a conception of human rights by determining their role within a global political practice. Rather than relying on a background moral theory which is likely to be fraught with epistemic and political controversy, the practical conception takes "the doctrine and practice of human rights as we find them in international political life as the source materials for constructing a conception of human rights."[217] In so far as the human rights practice has evolved within the interstate system, Beitz identifies the idea of human rights as being that states are responsible for upholding certain standards in the treatment of their individual citizens. In the case that they fail to do so, they may warrant the interference of the international community. This leads Beitz to propose a two-level model of human rights in which States are the Primary duty bearers where human rights are concerned, while the international community plays a supporting role as guarantor. This way of assigning responsibility means that at the international level, no agents bare duties to respect, protect or fulfill human rights. This is of course at odds with the conventional understanding of human rights and of rights generally, which supposes that a valid rights claim must consist in a rights-holder, an object, and an identifiable agent against which the claim may be held. [218] Beitz defends this irregular feature out of fidelity to his practical methodology—to impose a formal structure on human rights claims would be question-begging, succumbing to the logic of the traditional theories he wants to reject. Interestingly though, not only does Beitz resist identifying human rights with moral norms, but with legal norms as well. The question immediately arises is that if human rights are neither moral nor legal, what is the

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[217] IHR 102

[218] There is however the possibility that some rights can be understood to lack corresponding duties: for a discussion of the so-called "manifesto rights" see Feinberg, Joel, and Jan Narveson. "The nature and value of rights." The Journal of Value Inquiry 4.4 (1970): 243-260.

source of their normativity? While Beitz tells us that human rights secure urgent human interests against perceptible threats he is vague about how gets from interests from the individual sphere of the interest-holder to to norms that would bind individuals in a community of rights. [219] In what follows I will briefly describe Beitz's practice dependent methodology and outline his two-level model of human rights. I will discuss the charge of indeterminacy that is often leveled at the model and and show that the decision to leave the role of obligation holder underdetermined stems not only from a fidelity to the practice in which Beitz finds that this role is often left open but also from his identification of the discursive role of human rights in combating arbitrary concentrations of power (real or perceived) in the global arena. The role human rights play in mediating power is an important current running throughout his work and provides his model with a normative force that is often overlooked.

Although Beitz Credits Rawls with developing the practical conception of human rights in *The Law of the Peoples,* it his own substantial elaboration of the concept which popularized practice-dependent theorizing about human rights and largely set the tone for the subsequent debate between political and traditional theories in the philosophical literature on human rights. His classification of the traditional conceptions, and the objections he raises to this type of theorizing has likewise had a continuing influence on the literature. According to Beitz, the traditional approach to theorizing about human rights is predicated on the view that human rights "express and derive their authority" from a deeper order of values. [220] Beitz divides traditional theories into two camps, naturalistic and agreement based theories. Naturalistic conceptions of human rights, as their name

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[219] Samantha Besson "Human Rights: Ethical, Political . . . or Legal?
First Steps in a Legal Theory of Human Rights" Childress, Donald Earl. *The role of ethics in international law / edited by Donald Earl Childress, III* Cambridge University Press Cambridge ; New York (2012): 228

[220] IHR, 7

suggests, refer to theories of natural rights and their more modern secular counterparts (Gewirth's and Griffin's theories fall into this category), which suppose human rights to refer rights that are natural (in the sense of being pre-institutional) that we all have in virtue of our humanity.[221] Under the umbrella of agreement based theories, on the other hand, Beitz includes those theories which seek to identify a 'common core' or 'overlapping consensus' of the world's various moral and social systems. The relevant similarity between both types of views is that they depend on values which are prior, or external to the human rights practice. While Beitz uses different lines of argumentation to challenge both categories of conceptions, his broad condemnation of both is that they are "question begging" in so far as they presume to interpret and critique the practice of human rights on the basis of conceptions that don't take into account the function that the idea of human rights actually plays in contemporary practice.[222] Their insistence on some separate account of a moral or ethical system of value, according to Beitz puts them at at odds with the contemporary practice of human rights as well as the historical development of human rights doctrine, whose authors, he reminds us "disowned the thought that human rights are the expression of any single conception of human nature or human good or of any but the most general understanding of the purposes of human social organization." [223]

He argues that his own approach to theorizing about human rights, which he calls the "practical approach" should offer an alternative that is more amenable to the aims and goals of contemporary human rights practice because it, " takes the doctrine and practice of human rights as we find them in international political life as the source materials for constructing a conception of human rights."[224] Thus questions about the nature and content of human rights are taken to refer to the idea of human rights as it is employed in

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[221] IHR 7, 20, 48-59
[222] IHR, 8
[223] IHR, 9
[224] IHR 102

international practice. It understands questions about the nature and content of human rights to refer to objects of the sort called "human rights" in international practice.[225] This insight, as he describes it, is that "we might frame our understanding of the idea of a human right by identifying the roles this idea plays within a discursive practice.[226]

3.3.1 Practice dependence

The extent to which considerations of social and political practices should factor in to the formulation and justification of normative principles is a hotly debated issue in contemporary political philosophy. The question, which should be understood as both a methodological and normative one, has a wide implications that go beyond theory construction and speaks to the function of political philosophy and the role of the political philosopher generally. Rather than relying on abstract principles alone, on the practice dependent approach political realities determine, or to some extent constrain the relevant principles. Those who advocate the practice dependent approach to political philosophy ascribe to it a variety of advantages over old approaches: expediency—the ability to provide normative solutions to urgent issues without getting bogged down with metaphysical quandaries—and action guidance—the ability of a theory to catalyze tangible results —are chief among them. In the political philosophy of human rights, which deals with highly urgent issues of a global scope, where traditional institutional means of action coordination are often lacking, the practice dependent approach to political philosophy is highly appealing.

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[225] ibid
[226] ibid

3.3.2 Beitz's methodology

The methodological/normative approach Beitz uses is similar to the one Ronald Dworkin has defended for interpreting legal concepts. One of Dworkin's most influential claims in legal philosophy is that law is an *interpretative concept,*[227] a special kind of concept which differs from what he terms 'criterial concepts'—whose correct application depend on fixed criteria, and 'natural concepts'—which rely on an instance-identifying decision procedure. The correct application of interpretive concepts, on the other hand, depends on the facts (normative or evaluative) that best justify the total set of practices in which that concept is used.[228] Dworkin's argument for law as an interpretive concept begins from an appeal to a certain type of legal disagreement, what he terms 'theoretical disagreement'.[229] They serve as an inroad to his legal theory, because, as he tells us theoretical disagreements are genuine disagreements over what amounts to the grounds of law—essentially a philosophical problem.[230] Unlike empirical disagreements in which judges and lawyers argue over what such and such statute actually claims "ie the letter of the law", theoretical disagreements are more complex because parties can agree as to the letter of the law, all the while disagreeing as to what the law actually means. These type of theoretical disagreements arise not only in the realm of law but also regarding a variety of political and moral concepts as well. For Dworkin, this type of disagreement applies whenever parties share the same concept (ei. of the law, of freedom, of equality) but differ in their application of the concept because they interpret shared practices differently. Therefore, resolving these controversies requires not a careful rational reconstruction of the concepts themselves, or the appropriate principles relating to the practice, but rather an analysis of the way the concepts are employed within the practice itself.

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[227] Dworkin first posits the idea of interpretive concepts in *Law's Empire* (1986), and further elaborates in *Justice for Hedgehogs* (2011)

[228] Plunkett 242, Patterson

[229] Dworkin (1986) 5, 11

[230] Ibid 5, 63

3.3.3 Beitz's 'fresh start'

As mentioned above, Rawls applies this methodology to a conception of justice in *A Theory of Justice,* where he supposes that given the variety of reasonable opinions as to what constitutes social justice, it would be unreasonable to expect citizens to comply with one particular understanding of justice above all others. They might none the less be able to agree about the functional *role* a conception of justice should play in society Beitz applies this methodology to the concept of human rights, arguing that we may come to "understand the concept of a human right by asking for what kinds of actions, in which kinds of circumstances, human rights claims may be understood to give reasons.[231] In order abstract away from the particulars of the human rights practice and arrive at an account of their functional Role, Beitz begins with a general description of the practice and its history. He argues that historically, the need for a for a global practice with the "functional features of human rights" was supported in light of "an empirical thesis about the pathologies of a global political structure that concentrates power at dispersed locations not subject to higher order control.[232] Thus, the drafting of the UN Charter immediately followed the experience of WWII, because the war and the events leading up to it were seen as a structural deficiency in the state system.

> By embracing a broad sphere of autonomous domestic authority, the system's norms provided a safe haven for governments that mistreated or failed to protect their populations in ways that had devastating consequences for those affected.[233]

He argues that the framers were also motivated by an empirical thesis, that governments with the institutional and cultural features that would lead them to abuse their populations were more likely to be externally aggressive.[234] It is the combination of the two theses that gave the human rights practice it's shape. While the first thesis generates

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[231] *IHR* 90
[232] Beitz *IHR* 129
[233] ibid
[234] ibid

the need for something like human rights, the second thesis is what warrants human rights being seen as matters of international concern. Beitz is careful to clarify that he does not put any stock in the second empirical thesis. He points to a lack of systematic evidence that regimes which respect human rights are less likely to be externally aggressive. With this point distinguishes his theory from Rawls', who understood the role of human rights as promoting international stability. The point about the two historical theses is intended to show that the 'discursive role' of human rights, the kinds of circumstances in which human rights claims may be understood to give reasons,[235]is apparent when governments' treatment of their citizens illicit the attention of the international community. The institutional architecture which has grown up out of the UN Charter, the UDHD and all of the subsequent treaties and covenants, Beitz explains, are all built to embody the idea that the state is the primary agent responsible for its citizens' human rights, while the international community plays a supervisory role.

Beitz builds his conception of human rights, which he refers to as a two level model on the on the observation that:

> The central idea of international human rights is that states are responsible for satisfying certain conditions in their treatment of their own people and that failures or prospective failures to do so may justify some form of remedial or preventive action by the world community or those acting as its agents. [236]

He explains that the two level model expresses a division of labor between states as the bearers of the primary responsibilities correlative to human rights, wile the international community "and those acting as its agents" play a supporting role as the guarantors.[237] The two level model has three elements:

1. Human rights are requirements whose object is to protect urgent individual interests

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[235] *IHR* 90

[236] Charles R. Beitz, *The Idea of Human Rights*, *The Idea of Human Rights*, 2012. 13

[237] ibid 108

against certain predictable dangers ("standard threats") to which they are vulnerable under typical circumstances of life in a modern world order composed of states.

2. Human rights apply in the first instance to the political institutions of states, including their constitutions, laws, and public policies.

3. Human rights are matters of international concern. A government's failure to carry out its first level responsibilities may be a reason for action for appropriately placed and capable "second level" agents outside the state…[238]

There is one primary reason why this model of human rights differs significantly from both traditional conceptions of human rights, and the way human rights are normally understood in every day discourse. The first is that human rights are not only *not moral*, but they are not universal in any strong sense of the word. In this feature of the model Beitz goes beyond even Rawls' stark minimalism, in his discussion of 'outlaw' societies Rawls makes it clear that human rights norms apply to them whether their governments recognize them or not. On Rawls model, the international community seems to have a duty to step in when human rights are violated. On Beitz model on the other hand, the international community has only a remedial responsibility toward individuals in terms of their human rights. While Beitz clarifies that the two level model does not restrict human rights responsibility to states entirely, the international community has only *pro tanto* reasons for action when states fail in their "first level" responsibilities. [239] He writes:

> This means that, in the general case, a human rights failure in one society will not require action by outside agents. Although there may be some sense in saying that such agents would have "prima facie" duties to act, it would not necessarily be true that they have such duties, all things considered.[240]

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[238] ibid 109

[239] Beitz. *IHR* 115

[240] ibid 117

In so far as rights are usually understood as claims held against specific agents, the fact that human rights generate only *pro tanto* reasons for action rather than strict requirements seems problematic. It leaves human rights open to a certain indeterminacy as to who they are to be claimed against. Beitz preempts this objection by arguing that the model distinguishes between practical inferences about the deontic relationship between individuals and their governments on one hand, and the outside agents who are best disposed to act, on the other. He argues that there is no serious indeterminacy because the location of the first level responsibilities is clear: "they rest with the governments of states."[241] If we grant Beitz this point, then we might still think of human rights as universal in the sense that the may be secure the 'urgent interests' of all individuals against their national governments. Yet this line of reasoning has the problematic upshot of seeming to conflate international human rights with the constitutional rights held against national governments. Aside from the *pro tanto* reasons the international community may have to aid (or not) in their fulfilment, it is difficult to see what distinguishes human rights, at least conceptually from the rights embedded in national legal system. Christina Lafont raises this point, arguing that "if human rights served the exact same function as domestic constitutional rights then they would be redundant."[242] Beitz might of course counter that the *content* of international human rights varies from those rights found in domestic constitutions, so it is these specific rights which it is a government's responsibility to uphold as distinct from domestic rights. But Lafont's point is about *function,* [243] and I believe she is correct: in so far as the overall aim of Beitz' approach is to define human rights according to their role (or function), the redundancy in the function of both national and international human rights is problematic for his model. It is evident though, that what Beitz intends to pinpoint is the distinguishing element of human rights that sets them apart

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[241] ibid 118

[242] Lafont 20,

[243] Lafont 20 n16

from constitutional protections of individual interests is their "interference justifying feature" —the fact that they warrant international concern, giving international agents pro tanto reasons to act.[244]

This way of distinguishing leads to a second objection. As O'Niell has famously argued in *The Bounds of Justice,* the claim of universal rights is incomplete unless we are able to specify a set of corresponding universal obligations. The fact that human rights violations impose only remedial responsibilities on the international community means that the role of the obligation-bearer, in the case that the government fails to protect them is left open. This problem pertains not only to the *securing* of the objects of human rights (urgent human interests on Beitz's view) but also to the *enforcement* of the rights.[245] That is, if the state fails to secure the objects of rights for its individuals, there is no agent who bears this obligation,[246] furthermore, there is no agent who holds the obligation to enforce states' human rights performance. Regarding the first part of he objection, we can assume Beitz would be largely unconcerned, considering he has already 'bit the bullet' on the indeterminacy of responsibilities at the international level. Regarding the element of enforcement, Beitz does anticipate this objection, and again this irregularity is defended on the basis of fidelity to the practice. Whereas theoretically human rights claims are said to be information rich—identifying clearly the object of the right and the corresponding duty bearer—within the practice of human rights, a rights claim is less "information rich". In the practice, a rights claim "conveys information about the nature and importance of the benefit or harm, the likelihood that eligible agents will have reasons to act, and the aims at which their action should be directed", but it tells us less about "the identity of the agents whose conduct is regulated and the circumstances in which it would be permissible not to

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[244] Beitz IHR 123

[245] O'neill, Onora. Bounds of justice. Cambridge University Press, (2000). 135-6

[246] I return to this point in the following chapter

comply."[247] Yet under international treaty law, obligations are in fact rather well defined. While Beitz considers international human rights law as an important part of the practice, he none the less describes them as background norms, rather than legal rules.[248] The problem then becomes that is that it is increasingly difficult understand where the normativity of human rights come from on this model, or if they can be thought of as rights at all. Samanth Besson has raised this concern, writing that

> if human rights practice is normative in that it can provide reasons for action but is neither purely moral nor purely legal, then Beitz has to explain in what sense it may be said to be normative, even in a sui generis sense of normativity.[249]

While it is certainly possible to imagine a source of normativity—of reasons for action—that is distinct from both the law and the and morality, Beitz doesn't do a convincing job of explaining what this is. It is clear that the objects of human rights are urgent human interests, but in taking up the perceived vagueness of the practice into his theoretical construction, he fails to explain how they go form interests to rights.

3.3.4 The source of normativity

Beitz gives several reasons for not assigning more of an authoritative value to international human rights law. The first is that the content of the norms is not settled by referring to the sources of international law alone. This claim is uncontroversial, as it is seldom held that the law should be accepted at face value in the most strictly positive sense. Given his understanding of the discursive functions of human rights, this process involves a questioning of whether or not a given value has the "normative force of a human right in

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[247] Beitz. *IHR* 119

[248] *IHR* 210

[249] Samantha Besson "Human Rights: Ethical, Political . . . or Legal?
First Steps in a Legal Theory of Human Rights" Childress, Donald Earl. *The role of ethics in international law / edited by Donald Earl Childress, III* Cambridge University Press Cambridge ; New York (2012): 228

practical reasoning about conduct in global politics."[250] Additionally, he argues that our reasons to comply with a norm cannot be settled by determining whether or not said norm is properly a rule of law. His third reason or not taking international human rights law as authoritative is a lack of explanatory completeness—there is no reason to suppose that in any particular case, questions about a disputed norm could be settled solely by reference to statutes and codes, we can always expect a "space for reasonable disagreement among the members of a discursive community."[251] A similar argument is made by Michael Ignatieff, who argues that human rights are by their nature political, and therefor provide any kind of closure to political disputes, they can only serve as a common ground for political discussion.[252] Applying this logic to the law, we might say that international law is by its nature political and thus cannot provide closure as to what human rights are. Indeed it seems this it the direction Beitz wants to go. The final reason Beitz gives for not taking international human rights law as authoritative is most telling, and I believe, gets to the source of what Beitz takes to be the real normative force of human rights. Citing Martti Koskenniemi's post-modern assessment of international law, Beitz discusses the perceived tendency of law to be molded according to the advantage of power.

> The idea is that actors seek to advance their interests by proposing advantageous interpretations of legal rules and principles for the resolution of conflicts. In the presence of politically significant inequalities of power, states that have substantially greater influence in the international institutions and practices in which normative conflict takes place will tend to prevail, and by doing so will shape the prevalent understandings of the law.[253]

Despite the imbalance of power, law for Koskenniemi, still has a transformative potential. The structure of legal discourse creates a normative space in which individuals view each other as a community of rights holders with obligations to all other members of

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[250] Beitz *IHR* 210
[251] ibid
[252] ibid 21
[253] ibid

the community as such.[254] Koskenniemi demonstrates this point with a discussion of one of the most often cited examples of the unbridled power of hegemony: the American-led 'war against terrorism'. He points out that one of the most striking aspects of the global discourse condemning this political phenomenon was the frequent recourse to law. When people criticized the war against Iraq or the systematic acts of torture in Guantanamo, they characterized them not as merely wrong but 'illegal'.[255] The point of such claim, argues Koskenniemi is the implicit suggestion that what is at issue here is more than specific wrongs done to certain individuals in Iraq and Cuba, "but wrongs done to everyone in their position."[256] Beitz recognizes this feature of Koskenniemi's argument, quoting the following passage:

> Engaging in legal discourse, persons recognize each other as carriers of rights and duties who are entitled to benefits from or who owe obligation to each other not because of charity or interest but because such rights or duties belong to every member of the community *in that position*.[257]

Beitz argues that the norms of the global order generally, and human rights norms specifically, function in this way: "as in the case of law, agents accept a certain normative discipline by availing themselves of the resources of the practice of human rights."[258] Thus we arrive at the normative core of Beitz's model, and the reason why he resists identifying them with either moral or legal rights. Human rights, he argues, "operate at a middle level of practical reasoning, serving to consolidate and bring to bear several kinds of reasons for action." The normative content and application of human rights remains open ended

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[254] Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration', *Cambridge Review of International Affairs*, 17.2 (2004), 197–218 <https://doi.org/10.1080/0955757042000245852org/10.1080/0955757042000245852>.214 Emphasis original

[255] ibid

[256] ibid

[257] ibid, reprinted in *IHR* 211

[258] *IHR* 212

because of their discursive function.

3.3.5 Human rights as mediating power

Beitz's discussion of Koskenniemi is not haphazardly placed in the text, but comes immediately prior to the conclusion of the book. It sums up the themes of power-balance and discursive critique that are constant throughout the book. In his historical reconstruction of the human rights practice he tells us that the need for a practice with the "functional features of human rights" was born out of "an empirical thesis about the pathologies of a global political structure that concentrates power at dispersed locations not subject to higher order control."[259] In his discussion of the forms of skepticism that human rights must overcome, one of the most pressing skeptical challenges he identifies is the belief that the doctrine and practice of human rights are inseparable from the global order characterized by wide disparities of power.[260] It is also an acute awareness of the potential for the powerful to abuse human rights norms that leads him to define them not (as Rawls had done) as triggers for international intervention, but merely as cause for international concern.

> [I]nequalities of power are likely to generate inconsistencies in the application of human rights norms. The contrast between the intervention in Kosovo and the failure to intervene in Rwanda, even though the harms that might have been prevented in the latter case were much greater, is a case in point. [261]

Thus we may conclude that the—albeit weak—normative force of human rights lies in their discursive function as power-mediators. Here two concerns immediately come to mind. It is clear that Beitz understands human rights as power mediators both within states (protecting human rights from arbitrary abuses from their governments) and

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[259] Beitz *IHR* 129
[260] ibid, 3-7, 211
[261] ibid 207

between states, at the international states avail themselves of the logic of human rights and understand one another as participants in a discursive practice. Yet they do not seem to have normative force on citizens acting through their governments, as this would require rights pertaining to democratic governance which Beitz does not endorse. Where as anti-poverty rights are defended on his model in so far as they secure urgent human interests, he rejects a human right to democracy as having a necessarily institutional component. "A right to political democracy…not only requires protection of some underlying interests but also prescribes a particular kind of institutional mechanism for the purpose". [262] What is important is not the democratic form necessarily, but the underlying interest in participating in some meaningful way in shaping the political community. Here, he echoes Rawls in arguing instead for a less demanding right to collective self-determination that might take on a variety of institutional forms. As discussed in the section on Rawls, there are a variety of empirical reasons we might have for abstaining from forcing any type of political ordering onto a people, but recall that for Beitz, human rights are defined by their warranting international concern—they pose no correlative duty on the part of the international community to intervene through military means or sanctions. Might the international community not be warranted to put pressure on not yet fully democratic regimes?

In so far as human rights are intended to mediate the balance of power among states, the second concern is that, as Beitz is undoubtedly well aware, in the global age, power becomes concentrated in areas that transcend the inter-state system and often escapes state control. One frequently discussed example of this phenomenon is the increasing power and influence of multinational corporations (MNCs). [263] In the year 2009, MNCs accounted for nearly half of world's top 100 economies. Today, a mere 200 MNCs are estimated to

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[262] *IHR* 175

[263] See Valentini (2018), Wettstein, Jordan Paust, 'Human Rights Responsibilities of Private Corporations', *Vanderbilt Journal of Transnational Law* 35, no. 3 (2002): 801–25, 802.

control around a fourth of the world's productive assets.[264] Besides their economic power which often rivals that of national governments (the annual revenues of both Wal Mart and Shell are consistently larger than the GDPs of many countries, including Portugal, Hungary and Thailand to name a few), they are also able to shape regulation to their advantage through lobbying or evade regulation altogether by moving operations and assets around in a quest to maximize profit. The economic incentives that they offer tends to push states into a 'race to the bottom' as they try to entice corporations by continually loosening environmental and labor regulations.[265] Recently, the "unchecked power [of MNCs] and their ability to affect individuals' access to fundamental goods"[266] has been drawn the attention not only of political and legal scholars, but the UN as well, which is currently in the process of ramping up a decades old effort to reign in corporate power in the form of a binding treaty on business and human rights.

Still, a fidelity to the human rights practice interpreted as largely state-centric bars Beitz' model of human rights from having anything significant to say about the 'perceptible threats' these powerful businesses pose to the 'urgent interests' of individuals. Most relevant to the discussion of the normative force of Beitz's model however, is the fact that it is unclear how human rights can serve their function as power-mediators if they are unable bring responsibility to bare on the real forces of power that shape the contemporary global arena.

3.3.6 Critical remarks

Returning to the evaluative criteria of *non-parochialism, universality and prescriptive determaincy,* this final section will evaluate the strength of Beitz's model

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[264] Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' *Human Rights Quarterly* Johns Hopkins University Press
Volume 21, Number 1, February 1999pp. 56-79

[265] Davies and Vadlamannati.

[266] Valentini (2018) 9

according to each of the three standards. First, in terms of non-parochialism Beitz model appears on the surface to perform well in this regard, in so far as his desire to eschew any is based largely on the desire to avoid the charge of parochialism in the first place. One of the main benefits of his model, and political conceptions of human rights generally, is that in remaining agnostic to the metaphysical foundations of human rights we can avoid the charge that they perpetuate the Western legacy of natural law and its inherent ethical individualism. I worry however, that in his desire to avoid parochialism he risks being parochial in another sense by universalizing a certain neo-liberal attitude toward rights that views them solely in terms of negative freedoms. Beitz is clear that the human rights are not a part of an ideal conception of global justice, which is why on his model no social and economic rights beyond those that protect against poverty are understood as human right proper. The inclusion of the so-called second generation of human rights in the covenants may have been motivated strategically to appease the Soviet bloc, but those rights have an invaluable role (actual and potential) in offsetting the socially damaging effects of unrestrained economic freedom. Ad David Ingram argues:

> There were two human rights cultures after 1945, not just one. The Communist rights tradition—which put primacy on economic and social rights— kept the capitalist rights tradition—emphasizing political and civil rights—from overreaching itself. [267]

Whatever way we may feel about the fall of the major communist regimes, their absence has left social and economic rights largely without any powerful actor organized behind them. It is of course a common communitarian criticism of liberalism that in its pretense to neutrality is perpetuates a particular 'atomist' conception of individuals as self-sufficient regardless of their social framework.[268] Of course in his efforts to be as neutral

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[267] 300

[268] Nino, Carlos S. "The Communitarian Challenge to Liberal Rights." *Law and Philosophy*, vol. 8, no. 1, 1989, pp. 37–52. *JSTOR*, JSTOR, www.jstor.org/stable/3504629.
See also Taylor, Charles *Hegel.* Cambridge, (1977)

and agnostic as possible, Beitz's would no doubt reject a classification of his theory as liberal (except possibly the most austere political variety), but the communitarian challenge may still hold up. With the great lengths he goes to avoid parochialism Beitz risks his conception disclosing a bias toward the status-quo economic organization of the world order in which economic freedom reigns supreme. In terms of *universality* and *prescriptive determinacy*, Beitz willingly forgoes the latter in view of the former. Of course, his reluctance to assign international obligation-holders correlative to human rights is motivated on part out of fidelity the practice in which he believes the role of obligation-holder is largely left open. I will return to this point in the last chapter. As I have tried to show above by highlighting the importance of his discussion of Koskenniemi's postmodern theory of law, the lack of prescriptive determinacy is also motivated by the discursive function human rights play in mediating power. Power works its way into the formal law which assigns concrete obligations and duties just as easily as it does in other political practices. The universality of Beitz account, and its normative force lies in the discursive function of human rights as challenging the arbitrary concentrations of political power in the global arena. This is the feature of Beitz theory which is most admirable and the one that should certainly be retained by a political conception of human rights in so far as it describes the true emancipatory function of human rights. However, as I have argued, the lack of a right to universal suffrage internally, and the lack of formal obligations for transnational actors externally means the institutional means whereby the discursive function of human rights might be protected go wanting. In an effort to leave the discursive process of human rights as open-ended as possible, Beitz model risks stifling it in the long run.

CHAPTER 4
Discourse Theoretic Conceptions

4.1.1 A third way?

In the previous chapter I have tried to show that while the main political conceptions of human rights in the literature have some attractive features, they risk cutting human rights off from their most important feature, namely their ability to call into question illegitimate forms of political power. In this section I will investigate whether another group of theories might be able to offer a more attractive solution. While the political and practical theories presented in the previous sections employ the Rawlsian method of political justification, the theories in this group rely on Habermas' intersubjective model of justification. The conceptions discussed will be the theory of human rights worked out by Habermas himself in the context of his post-national cosmopolitanism, as a recent conception of human rights which inspired by his discourse ethics and communicative model of rationality put forward by Seyla Benhabib.

There are considerable similarities between the work of Rawls and Habermas, as Habermas suggests by referring to their back-and-forth about reason and public justification a 'family quarrel'. Both authors depart from the work of Kant, who's enduring legacy been a notion of moral autonomy in which the autonomous individual is both author and addressee of the moral law. In the context of justice this warrants the essentially public character of justification: claims to normative validity must withstand the test of public scrutiny. One of the lessons that Rawls and Habermas absorb from this is that a foundationalist model of justification is unfeasible.[269] Habermas has identifies both his and Rawls's project as an "intersubjective version of Kant's principle of autonomy: we act autonomously when we obey those laws that could be accepted by all concerned on the basis of a public use of their reason." [270]

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[269] Hedrick, T., (2010). Rawls and Habermas: Reason, pluralism, and the claims of political philosophy. Stanford, Calif: Stanford University Press. 5

[270] Jurgen Habermas, 'Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism', in *Habermas and Rawls: Disputing the Political*, 2012 <https://doi.org/10.4324/9780203723869>. 49

At the international/global level and their projects of political liberalism and post national cosmopolitanism respectively share a lot in common as well, both proceed from Kant's famous treatise on *Perpetual Peace*, and both agree that respect for universal human rights may limit national sovereignty, and affirm the importance of allowing deferent peoples to interpret human rights differently according to their political cultures within reasonable limits. As David Ingram has observed, a key difference among the two authors is where they set these limits, "with Habermas affirming and Rawls denying the necessity of liberal democratic institutions for realizing a fully legitimate and stable system of rights."[271] As we have seen, motivated by the importance of toleration in attaining a stable overlapping consensus, Rawls rejects the notion that liberal-democratic and socioeconomic human rights are human rights proper. Habermas, on the other hand argues that "standards of human rights stem less from the particular cultural background of Western civilization than from the attempt to answer specific challenges posed by a social modernity that has in the meantime covered the globe."[272] The link between human rights and democracy for Habermas is not historically or culturally contingent, but conceptually 'internal', as human rights institutionalize the conditions of possibility for reasonable political will formation.[273] Furthermore, socioeconomic rights follow from the human right to democracy on Habermas' account, in so far as "equal social rights are the mainstays of democratic citizenship."[274] At first approximation it would seem that a Habermasian account of human rights would be a better candidate if human rights are to serve as a component in a realistic conception of justice for the globalized world, but as we shall see, there are several problems with his account which include the difficulty in describing exactly how we go

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[271] Ingram, 'BETWEEN POLITICAL LIBERALISM AND POSTNATIONAL COSMOPOLITANISM Toward an Alternative Theory of Human Rights'. 360

[272] Jürgen Habermas and Max Pensky, *The Postnational Constellation: Political Essays*, *Studies in Contemporary German Social Thought.*, 2001.

[273] Flynn, "Habermas on Human Rights," 432

[274] Habermas and Pensky.

from the abstract level of intersubjective justification to a concrete schedule of rights and duties.

In any case, this family of theories has the advantage of accounting for the potential to a progressive universalization of a schedule of human rights that goes beyond negative liberal rights. At the same time, the starting point in a communicacative model of rationality and an intersubjective model of justification makes these theories well placed to respond to the challenges of parochialism and concerns about the the atomized, monologically acting individual that is often associated with human rights. Furthermore, it should become apparent over the course of this discussion that the Rawlsian-inspired non-metaphysical political constructive accounts and the Habermasian 'post-metaphysical' accounts are not as far apart as they may seem. Afterall, all of these theories rely on a model of justification which is similar to Rawls' original Kantian enterprise, which pinpoints the importance of the(inter)subjective procedural process in establishing objective, action guiding norms. Because Habermas' conception of human rights must be understood in the context of his overall philosophical perspective—especially his theory of communicative rationality/action and discourse ethics—the following section will begin with a cursory overview of these, especially in so far as they have baring on his understanding of human rights.

4.2 Habermas: communicative action

In so far as our goal is find a philosophical basis for human rights that won't be bogged down in metaphysical quandaries or be guilty of parochialism Habermas is an excellent place to start. With his theory of communicative action and the discourse ethics which emerged from it, Habermas provides a philosophical system for our post-metaphysical universe,[275] that is "the experience of the noncoersively unifying, consensus-

[275] For Rawls, Habermas does rely on a metaphysical system, and this is a sticking point between the two authors. A lot of it comes down to the definition of metaphysical they employ, see Forst *RTJ* 87-90

promoting power of argumentative speech."[276] Habermas has been called "the last great rationalist"[277] and much of his philosophical project can be understood as a sustained attempt to recover the Enlightenment hope of identifying a rational basis for collective life in society. Habermas began his philosophical career in the post was period in which was pervaded by doubts about the conceptual foundations of Western modernity, and the ideals of the Enlightenment seemed to have fallen on hard times. With the decline of the grand metaphysical systems which once supported them, modern concepts like rationality, universalism and democracy were now left hopelessly vulnerable, on one side to their cooption by market forces, on the other to scathing skeptical critique. However, against the radical critiques leveled by French post-modernists and post-structuralists (particularly Derrida and Foucault) and the growing disillusionment of his Frankfurt school colleagues, Habermas argues that the wholesale rejection of the metaphysical tradition entails a performative contradiction, inevitably undercutting the possibility of rational critique itself.[278] The very act of posing and answering the question of whether or not reason is dead is proof that it is still very much alive. While modern concepts like universalism, autonomy and civil and political liberty cannot be simply accepted wholesale but must be deconstructed and critically reevaluated, the central insight of modernity—the standpoint of critical reflection—must be retained in order for this to be accomplished. Genuinely postmetaphysical thinking, according to Habermas, can remain critical only if it preserves the idea of reason derived from the tradition, while striping it of its metaphysical garb.[279] His theory of rationality then, has the distinction of at the same time incorporating a critique of rationality within the theory itself.

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[276] Habermas (1984) 220

[277] TCA vi

[278] *Habermas* Cf. DE, pp. 77ff.

[279] **Postmetaphysical Thinking: Between Metaphysics and the Critique of Reason**
By Jürgen Habermas, Translators introduction VIII

The starting point of Habermas' theory of rationality is the same worry that first preoccupied Max Weber, that increased rationalization of social life in Western capitalist societies subsumed individuals in systems ruled by efficiency and technological control. The ordering of modern societies had become "bound to the technical and economic conditions of machine production which to-day determine the lives of all the individuals who are born into this mechanism"[280] trapping them in the "iron cage" of rationality. Webber distinguishes between four types of action: *purposive-rational, value-rational, affectual,* and *traditional*. According to Webber, contemporary Western societies are characterized by a predominance of the purposive-rational action type—defined in terms of an individual actor's ability to use his knowledge to adjust to or manipulate his surroundings to achieve his goals. [281] Like Weber, and Horkheimer and Adorno, identified a central problem of modern society in the unbalanced expansion of purposive rational agency and the technical interest in control. "The individual" they warn in the *Dialectic of Enlightenment, "*is entirely nullified in face of the economic powers [which are] taking society's domination over nature to unimagined heights. While individuals as such are vanishing before the apparatus they serve, they are provided for by that apparatus and better than ever before." [282] The technological domination over nature extends to the domination of the individual, and the enlightenment ideal of rationality is completely subverted as it ends up in the total, manipulative domination of instrumental reason.

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[280] Weber, *The Protestant Ethic and the Spirit of Capitalism*, 181

[281]Max Weber *The Nature of Social Action* 1922 7

[282] Horkheimer, M., Adorno, T. W., & Cumming, J. (1972). *Dialectic of enlightenment*. New York: Herder and Herder. xvii

Habermas's speculation on how to alleviate this distortion and resuscitate the transformative and emancipatory hopes of the enlightenment project of rationality, centered on reasserting the rationality inherent in our "practical" and "emancipatory" interests. [283] Intertwining these two interests, Habermas argues that a rational basis for collective life depends on social relations were organized "according to the principle that the validity of every norm of political consequence be made dependent on a consensus arrived at in communication free from domination."[284] Taking up Weber's four types of social action, Habermas introduces a fifth: *communicative action.*

Rather than arising from the subject-object relation of an individual acting in his own interest, communicative rationality is tied to the subject-subject relation of communicating individuals. While purposive rationality permeates modern society, and almost completely dominates certain spheres—such as the market economy—it is communicative rationality which is the foundational element of social interaction. Importantly, Habermas doesn't deny the existence of purposive rational agency in modern society, he even agrees that it predominates in many spheres—especially in the economic sphere self interested action and objectification of the other may well be the norm. However, he argues that communicative action is more basic, and all other forms of social action proceed from it. Without understanding linguistic utterances and their meanings (both explicit and implicit), no social action or interaction would be possible.

Central to Habermas' concept of communicative action (and thus his ontology and ethics) is the concept of 'validity claims'. His argument begins from the assumption that in

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[283] The Cambridge Companion to Habermas
edited by Stephen K. White, 6

[284] Habermas, Knowledge and Human Interests, trans. Jeremy Shapiro (Boston: Beacon Press, 1971). 284
The Cambridge Companion to Habermas
edited by Stephen K. White, 6

order for a normal conversation to be understood or perceived as meaningful, linguistic utterances must have certain built-in validity claims. This means that underlying any act of speech are claims about validity that the hearer must implicitly accept before before seriously considering the speakers claim. According to Habermas, it is the implicit validity claims that give language its rational, action-coordinating power.[285] Hence the structure of linguistic communication is such that it necessarily presupposes the ability of individuals to discourse with others, and to settle the epistemological status of language claims through the consensual force. Consensual force is key here, for in order for individuals partake in genuine discourse (rather than coercion or manipulation) they must enter speech scenario on equal terms. The importance of this egalitarian premise will become apparent when he describes the social order in which the potential for inclusive dialogue undergirds its legitimacy. Habermas understands his formal pragmatics as a "reconstructive science," which aims to render theoretically explicit the intuitive, pre-theoretical know-how underlying basic human competences like speaking and understanding.[286] It is important here to note that unlike the transcendental analysis of the conditions of rationality, which aims at theoretical foundations that are necessary, a priori and certain, reconstructive science admits only to yield knowledge that is hypothetical, empirical and fallible. Nevertheless the process of reconstruction is directed to invariant structures and conditions, and raises universal—but defeasible—claims to an account of practical reason.[287]

Thus we arrive at the bedrock concept of Habermas' postmhetaphysical approach to social and political theory: communicative rationality defined as "the experience of the noncoersively unifying, consensus-promoting power of argumentative speech."[288]

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[285] Eriksen: 37

[286] Bohman, James and Rehg, William

[287] ibid.

[288] Habermas (1984) 220

With this reconstructed social ontology Habermas, locates the genesis of the norms and values that might unite individuals in a diverse society not in some deeper order of values that it is up the theorist to describe, but in the norms that citizens would agree to themselves in the ideal speech scenario. To get from the ideal speech scenario to general principles, Habermas' discourse theory employs a constructive method based on hypothetical consent. To this end Habermas reformulates Kant's categorical imperative, which compels me to act according to those maxims that I could at the same time, without contradiction, will to become universal law. For Kant, the moral force of collective will formation stems from the moral force of the autonomous individual's 'good will'. For Habermas universalism is discursive process that justifies intersubjective agreements. [289] So in his dialogical reformulation of the categorical imperative, universalizability is shifted from a solitary thought process to a procedural model of argumentation. [290] So, the project of discourse ethics becomes to identify those norms or institutional arrangements to which all might agree through "practical discourses".[291] With its "intersubjective interpretation of the categorical imperative" [292] discourse ethics incorporates a recognition of the other in from the very beginning.

> Like Hegel [discouse ethics] insists, though in a Kantian spirit, on the internal relation between justice and solidarity. It attempts to show that the meaning of the basic principle of morality can be explicated in terms of the content of the unavoidable presuppositions of an argumentative practice that can be pursued only in common with others[293]

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[289] Habermas, *TCA*, *Justice and Application*

[290] Seyla Benhabib's Interactive Universalism: Fragile Hope for a Radically Democratic Conversational Model Sharon L. Bracci 468

[291] Benhabib Self 24

[292] *Justice and Application* 1

[293] *Justice and Application* 1

This feature will be useful—as I will discuss below—in responding to worries about the 'isolate individual' that tend to accompany deontological theories.

4.2.1 The 'janus face' of human rights

For Habermas, human rights have both a juridical and a moral nature, and both aspects of their nature are equally basic. Like the authors I have discussed in the section on political conceptions of human rights, Habermas is wary of the tendency to conflate merely moral rights. The tendency to confuse human rights with moral rights is what Habermas refers to as their "mode of validity, which points beyond the legal orders of nation-states.[294]" Habermas advances a juridical conception of human rights in which morality and the law are inseparably bound up. . The inter-penetration of human rights and the law (or morality and the legal form) was first fully explored by Habermas in the context of a constitutional democracy in BFN. In this work he is considered with the legitimacy of modern law, which becomes problematic in the post-conventional era where it is no longer reasonable to suppose that individuals in pluralistic societies would accept a legal system justified on the basis of a robust metaphysical or religious world view. Yet the need for the law to be perceived as legitimate still remains, as it requires individual compliance regardless of motivation, it should thus have a rational basis that makes it appear to individuals as worthy of their obedience.[295] Of course, if one's goal is to find a source of normativity grounded in rational consent, an obvious place to look is to the writings of the liberal greats like Kant and Russeau, whose primary aim was to describe the conditions in which a society might be ruler according to reason. In these works, however Habermas perceived a tension between classical liberalism and civic republicanism as it pertained to

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[294] Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, *Political Theory*, (2000).

[295] William Rehg, "Translator's Introduction" in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg Cambridge, MA: The MIT Press, (1996), xxv

the legitimacy of modern law. Where as natural law accounts like Kants put a moral emphasis on the autonomy of the individual as a source of the law's legitimacy, republican views like Rousseau's emphasized will of the people of as pouvoir constituant as the ethical grounding of modern law. Yet in our modern pluralistic societies neither the republican nor the classical liberal conception could account for the legitimacy of law, since choosing between one or the other position commits us to either subordinating the law to morality or conflating it with the community's ethical values. [296]. Still, the legacy of both traditions make valuable contributions. In so far as the law protects the private sphere in which citizens can exercise their free choice, the law should guarantee the private autonomy of individuals. At the same time, the law's enactment must be such that individuals find it reasonable to comply with its constraints, so legitimacy of the law also requires that individuals view themselves as it's authors. To accomplish this end, the law must secure public autonomy as well.[297] This leads Habermas to claim that there is an internal relation between public and private autonomy—an idea which informs his concept of legitimacy and is the basis for what Habermas understands to be the duality of modern law. The fundamental rights of individuals and the democratic body-politic are not at odds with one another, nor is either component prior or subordinate to the other. It is only through the fusion of these two elements that the law finds the source of its legitimacy in the eyes of the individuals who are at once its authors and its subjects.

Although for Habermas, it is a mistake suppose that the law's authority derives from a background theory of morality, it is none the less one that can be easily made. Both the modern doctrine of morality and modern law have the common feature of claiming to rest on reason alone. They similarly share the foundational components of autonomy and

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[296] William Rehg, "Translator's Introduction" in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg Cambridge, MA: The MIT Press, (1996), xxv– xxvi.

[297] Ibid

equal respect. This common basis however, has the tendency to obscure a decisive difference between them: "whereas morality imposes *duties* concerning others that pervade all spheres of action without exception, modern law creates well-defined "*domains* of private choice for the pursuit of an individual life of one's own." [298] It is in the context of the legal community that the duties imposed by morality become actionable claims, or has Habermas puts it "[t]he transition from morality to law calls for a shift from symmetrically intertwined perspectives of respect and esteem for the autonomy of the other to raising claims to recognition for one's own autonomy by the other.[299] As I have outlined in the introduction to this section, Habermas's conception of autonomy is not that of a monological actor, but one who's action is essentially communicative. Communicative rationality doesn't ground moral norms but rather creates/validates them in the discursive process. The law is what moves form the abstract level of a community of individuals engaging in validity clams to the concrete level of a community of individuals who reciprochally recognize one anothers' rights and duties. The fusion of the law with the discursive process of norm construction is what gives it its moral quality. The solution to the source of the legitimacy of law thus lies in the discourse principle (D). The discourse principle embodies the "post-conventional" requirements of justification and states "just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses." On this view there is no metric for determining which rights are valid prior to the citizens entering into discourse with one another. Because the self legislation of citizens is what gives moral force to the legal form, a principle of democracy is also needed to support the construct. In Habermas' words [t]he principle of democracy is what then confers legitimating force on the legislative process."[300] With these parameters in place we can move on to Habermas 'rational reconstruction' of the system

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[298] Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', in *Philosophical Dimensions of Human Rights: Some Contemporary Views*, (2013). 471

[299] ibid 472

[300] *BFN* 121

of rights. He prefaces this enterprise by arguing that the fusion of the discourse principle and the legal form results in the "logical genesis" of a system of rights.[301] The idea of a 'logical genesis' is not intended as a historical depiction of the processes in which constitutional rights came into being, but rather refers to a notion of conceptual reconstruction on the part of the theorist of the presuppositions inherent in the idea of a legitimate law, and the rights inscribed in the legal code itself.[302] To do the philosopher must begin by asking "[w]hat basic rights must free and equal citizens mutually accord one another if they want to regulate their common life legitimately by means of positive law?"[303] The logical genesis gives rise to five categories of rights:

1. Basic rights that result from the politically autonomous elaboration of the right to the greatest possible measure of equal individual liberties. These rights include the following as necessary corollaries (2) and (3):

2. Basic rights that result from the politically autonomous elaboration of the status of a member in a voluntary association of consociates under law.

3. Basic rights that result immediately from the actionability of rights and from the politically autonomous elaboration of individual legal protection.

4. Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law.

5. Basic rights to the provision of living conditions that are socially, technologically, and

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[301] ibid

[302] Jeffrey Flynn, 'Habermas on Human Rights', *Social Theory and Practice*, 29.3 (2003), 431–57. 439

[303] *PNC* 113

ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4).[304]

While the first three categories pertain to the exercise of private autonomy, the fourth category allows legal subjects to become collective authors of the law. It should be noted at this point that there is no prioritization among the categories of rights (the liberty rights listed in 1-3, the political rights in category 4 and the economic rights in category 5) all are necessary to secure the process of moral/legal self legislation. Because the legitimacy of the law is tied not to an underlying moral notion of autonomy, but requires the agreement of all possibly affected persons as participants in rational discourses (D), all categories of rights are needed if the law is to secure a stable consensus. Genuine consensus, in contrast to to coercion or manipulation, requires that individuals reach and agreement through a discursive process that begins on equal terms. The unequal footing created by great disparities in wealth, quality of life and education lead to power imbalances that preclude genuine agreement. The legitimacy of the law requires that individuals perceive themselves as its co-legislators, and this won't occur unless citizens may speak to one another as free and equal moral subjects, unhindered by material inequality.[305]

4.2.2 International human rights and cosmopolitan democracy

In the international arena, all aspects of Habermas' understanding of human rights in the context of a constitutional democracy transfer up. They still exhibit a dual nature with one foot in the moral realm the other in the legal, and as such they still require all the trappings of a constitutional democracy. Because of the inherent link between intersubjective-moral and political rights, which must be supported by a process of democratic governance human rights are most clearly represented within the institutional

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[304] *BFN* 122-3

[305] Ingram, 'BETWEEN POLITICAL LIBERALISM AND POSTNATIONAL COSMOPOLITANISM Toward an Alternative Theory of Human Rights'.

structure of a constitutional democracy.[306] Beyond the level of the nation-state, Habermas argues that human rights "remain only a weak force in international law and still await institutionalization within the framework of a cosmopolitan order that is only now beginning to take shape.," The current international institutions we have which aim at securing human rights (especially the ICC and the UN Security Council) can be thought of as the preliminary stages of an emerging cosmopolitan order in which true human rights could be realized. Forming this international order into the type of cosmopolitan democracy that would be required to support universal human rights argues Habermas, would involve at least "the establishment of a world parliament, the construction of a global judicial system, and the long overdue reorganization of the Security Council." [307] Briefly, the General Assembly would be transformed into to something akin a kind of upper house that would divide competences with a second chamber. In this new global parliament, "peoples would be represented as the totality of world citizens not by their governments but by directly elected representatives." Secondly, the ICC should have the ability to make binding judgments, and its jurisdiction should be expanded to cover to "conflicts between individual persons or between individual citizens and their governments." Finally, the Security Council should be reformed to include regional regimes (such as the EU) and the requirement of unanimity between permanent members should be abolished in favor of decision-making by majority rule.[308] Ideally, these reforms would also be complimented by a global public sphere which persuade representatives and law enforcement bodies to interpret and implement human rights in accordance with public opinion as it evolves.[309] At the domestic level, the cooriginality of the human rights and constitutional democracy is what allows Habermas to reconcile the tensions between individual autonomy and popular sovereignty. At the international level, the enmeshment of human rights norms

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[306] Flynn (2003) ibid.

[307] Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, *Political Theory*, (2000). 186

[308] ibid. 186-8

[309] Ingram, 'BETWEEN POLITICAL LIBERALISM AND POSTNATIONAL COSMOPOLITANISM Toward an Alternative Theory of Human Rights'. (2003) 365

within legal systems is what allows his theory overcome both the realist skepticism about the 'moralization' of international law on the part of powerful actors as well at the charge of parochialism. The intersubjective understanding of justification as an inclusive and other regarding discursive process allows him to escape the perceived bias toward a distinctively Western notion of autonomy.

However, the linking of human rights to a constitutional democratic framework means that in the absence of cosmopolitan institutional framework needed to fully carry them out, human rights remain bound up in the state. This feature has unsurprisingly lead some observers to to criticize his conception of human rights, on the grounds that it may be ineffectual in the face of some areas in which a human rights approach might be needed the most, namely in areas where the law might be week or underdetermined. One such challenge has been raised by Jeffery Flynn, who questions whether this may be a problem with juridical conceptions of human rights generally. To frame Flynn's objection briefly, he points out that a similar challenge has been made by David Boucher regarding Rex Martin's juridical conception of human rights, which is similar to Habermas' in that starts from an 'irreducible duality' of the law and human rights.[310] David Boucher worries that the uptake of this approach might be to preclude the possibility of justifiably using human rights language when it may be most needed. When a a well-functioning legal infrastructure is in place, there is little need for a critical conception of human rights. However, Boucher observes "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." Flynn applies this critique to Habermas conception of human rights, asking whether "in the absence of a

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[310] Rex Martin, "Human Rights and Civil Rights," in Morton E. Winston (ed.), *The Philosophy of Human Rights* Belmont, Cal.: Wadsworth, (1989), 83,

constitutional democracy, is there any reason to speak of human rights at all?". [311]

David Ingram has put pressure on Habermas' juridical model in a slightly different maner by questioning whether a juridical understanding of human rights can ever truly undergird an expansive conception of human rights such as the socio-economic and group rights found in the UNDHR. It is clear form Habermas' rational reconstruction of the categories of rights, as well as the fact that he advocates for a global "politics of human rights" as necessary to offset the destructive power of economic globalization,[312] that he prioritized social and economic rights along side liberal freedoms. However the insistence on the juridical form, as Ingram points out, has the potential to constrain a list of human rights significantly. Ingram illustrates this point through a discussion of the human right to subsistence. This is a fairly uncontroversial right which can be defended on a wide range of philosophical accounts because this is what Beitz would call a urgent human interest. Yet despite its being relatively uncontroversial, Ingram questions whether it can accurately be explained juridically. Using the example of sweatshop labor, Ingram points to the ways in which individuals' human rights to subsistence may be diminished by structural features for which no directly identifiable agent may be deemed responsible. Surely, many of the factors that threaten sweatshop workers' rights to subsistence result from a violation of their legal rights on the part of their governments which may fail to enforce labor laws that should protect fair pay and collective bargaining. However, as Ingram points out, some of the threats to the sweatshop workers right to subsistence "emanate from the lawful, normal operations of a market economy in which sweatshops are forced to operate on a precariously thin margin of profitability in order to meet the demands of multinational retailers and their affluent clients."[313] The example of the Haitian rice industry I discussed

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[311] Flynn (2003) 443

[312] *PNC,* especially chapter four (58-113) on the 'postnational constellation and the future of global democracy.'

[313] David Ingram, 'Of Sweatshops and Subsistence: Habermas on Human Rights', *Ethics and Global Politics*, (2009). 197

in the introduction raises a similar challenge for Habermas' strictly juridical conception of human rights, in so far as a variety of factors compounded to impact the Haitian citizens' well being, not all of them illegal. For David Ingram these challenges point to the primary weakness of the juridical understanding of human rights. The tendency to rely on an an interactional conception of rights[314] and a corresponding 'liability model of responsibility means these theories may be unable to speak to the structural features that threaten human rights, or recommend real political reform "aimed at eliminating class and gender domination."[315] I will return to this point at length in the concluding chapter, but for now it stands out as an important challenge for Habermas' juridical conception of human rights, although one which I think his model might be plausibly altered to accommodate. In so far as Seyla Benhib relaxes somewhat the strictly juridical understanding of human rights in her adaptation of the discourse theoretic-model, we might expect it to fare better in speaking to human rights abuses that escape the confines of a theory conceptually anchored in either the law or the nation-state.

4.3 Discourse theoretic accounts

Both Rainer Forst and Seyla Benhabib have recently elaborated conceptions of human rights which are influenced by Habermas' discourse ethics. Although there are significant differences in the two authors' accounts, it will be helpful to begin with an initial account of what their two theories share in common. To begin, both writers share the aim that is consistent with the political conceptions discussed above (the aim which this dissertation also shares), in seeking to provide a reasonable account of human rights that

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[314] Thomas Pogge, *World Poverty and Human Rights*,

[315] Ingram (2009)

does not depend on controversial metaphysical assumptions. [316] Although both accounts do make refrence to certain universal features of human nature and rationality and understand these as moral notions,[317] neither author interprets human rights as a class of moral rights alone— this is to say as rights that can be elaborated or justified independently of a procedure of collective decision making within a political order.[318] The novel theoretical development of the discourse conception of human rights is precisely this point, although human rights have a moral component it is not identical with their content. As Forst explains it: "Human rights constitute the inner core of any justified social structure without being concrete regulations that the legal system must simply mirror. The form that the rights take must be determined discursively by those affected." [319] In the following section I will discuss Benhabib's conception of human rights which follow's Habermas' account most faithfully and expands it considerably. However In his article *Discourse Ethics and the Political Conception of Human Rights,* Kenneth Baynes has briefly synthasised BenHabib's and Forst's conceptions in a three step analysis that can be helpful here to set up the preliminary discussion. According to Baynes, constructive endeavors of both authors begin by (1) "identifying the speech-act immanent obligation of speakers and hearers to provide reasons in support of the validity claims raised in their respective utterances." Baynes explains that this 'speech-act immanent obligation' bears a weak

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[316] For example those drawn from teleological historical accounts, philosophical anthropology or the philosophical or the natural rights tradition. See Kenneth Baynes (2009) Discourse ethics and the political conception of human rights, Ethics & Global Politics, p3

[317] Seyla BenHabib argues that if we are to suppose any type of universalism about human rights at all they cannot simply be reduced to judidic-political principles. Universalism itself entails justificatory universalism, which entails a moral assumption. She agrees with with Forst in his claim that "…Human · rights secure the equal

standing of persons in the political and social world, based on a

fundamental moral demand of respect. " Dignity in adversity (62)

[318] Baynes (2009) P.3

[319] Rtj 48

'transcendental force', and is sometimes understood by Habermas and others as the hearer's 'right' to accept or reject the reasons the speaker presents.[320]

In the next step,(2) this illocutionary 'right' is said to imply a basic moral right, defined by Forst as 'the right to justification' and by Benhabib 'the right to have rights' In the final step (3) this basic moral right (or 'moral principle' in Benhabib's account) lays the foundation for a more extensive list of human rights. The point at which both authors are most often challenged is the move from step (2) to step (3) of this construction, and their responses to this challenge will be discussed below.

4.3.1 Benhabib: human rights and democratic iterations

Seyla Benhabib's discourse theoretic conception of human rights is developed over the course of several works, most thoroughly in the book *Dignity in Adversity: Human Rights in Troubled Times*. Her unique conception relies on a synthesis of discourse theoretical assumptions and Hannah Arendt's notion of the 'right to have rights'. Contrary to Arendt, who understands this right principally as a political right to membership in a political community, Benhabib proposes to interpret the right to have rights "more broadly as the claim of each human person to be recognized and to be protected as a legal personality by the world community."[321] As Benhabib explains, the term 'right' has a different meaning in its two occurrences in the phrase 'right to have rights'. The first, refers to a right in the moral sense, while he second, refers to right in a 'juridico-civil' sense. In other words, the latter right refers to the rights that come with membership in a political community; while the former, by contrast, is the moral right to be a member in said political community or to possess a legal personality. [322]

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[320] Baynes 4, se also, Benhabib, The Rights of Others (New York: Cambridge University Press, 2004), 132f; and Forst, 'The Basic Right to Justification: Toward a Constructivist Conception of Human Rights', Constellations 6, no. 1 (1999): 40.

[321] *Dignity in Adversity,* p.9

[322] The Rights of Others 56

The moral component of Benhabib's construction is grounded in the Habermasian notion of communicative freedom. Using what she refers to as a "presuppositional analysis", Benhabib attempts to show that communicative freedom is presupposed in any meaningful account of human rights.[323] She explains that

> In order to be able to justify to you why you and I ought to act in certain ways, I must respect your capacity to agree or disagree with me on the basis of reasons the validity of which you accept or reject. But to respect your capacity to accept or reject reasons the validity of which you may accept or reject means for me to respect your capacity for communicative freedom.[324]

The universal assumption at the core of her account is that all human beings, as "potential or actual speakers of a natural or symbolic language" are capable of communicative freedom, which she defines, much like Habermas, as "saying "yes " or "no" to an utterance whose validity claims they comprehend and according to which they can act." [325] Although communicative freedom is an exercise in agency, it is not the purposive rational agency of a monologically acting individual, but rather as a communicative actor, the individual is fundamentally embedded in social communities and structures. "Reasons for actions" she explains, "are not only grounds which motivate me; they are also accounts of my actions as I project myself as a " doer" unto a social world which I share with others, and through which others recognize me as a person capable of, and responsible for, certain courses of action." The advantage Benhabib—rightly, I believe—claims for her theory over the more standard agency-centric approaches like Gewirth's is that the norms of social structures are bound up in an intersubjective process of norm generation form the very beginning.

As discussed above, the challenge that any discourse theoretic account will face is the move from these abstract formal notions to a concrete conception of rights for existing legal systems and political communities (the transition from step 2 to 3 in Baynes'

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[323] Benhabib, Dignity in Adversity, 60.

[324] Ibid 66

[325] Ibid 66-67

analysis). Benbabib's answer to this problem is the concept of "democratic iterations."[326] The concept of democratic iterations in Benhabibs account of human rights is a key component in explaining its most attractive features.[327] It accounts for the 'jurisgenerative' nature of legal human rights—their tendency to create a normative universe of meaning that which goes beyond formal law— and undergirds the moral-legal component of her conception of human rights, what she calls justificatory universalism.

The concept of " jurisgenerativity," as Benhabib employs is borrowed from jurisprudence where is was first introduced by Robert Cover. He employs the term to describe how the law and narrative are inseparably related in the normative universe. "The normative universe", he tells us, "is held together by the force of interpretive commitments - some small and private, others immense and public. These commitments - of officials and of others - do determine what law means and what law shall be."[328]Thus, when the law is interpreted from the narratives that give it its meaning, the law is something more than a set of formal rules but a world in which we live. This normative world is held together by the force of the obligations from the people's interpretations of what it means to live in a shared society[329], and "[t]he uncontrolled character of meaning exercises a destabilizing influence upon power." [330] The relevant point for Benhabib's discourse theoretic account of human rights is the way the concept of jurisgenerativity describes the interplay between "formal processes of lawmaking and informal processes of opinion- and will-formation".[331] According to Benhabib,

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[326] The Rights of Others, 179 ff., Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006), pp. 45 ff.

[327] See Means, 407

[328] Cover 7

[329] Understanding the Universal Right to Education as Jurisgenerative Politics and Democratic Iterations NINNI WAHLSTRÖM

[330] Cover 35

[331] RO 152

> …the "jurisgenerative" effects of human rights declarations and treaties enable new actors - such as women and ethnic, linguistic, and religious minorities - to enter the public sphere, to develop new vocabularies of public claim-making, and to anticipate new forms of justice to come in processes of cascading *democratic iterations*.[332]

Democratic iterations are defined as "complex processes of public argument, deliberation and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society.[333]" The concept of iteration is adapted from Derrida, who discusses it in the context of hermeneutics. In *Limited Inc.* Derrida considers whether or not written communication can ever be understood in the 'right' or intended way given the fact that it is constructed in the absence of the interlocutor and read in the absence of the author. Regarding the interpretation of texts, a central problem identified by Derrida and others is the distinction between repetition and alteration as it relates to the constitution of meaning. As regards this distinction, Derrida reasons that there can be no pure repetition—repetition is always marked by alteration since repetition always happens in a new context, and meaning is constituted through context, and thus can never be completely determined. [334] For Derrida the writing of a text perceived as "to produce a mark that will constitute a sort of machine which is productive in turn".[335] Even if the original moment of the text's coming into being is lost, the signs and marks of the text remain, possible to read and interpret. [336] In this way, every repetition is also, however slightly, an original. At the same time, there can be no pure original meaning, because the

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[332] The Rights of Others 15 emphasis added

[333] Cosmopolitan Norms, Human Rights and Democratic Iterations, 20

[334] Thomassen, L. (2011). The Politics of Iterability: Benhabib, the Hijab, and Democratic Iterations. *Polity, 43*(1), 128-149. 130

[335] Derrida, *Limited Inc.* 8

[336] Iterability and Différance: Re-tracing the Context of the Text Roland Theuas S. Pada

role of the interlocutor is supposed from the very beginning-- an act of signification must be recognizable to others in order to function as such. Because any act of signification must be must be repeatable in new contexts, the original is marked from the very beginning by its repeatability.[337] Yet, as Roland Pada explains in the article *Iterability and Différance: Re-tracing the Context of the Text* , although texts demonstrate alterity in their iteration, this is not a skeptical point about the possibility of meaning generally:

> [t]he signatures itself retains its functions despite the differences that it incurs from the circumstance of its inscription. The assertion of this occurrence of différance is…not a nihilistic approach of doing ontology through aporia, rather it is a creative process in which transformation takes place in ontology.[338]

It is easy to see why this picture of the constitution of meaning is attractive from the standpoint of discourse ethics. It rejects an essentialist understanding of meaning in favor of an unbounded and fluid characterization, yet in its fundamentally other-regarding quality it resists all out skepticism about the possibility of being understood. As several authors have observed, [339] for Benhabib, who is committed to the Habermasian conception of deliberative democracy, the concept of iteration provides her with a dynamic conception of democracy and citizenship, by offering a way to demonstrate that the resignification of 'original' meanings can be guided in the direction of deliberative democracy within legal, political and cultural spheres.[340] In her work on human rights-- both in *The Rights of Others*

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[337] Thomassen, L. (2011). The Politics of Iterability: Benhabib, the Hijab, and Democratic Iterations. *Polity, 43*(1), 128-149. 130

[338] Iterability and Différance: Re-tracing the Context of the Text Roland Theuas S. Pada

[339] See Means, A. (2007) The Rights of Others, European Journal of Political Theory, 6(4), 406-423., Understanding the Universal Right to Education as Jurisgenerative Politics and Democratic Iterations NINNI WAHLSTRÖM and Lasse Thomassen, "The Politics of Iterability: Benhabib, the Hijab, and Democratic Iterations," Polity 43, no. 1 (January 2011): 128-149.

[340] See especially Means, 407

and *Dignity in Adversity*—the concept of iteration helps Benhabib theorize the relationship of interplay between the universal and the particular.

4.3.2 The 'Concrete' and 'Generalized' Other

The conception of iteration elaborates on themes from her previous work, particularly *Situating the Self,* where she argued, in Hegelian fashion, that universality must not be understood as 'subsumptive', but rather "interactive," that is--mediated by the particular.[341] This must be understood as part of her ongoing project (began by Habermas) to recover the project of universalism from the problematic legacy of essentialism, while at the same time address the often criticized liberal conception of the 'unincumbered self'.[342] One of the most long-standing challenges to liberalism generally is leveled by communitarians who accuse liberal theorists of relying on an unrealistically atomized and impoverished conception of an individual. More often than not, this criticism is translated into a critique of deontological moral theory generally. This is precisely the case with Michael Sandal's famous critique of John Rawls, where he links the view of the unencumbered self to the commitment within liberal theory to the priority of the right over the good,[343] implying that the latter depends on the former and would no no longer make theoretical sense in the presence of a more realistically embedded notion of self. Interestingly though, as Benhabib observes, Habermas (like the communitarians) rejects the vision of the unencumbered self—he embraces the intersubjective constitution of the self, and the evolution of self-identity through the communicative interaction is at the core of his overall philosophical project. Yet still, in his theory of communicative ethics he follows Rawls and Kohlberg, defending a deontological outlook and the priority of the

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[341] Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (London: Routledge) See also Thomassen 130

[342] Ibid 71

[343] Self 71

right over the good.[344] Benhabib, argues, correctly I believe, that not only is this *not* a theoretical inconsistency or a misunderstanding on Habermas' part, but a highly attractive feature of his theory. According to Benhabib, the strong deontological interpretation which Habermas gives to communicative ethics can be characterized as follows:

> the fairness of moral norms and the integrity of moral values can only be established via a process of practical argumentation, which allows its participants full equality in initiating and continuing the debate and suggesting new subject matters for conversation. Thus understood, communicative ethics is a theory of moral justification.[345]

In this context she introduces the concept of the 'concrete' and 'generalized' other and argues that the moral perspective must take both into account. The standpoint of the concrete and generalized other constitutes the starting point of Benhabib's ethical construction. It is not an essentialist claim about human nature but rather a phenomenological account of human experience.[346] She argues that human identities (both individual and collective) are constituted through narratives, which are inherently open-ended and can be told and retold in different ways. The open-endedness and plurality of narratives means that identities (both individual and collective) are not fixed and finite but open to an ongoing process of interpretation and meaning creation in the process of democratic iteration. Hence, although we are enmeshed in the ongoing narratives of the society and culture in which we are embedded, as we take them up and incorporate them with our own their "[m]eaning is enhanced and transformed."

As a moral/justificatory enterprise we might think of the process of iteration as a phenomenological analog to Kant's kingdom of ends formulation of the categorical imparitive. In so far as the narratives of our identities are heteronomously constituted through the plurality of other narratives, we are bound by the narratives of the social

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[344] ibid, see Habermas *Justification and Application*

[345] ibid 73

[346] DiA 69-70

universe in which we are imbedded. At the same time, through the process of iteration we take up these narratives, transform their meanings, add to them and enrich them in ever-so-subtle ways.[347] Thus we are both subjects to and legislators of the normative order in which we find ourselves. The position of the concrete and generalized other then, stands in the position of Kant's rational individual, or Rawls' moral person, as the starting point of a constructivist conception social morality. As a 'moral being' capable of communicative freedom, "your capacity for embedded agency needs to be respected", this means you must be "recognized as a member of an organized human community in which your words and acts situate you within a social space of interaction and communication."[348] This in turn requires the acknowledgement of each individual's identity as a concrete and generalized other:

> If I recognize you as a being entitled to rights only because you are like me, then I deny your fundamental individuality which makes you different. If I refuse to recognize you as a being entitled to rights because you are so other than me, then I deny our common humanity.[349]

The concept of the generalized other was famously introduced by George Herbert Mead to explain the process whereby we come to view own behaviors from the perspective of the system of orgized actions in which we are embedded. As Mead employs the concept 'the generalized other' refers to the "organized community or social group which gives to the individual his unity of self."[350] Habermas often formulates this insight concerning the intersubjective constitution of self-identity in the language of George Herbert Mead. The "I" becomes an "I" only among a "we," in a community of speech and action. Individuation

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[347] RO 8

[348] DiA 68

[349] DiA 69

[350] *Mind, Self, and Society: From the Standpoint of a Social Behaviorist,* edited, with an Introduction, by Charles W. Morris, Chicago: University of Chicago Press, 1934 154

does not precede association; rather it is the kinds of associations which we inhabit that define the kinds of individuals we will become.[351] For Benhabib, in assuming the standpoint of the " generalized other ", we abstract away from the individuality and the concrete identity of the other, which in turn "requires us to view each and every individual as a being entitled to the same rights and duties we would want to ascribe to ourselves."

The jurisgenerative nature of human rights—the open character of their meaning which is filled in through democratic iterations—is what supports the moral-normative component of Benhabib's conception of human rights, which she refers to as *justificatory universalism.* By linking the justification strategy with deliberative processes, Benhabib's account is able to overcome some of the main problems that have been identified with both traditional and standard political accounts. In so far as it understands human rights as 'instruments of critique' their meaning is open to interpretation and transformation (reiteration). Thus, although human rights are understood as universal (and this universalism is a moral notion on Benhabib's account), they are still capable of accommodating the dynamic nature of the human rights practice in a way a timeless moral notion cannot. Secondly, in so far as the moral universality of this understanding of human rights is linked with discursive process of justification in which every actor is to …..asking and answering… it avoids the parochialism charge that which is often leveled at the traditional account. On the other side, while the open and interpretive character of this way of conceptualizing human rights makes it suitably responsive to the contemporary practice, it is not conceptually constrained by by the status quo and thus offers a better standpoint for critique of current institutions than the standard practical conception, which defines human rights according to their functional role in a world of separate states.

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[351] Self 71, citing J. Habermas, "Mora l Development and Ego Identity," in Communication and the Evolution of Society, trans. and introd. Thomas McCarthy (Beacon Boston, 1979), pp. 93ff.

Returning to the evaluative criteria of *non-parochialism*, *universality*, and *prescriptive determinacy.* Benhabib's account approaches the universalism of human rights in a novel way. In *Dignity in Adversity,* Benhabib distinguishes between four types of universalism: essentialist universalism, moral universalism, justificatory universalism and juridical universalism. Essentialist universalism is a fundamental claim about some objective human quality. This might be understood as in terms of human nature—conceived as something stable and predictable about the human constitution which might be rationally discovered. This essential quality might also be interpreted, as Kant understood it, as a capacity to formulate and act from universalizable moral principles. As Benhabib correctly points out, universalism in contemporary philosophical debates has come to refer to, most prominently, as justification strategy rights claims have the following structure "I can justify to you, with good reasons that you and I should respect each others' reciprocal claim to act in certain ways and not to act in others, and to enjoy certain resources and services ."[352]

In terms of the other criteria *non-parochialism*, and *prescriptive determinacy,*[353] Laura Valentini has evaluated the performance of Benhabib's model according to the these metrics in her article *Human rights and discourse theory: some critical remarks.*[354] We can therefore take her assessment as a starting point. In terms of non-parochialism, it is no surprise that Valentini rates the Benhabib's model well. The discouse theoretic model understands human rights as setting out conditions in which people can 'fairly negotiate' the terms of their coexistence on reciprocal grounds. Thus Valentini reasons that "[f]ar from imposing one set of terms (e.g. Western liberal) on the world at large, Benhabib**'** s human rights outline conditions that precisely secure human beings against any such unilateral imposition." In terms of prescriptive determinacy, Valeniti points out a problem with Behabib's model, that could equally stand for Habermas' conception of human rights

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[352] *DA* 66

[353] Valentini calls this metric 'plausible action guidance'

[354] Valentini, 'Human Rights and Discourse Theory: Some Critical Remarks'.

as well. Regarding the 'object' of human rights, this is determined on the basis of the 'right to have rights' which should secure the basis for communicative action (in Habermas' model this role is played by the discourse principle). In brief, what goods or interests qualify as rights (their objects) are determined on the basis of whether or not they safeguard communicative agency.[355] The problem Valentini points out (which Benhabib also acknowledges) is that way of determining the content of rights might be understood in two ways: one extremely expansive, the other restrictively narrow. On the thin interpretation, human rights would only secure a right to free speech—the literal interpretation of the conditions for communicative action. On a thick interpretation protecting communicative agency could require far more than this. The conditions that would support 'symmetrical entitlement[s] to speech acts, ' and 'reciprocity of communicative roles ' [356] could be put in jeopardy by the presence of power and resource inequalities in society. A whole host of social guarantees might be needed to secure equal footing in the discursive procedure, including not only liberal-democratic rights, but also strongly egalitarian redistributive policies. It is clear that Benhabib intends to endorse something like this broader reading, but for Valentini this move jeopardizes her claim to non- parochialism. She writes that "on the second interpretation, her account of human rights is, substantively, no different from those routinely accused of Western-liberal imperialism."[357] While a human right to democracy is indeed problematized by the sceptics of human rights, both in philosophical as well as public political discourse, it is not clear why we should think of economic redistribution as a form of imperialism or parochialism. Arguably, the global power imbalances that result from unequal economic distribution are just as suspect as human rights and democracy, and provide of the primary rationales for criticizing these institutions. I will return to this issue at length in the following chapter.

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[355] *DA*, 70-71, Valentini (2014) 677
[356] *DA* 71
[357] Valentini (2014) 677-8

CHAPTER 5

Toward a Political Conception of Human Rights for the Realities of the Global Age

5.1 Institutional human rights

When it comes to articulating a conception of human rights, one way to start out is by taking what Raymond Guess has called an 'ethics first' approach. Here the realm of ideal theory comes first, and problems relating to implementation of the theoretical standards is a matter of secondary concern.[358] The traditional conceptions I have discussed tend to take this approach. As it should now be clear from the discussion, these 'humanity-centric' theories have several attractive features. First, they seem to capture the universalism implied by the concept of human rights, and try to offer the strong justification human rights require, by arguing that they are grounded in a salient quality that is common to all humanity. They are also able to ground a robust set of rights (rights to liberty, but also those necessary for human well-being such as social and economic rights) in so far as these can be shown to be vital to their preferred understanding of humanity. Theorizing human rights in this way means the issues related to their institutional instantiation are secondary from a normative point of view. This does not mean that theorists who advance this type of ethics first conception of human rights disregard the political and legal conditions of their possibility, but rather that awareness of these conditions does not have normative consequences at the level of theory construction. With something as serious and seemingly sacrosanct as human rights, it might seem inappropriate to concede moral ground to the basis of empirical considerations. Yet, there are several good reasons, in the case of human rights why factual considerations ought to factor in, namely the fact that they must be justified in a world of diverse cultural and moral points of view.

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[358] Geuss R (2008) Philosophy and real politics. Princeton University Press, Princeton

As I have discussed in the course of the literature review, there are several ways a political conception can be political, i.e. several reasons authors may claim for limiting a conception of human rights according to empirical-political considerations. The first is the feasibility constraint, which takes seriously the 'ought implies can' proviso. The second reason pertains to the nature of institutions, and supposed that in so far a political principles apply to institutions, considerations of the institutional reality factor in at the very beginning. Matters of justification for human rights are also equally important. Because human rights should be able to critique unfair institutional arrangements and social practices of domination, moral theories of human rights try put them on the firm grouning they need to carry out this purpose.

Of these theories, the most interesting are the ones (such as Griffin's and Gewirth's) which are grounded in human rationality. They resemble most closely the classical liberal idea that what is rational for the individual corresponds with what is right for individuals generally-- I cannot, without contradiction will that I would live in a social order that would protect my own interests without willing the same for all others. In supposing that what is right for society corresponds with what is rational for individuals, they imagine a legitimate social order organized so as to channel the self-interested actions of rational actors toward the collective interests of social unity and the progressive realization of individual wellbeing. Here we see that one of the common criticisms of the traditional conception of human rights is misguided somewhat, as it is generally supposed that this way of theorizing takes the institutional instantiation of human rights to be a matter of secondary concern. In supposing that a stable well ordered society depends on a rational basis for its authority, institutional considerations are taken up from the very beginning. The real problem with the traditional approach is its naturalism (or 'modified naturalism' to use Gewirth's phrase), that supposes we all reason in the same way, and that the rational competence fixed and finite--a metaphysical certainty on which we can to longer rely in the post-metaphysical world. It is precisely the fallibility of this rational ontology that both Rawls

and Habermas have problematized and tried to address. Rawls, citing the burdens of judgment and the incommensurability of values abandons the project of a rational consensus as to what is true, in favor of an overlapping consensus on what is reasonable. Habermas, in a similar manner acknowledges the intersubjective, phenomenological nature of rationality. Still, for both authors describing a reasonable basis for life in collective society remains the primary goal. Thus, their reason for abandoning the rational model in its naturalistic variant pertains first and foremost to the issue of legitimacy. To clarify, consider Kant's famous passage about man's transition from the state of nature to life in collective society:

> Man, who is otherwise enamored with unrestrained freedom, is forced to this state of restriction by sheer necessity. And this is indeed the most stringent of all forms of necessity, for it is imposed by men upon themselves, in that their inclinations make it impossible for them to exist side by side for long in a state of wild freedom. [359]

For Kant the stringent necessity of entering into mutually beneficial social relations drives man to curtail his freedom—making it rational for him to comply with the rules of the social order. Accepting this necessity as a given, the social order would be legitimate in so far as it enabled to the conditions for man's autonomy to flourish while mediating benefits of social cooperation. The moral epistemological precepts of this model no longer hold water (and perhaps never did), but the insight behind it remains valuable. In order for an individual to take on the interests of society as his own (by supporting its laws and institutions), he must believe they are ordered in a manner that is reasonable and deserving of respect—i.e. legitimate.

Returing now to the issue of international human rights, this insight factors into both Habermas' and Rawls' accounts. For Habermas, the insistence on couching human rights within a cosmopolitan legal-institutional framework will ensure that their legitimacy

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[359] Kant, *Idea for a Universal History* 46

is not called into question by powerful actors misappropriate their moral language to justify wars of aggression. For Rawls, his limiting of the list of human rights out of consideration for non-liberal but decent societies is informed by their important role in the world order, which should be perceived as legitimate from the perspective of all the world's diverse societies. Thus questions of legitimacy have a limiting effect on moral concepts in general for these authors, and for human right in particular. The concern for legitimacy, and the real world circumstances in which it can be said to obtain, is what truly marks a political conception out as *political*. The political is what pertains to power in society, and power is legitimate (as opposed to arbitrary) when it is organized in a manner that individuals deem worthy of respect. A political conception of human rights takes the normative and sociological meanings of legitimacy in tandem, and supposes that a necessary condition for an institution's legitimacy is its being perceived as legitimate. This does not mean that theorists who advance this type of ethics first conception of human rights disregard the political and legal conditions of their possibility, but rather that awareness of these conditions does not have normative consequences at the level of theory construction. With something as serious and seemingly sacrosanct as human rights, it indeed seems inappropriate to concede moral ground to the basis of empirical fact. Yet, there are at least two good reasons, in the case of human rights specifically, why conditions of possibility—considerations of what is actually achievable—should factor into a conception of human rights. The first is that although human rights are moral demands, they are also legal entitlements. In so far human rights ultimately demand their institutionalization on the legal form, facts about whether and how they could be implemented must factor in from the very start. The second reason why moral theory alone is not enough to ground a theory of human rights is their political function as standards of legitimacy.

5.1.1 Human rights are political

Although human rights express ultimate moral concerns, they place demands on

political institutions. They are not moral claims that every human holds against every other human (in the sense of natural law), but impose demands on institutions and as such are fundamentally institutional in their nature. Of course, there very well can be such a thing as universal moral duties— Kant's imperative that we treat others, and deserve to be treated, as ends in our own right is a good candidate. However, when we speak about 'human rights' this is not usually what we are referring to. This can be demonstrated by way of an intuitive example. Imagine I am an activist fighting for labor rights in my home state, organizing peaceful demonstrations and rallies to raise awareness of my cause. My neighbor—perhaps because of his political beliefs but the reason isn't pertinent—disagrees strongly with my views and takes it upon himself to kidnap me stop me from spreading them. This violates my interest in freedom and personal security, as well as my dignity, yet we wouldn't normally consider it a human rights violation. On the other hand, if I am taken in by government officials and held for a period of time, without being charged with a crime or availed of due process, this would almost certainly be understood as a human rights abuse.[360] An example constructed by Laura Valentini in a recent article demonstrates this intuition as it regards economic rights. A business tycoon— Jeff Bezos of Amazon for example— might have the financial means to provide access to food, shelter, and sanitation that could significantly better the lives of individuals in small, economically disadvantaged village in Sierra Leone. Yet, if he fails to do so, (and despite what we may think about him and his business practices) we wouldn't typically consider him a human rights violator. By contrast, Sierra Leon's central government, were it to have the resources and capacity to aid the rural village , and yet still refused to do so, would most certainly be thought to be violating its inhabitants human rights.[361]

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[360] I was inspired to make this example by Thomas Pogge's (1999) example contrasting a using a bar fight and a police beating

[361] Valentini (2018) 6 constructs a similar model (using Bill Gates and an unnamed village somewhere in the developing world) in the context of a rather different argument which I will discuss later on in the text. Despite Sierra Leon having the third largest natural resources in the world it is also one of the poorest countries with over 50% of its population living in poverty.

Now, this argument might be taken to show that human rights pose demands on national political institution—indeed it is often framed in this way. But this need not necessarily be the case. There are a variety of reasons for prioritizing the nation state as a locus for justice, and socio-economic justice particularly. Communitarian arguments based on the bonds among the national community have largely fallen out of favor for reasons too numerous and complex to get into here. What has replaced them is a family of social-liberal arguments which see matters of justice as arising primarily in the contexts of states. This might be because it is only within the states that the coersive apparatus and redistributive mechanisms exist that warrant the need for principles of justice, similarly it might be related to feasibility or justification… Where human rights are concerned, Because contemporary human rights regimes presuppose the modern state and all of its salient institutional components— a comprehensive legal system and centralized mechanisms for resource distribution and coercion— what human rights *are* is cannot be understood without reference to their role within this context.[362]

Yet in the era of globalization, the nation-state is no longer the sole locus of political authority. What has been called the post-national era is characterized by a diffusion of political power outside the immediate confines of the state. To be clear, states remain crucial sites for political authority—a fact that tends to be overlooked in the literature on global governance. But while the boundaries of nations still very much exist, even the most powerful states now share authority with major global institutions, intergovernmental organizations, regional supernational institutions, trade agreements and powerful private actors. These include but are not limited to the UN, World Trade Organization (WTO), the International Monetary Fund (IMF), and the European Union. John Rawls, who largely initiated the political institutionalist turn in global justice, presupposed an empirical reality in which states still held a monopoly on political power. The point I wan to make was articulated William Scheuerman, who writes

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[362] Sangiovanni *Justice & the Priority of Politics to Morality.* 152-3

> The "final authority" Rawls associated with (national) states tends increasingly to be situated in a complex multi-layered system where national decision makers remain central yet no longer always dominant players. Empirical evidence, in short, suggests a heightened role for international and postnational decision-making sites Rawls (and his contemporaries) neglected.

The Haitian rice case discussed in the introduction is a powerful example of the way that third parties (in that case another state, as well as regional trade agreements and international monetary agencies) can have a considerable impact on the lives of individuals in ways that escape their own governments' control. The global basic structure is not wanting in governance institutions, where it lacks is in legitimacy. Imposing human rights obligations on these institutions is vital to the continued stability of the global order, as I will argue in the following section. [363]

5.1.2 Stability for the right reasons.

In the section on Rawls' conception of human rights I introduced his notion of 'stability for the right reasons' and the important role toleration plays in facilitating it. Toleration goes to the issue of legitimacy, in so far as the latter assumes that citizens—either individually or acting through their governments—should have moral, rather than purely prudential reasons for supporting the institutional framework they are a part of. In this section I will argue that a robust conception of human rights is vital to the stability of the international order, as the former could serve a legitimating function. To begin I will discuss the distinction between stability based on political compromise, and stability born out of mutual cooperation and trust. To this end I will compare the political conception of human rights put forward by Michael Ignatieff (as an example of the former) with Joshua Cohen's (as an example of the later). In section 5.1.6 I will analyze the value of toleration

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[363] William E Scheuerman, 'Civil Disobedience in the Shadows of Postnationalization and Privatization', *Journal of International Political Theory*, 12.3 (2016), 237–57

in Cohen' and Rawls' theory, and whether or not it could serve its intended function in as part of a stable and ongoing consensus among the worlds individuals and groups.

5.1.3 Moral consensus or *modus vivendi*?

In his very influential article 'Minimalism about Human Rights: The most we can hope for?'[364] Joshua Cohen advances a political conception of human rights informed by 'justificatory minimalism'. Here he expands on the Rawlsian idea of stability for the right reasons, in which considerations for toleration play an important role. The title of the article is a reference to a quote from Michael Ignatieff, who argued that only a conception of human rights limited to negative freedom and bodily security would be able to secure agreement among the world's diverse political cultures. Given the difficulty of reaching a consensus about a more robust set of rights—mainly due to persistent skepticism that the doctrine of social and political rights has a tendency to be operationalized as a rational for interference in domestic politics—a minimal list of human rights is the most we can hope for. In his article, Cohen also advances a minimal conception of human rights, with the aim of securing a consensus, but with one key difference. Ignatieff's minimalism in content is justified by way of political compromise for the sake expediency and as such presents human rights as part of a *modus vivendi.* [365] Cohen, on the other hand sees human rights as part of a stable overlapping consensus—an essential element of a global—as a basic feature of "global public reason."[366] Cohen contrasts what he refers to Ignatieff's 'substantive minimalism' with his own account which turns on the concept of 'justificatory minimalism.' Justificatory minimalism is aimed at securing the broadest possible

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[364] Joshua Cohen, 'Minimalism about Human Rights: The Most We Can Hope For?', in *Journal of Political Philosophy*, (2004).

[365] Kenneth Baynes, 'Toward a Political Conception of Human Rights', *Philosophy and Social Criticism*, (2009). 9

[366] Joshua Cohen, 'Minimalism about Human Rights: The Most We Can Hope For?', in *Journal of Political Philosophy*, (2004).

consensus on human rights, and assumes (in the manner of Rawls' political liberalism) t we cannot, *ex hypothesi*, agree on the reasons that would support it in our pluralistic world.[367] The guiding idea is that a *modus vivendi*—a *de facto* consensus born out of trenchant disagreement—will be unstable in the long run. Only by embracing the value of toleration can mutual trust and cooperation be sustained over time.

5.1.4 Ignatieff's minimalism as a *modus vivendi*

In *Human Rights as Politics and as Idolatry* Ignatieff is concerned with many of the problems that I have discussed in the section on skepticism: in particular, worries in many parts of the globe that the language of human rights disguises Western interests and seeks to erode cultural values and perpetuate the market economy. None the less Ignatieff is hopeful about the project of human rights, especially as it is employed by activists who speak on behalf of the powerless in order to "sustain ordinary people's struggles against unjust states and oppressive social practices." [368] What he is skeptical about however is the moralization of human rights as political norms:

> As the West intervenes ever more frequently but ever more inconsistently in the affairs of other societies, the legitimacy of its rights standards is put into question. Human rights is increasingly seen as the language of a moral imperialism just as ruthless and just as self-deceived as the colonial hubris of yesteryear.[369]

In a manner familiar to other political conceptions I have discussed, Ignatieff takes the role of political human rights norms as triggers for international interference (increasingly in the form of military intervention) as sufficient to warrant a significant

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[367] David Ingram, 'BETWEEN POLITICAL LIBERALISM AND POSTNATIONAL COSMOPOLITANISM Toward an Alternative Theory of Human Rights', *POLITICAL THEORY*, 31.3 (2003), 359–91. 369

[368][368]Ignatieff 290

[369] Ibid 299

limitation on what is to count as a human right proper. Ignatieff identifies what he sees as the 'spiritual crisis of human rights', beginning from the observation that "Human rights has become a secular article of faith. Yet the faith's metaphysical underpinnings are anything but clear." [370]Rather than attempt to flush out a robust philosophical or metaphysical justification for human rights his approach to this problem is informed by what he takes to be an ingenious feature of the UDHR: it is precisely the fact that it remains silent on the question of the deeper foundations of human rights that its application has been such a success. This silence was no doubt in part the result of political compromise the part of the drafting committee, but it has its own virtues as well:[371] "Pragmatic silence on ultimate questions has made it easier for a global human rights culture to emerge."[372] The strategic agnosticism of the drafting committee is often discussed in the literature, especially in the context of political conceptions of human rights, as a integral to the success of the human rights regime. This idea is summed up by Cohen in the words of the Catholic philosopher Jacques Maritain, who helped to formulate the UDHR: "Yes, we agree about the rights, but on condition that no one asks us why."[373] As Charles Taylor writes, the concept of human rights "could travel better if separated from some of its underlying justifcations."[374] Rather than view human rights in the broadly moral terms that activists sometimes do, Ignatieff implores us to recognize the the reality that "[h]uman rights is nothing other than a politics" and as such "must reconcile moral ends to concrete situations and must be prepared to make painful compromises not only between means and ends, but between ends themselves." [375] At the collective level, he argues that rights language pertains to "the desire of human groups to rule themselves". This being the case,

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[370] Ignatieff 337

[371] Baynes 7

[372] Ignatieff 338

[373] Cohen 193

[374] Charles Taylor, "Conditions of an Unforced Consensus on Human Rights," in Bauer and Bell, The East Asian Challenge for Human Rights, p. 126.

[375] Ignatieff 301

the discourse of human rights "must respect the right of those groups to define the type of collective life they wish to lead, provided that this life meets the minimalist standards requisite to the enjoyment of any human rights at all."[376] The minimal standards Ignatieff has in mind are those which protect human agency. He understands agency in terms of what Isaiah Berlin described as 'negative liberty'—the capacity to carry out our rational intentions unhindered. While human rights may serve as a common ground for argument about about political conflict, they are by their nature political, and thus cannot provide any kind of closure to political disputes.[377] For this reason Ignatieff argues that instead of trying to burden the conception of human rights with unrealistic aspirations of an international public morality or cosmopolitan justice, we should focus our efforts on the urgent global problems where human rights might realistically be able to help. Thus he argues that the "elemental priority of all human rights activism: to stop torture, beatings, killings, rape and assault to improve, as best we can, the security of ordinary people."[378]

5.1.5 Cohen's justificatory minimalism

Cohen takes Ignatieff's conception of human rights, and in particularly this last quote about the 'elemental priority' of human rights discourse as a starting point for his own conception of human rights, and contrasts Ignatieff's 'substantive minimalism' with his own account which turns on the concept of 'justificatory minimalism.' Like his mentor and former professor Rawls, he understands human rights as *inter alia*, international norms which specify the basis for membership in a political society.[379] The central idea of *justificatory minimalism* is that "a conception of human rights – including an account of

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[376] ibid
[377] ibid 21
[378] ibid 173
[379] Cohen (2004). 197

their content, role and rationale – should be stated autonomously and independent of particular philosophical or religious theories that might be used to explain and justify its content." At face value it is difficult to understand exactly what is the difference between this appeal to justificatory minimalism and Ignatieff's. Cohen seems to take Ignatieff's claim about his minimalism about human rights being 'the most we can hope for' to mean that his conception of rights to freedom and bodily security is exhaustive, however it is not clear from the text that this is precisely the case. Elsewhere in this series of lectures Ignatieff describes his conception of human rights grounded in negative liberty as the conditions necessary to undergird any type of human agency and protect it from cruelty, he writes "[p]rotecting such an agent from cruelty means empowerment with a core of civil and political rights."[380] And while the political nature of human rights precludes them from providing definitive closure in political disputes, they none the less serve as a 'common ground' for argument.[381] The crucial difference between the two positions, at least as Cohen understands it, that Ignatieff's minimalism in content reflects a justificatory strategy built on compromise for the sake of political expediency. Through a brief yet poignant discussion of Kant, Cohen reminds us that political philosophy is about more than what is possible, given the current empirical circumstances, but also about what we might reasonably hope to achieve. Rather than resigning ourselves to the fact of trenchant disagreement and compromising on a short list of human rights, Cohen hopes that securing a stable consensus around human rights would allow for the potential of their content to expand with time. Thus Cohen describes his account as beginning "with an emphasis on the value of toleration and an acknowledgement of ethical pluralism", and ending up in human rights minimalism. [382]

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[380] Ignatieff 346
[381] ibid 21
[382] Cohen 191

5.1.6 Toleration and stability

The value of toleration is an important component in Cohen's conception, as in Rawls'. It assumes that states should be allowed a reasonable degree of variation with regards to the economic and political ordering of their societies. There is a vast literature on the liberal conception of toleration,[383] a full discussion of which won't serve the purposes of the investigation here. Regarding the way toleration is understood in relation to human rights, in particular in the theories of Rawls and Cohen there are two relevant points to consider. The first it that toleration is understood by these authors as part of a stable consensus as to the reasonable terms of social cooperation and as such is something more than a simple *modus vivendi*. As an example of the principle of toleration being honored as a *modus vivendi*, Rawls cites the compromise made between Catholics and Protestants sects in the sixteenth and seventeenth centuries.[384] In spite of a mutual distain for one another, Catholics and Protestants initially tolerated each other out of– in David Ingram's words– a "purely Hobbesian fear of mutual destruction."[385] Because both faiths held that it should be the duty of the ruler to uphold the 'true' religion– repressing the spread of heresy and false doctrine– if either group came to power the principle of toleration would no longer apply.[386] This type of political compromise is inherently fragile, because in Rawls' words "stability with respect to the distribution of power is lacking."[387]

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[383] The literature on liberalism and the virtue of toleration in both domestic societies and internationally is extremely vast, just a few notable examples across a range of perspectives include: Catriona McKinnon, *Toleration: A Critical Introduction*, *Toleration: A Critical Introduction*, (2005); John Locke, 'A Letter Concerning Toleration', in *The Two Narratives of Political Economy*, (2011); James Bohman, 'Deliberative Toleration', *Political Theory*, (2003); D. Madden, 'Toleration in Enlightenment Europe', *History of European Ideas*, (2000); Sune Lægaard, 'Toleration out of Respect?', *Critical Review of International Social and Political Philosophy*, (2013); Rainer Forst, 'Two Stories about Toleration', in *Law, State and Religion in the New Europe: Debates and Dilemmas*, (2012); Bernard Williams, 'Toleration: An Impossible Virtue?', in *Toleration: An Elusive Virtue*, (1996).

[384] *PL* 148

[385] Ingram (2003) 370

[386] *PL* 148

[387] ibid.

The instability of this *modus vivendi*, has lead liberal theorists from Montesquieu to Rawls to argue that true toleration must rest on a moral foundation of mutual respect.[388] This means that although citizens may differ considerably in terms of their moral beliefs and cultural practices, they can recognize the value of a political organization founded upon norms that all parties could agree to rather than those which favor a particular ethical or cultural community.[389] In this way they understand and respect each other as moral and political equals. It is supposed by Rawls and other authors who afford priority to the principle of toleration as respect, that a society that incorporates the principle of toleration will be more stable in the long term. This thought involves both a normative and descriptive component. The normative component relates to individual autonomy, and the idea that a concern for the diversity of private ethical and cultural world views will ensure that institutions will be organized in such a way that they relate to individuals in a non-arbitrary way. It also entails the descriptive thesis that individuals who feel that their private interests and opinions have been respected will be more likely to comply with the institutions of society. There are, of course limits to which type of private moralities and world views should be tolerated in a liberal society. Violent neo-Nazi groups and their adherents, for example should not be tolerated, because their world view does not respect fellow citizens as moral-political equals and is thus unreasonable in the Rawlsian sense.

This view of toleration in moral, rather than purely prudential terms is vital to understanding why Rawls and Cohen conceive it as a justifiable limitation on human rights. A political moral consensus of the type that could facilitate sustained peaceful cooperation can be achieved, at the international level as in the domestic case, only if it grounded in reasons that reflect the moral-political equality of the participants. Were we to impose our

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[388] Ingram (2003) 370, see also Montesquieu, Charles de. "The spirit of the laws (1748)." Ed. JV Prichard and trans. Thomas Nugent. Rev. ed 1 (1989).Gilbert, Alan. "“Internal Restlessness” Individuality and Community in Montesquieu." Political theory22.1 (1994): 45-70.

[389] Forst, Rainer., (2002) *Contexts of Justice*, J. Farrell (trans.), Berkeley and Los Angeles: University of California Press.;Forst (2012); Lægaard (2013);McKinnon (2005)

distinctively Western conception of human rights, with all the liberal trappings of free speech and equal representation on societies whose prevailing political culture might not adhere to those values, we risk marginalizing their interests, thus compromising the project of stability. The derogation from the full-set of liberal and political rights is justified, in part because Rawls and Cohen hope that with time, the benefits of cooperation in a stable world order that prioritizes trust could have a transformative effect. Even if decent societies do not yet accept a full set of liberal human rights, Rawls argues that this is no reason to suppose that they cannot, with time come to embrace these rights and the constitutional-democratic ordering necessary to facilitate them:

> All societies undergo gradual changes, and this is no less true of decent societies than of others. Liberal peoples should not suppose that decent societies are unable to reform themselves in their own way. By recognizing these societies as bona fide members of the Society of Peoples, liberal peoples encourage this change.[390]

The hope here seems to be that through membership in the society of peoples and the positive experience of international cooperation built on trust and mutual respect, a decent society could come to integrate the norms of the liberal society of peoples into its own public political culture. Forcibly imposing a human right to democracy on the other hand non-liberal society would have the opposite effect, as the act of disrespect would be likely to garner resentment which might stifle change. Thus, Rawls maintains that the law of peoples considers the "wider background basic structure and the merits of its political climate in encouraging reforms in a liberal direction as overriding the lack of liberal justice in decent societies."[391]

The second feature of the value of toleration which is important for understanding its relevance for theorizing about human rights regards its application to the sphere of international relations and precisely how this is to be understood. Charles Beitz (who's

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[390] *LoP* 61
[391] *LoP* 63

conception of human rights is not guided by considerations for toleration) distinguishes between two ways interpreting the value of toleration as it pertains to the international arena. On one understanding toleration at the international level is taken to be analogous to toleration in the domestic society. This is the interpretation given by Emerich de Vattel, in the *The Law of Nations,* who argues that a state, like an individual in the state of nature is a "moral person having an understanding and a will peculiar to itself." This moral quality grounds the right of each state to govern its affairs as it sees fit, so "[n]o foreign state may inquire into the manner in which a sovereign rules, nor set itself up to judge of his conduct." [392] On this view states are both the agents and objects of toleration: their right to remain autonomous depends on a duty not to interfere with other states. This understanding of the international principle of toleration—in so far as it is to be understood as more than a *modus vivendi*—is difficult to accept from the perspective of the contemporary international order. Insofar as it establishes a moral imperative to respect the external sovereignty of a nation at all costs, it would require us to tolerate even the most violent and oppressive regimes.[393]

There there is another way to think about the value of toleration in international affairs, which understands the international principle of toleration as an extension of the domestic principle, rather than its analog. According to this second conception, individuals are the objects of toleration. It is for the sake of individuals that international actors must practice toleration, and while states may be the rightful objects of toleration as well, this relationship is derivative. States are to be tolerated only in so far as this practice contributes to the interests and wellbeing of their individual members. [394] It is clear from the important role that human rights play within the society of peoples that Rawls understands toleration in the latter manner, as an extension of the domestic principle. This is further demonstrated

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[392] Emerich de Vattel, The Law of Nations [Le Droit des gens] [1758], trans. Charles G. Fenwick (Washington, DC: Carnegie Institution, 1916), These quotes are reprinted in Beitz *IHR* 144

[393] Beitz *IHR* 144

[394] Beitz, *IHR* 155

in the the carefully constructed hypothetical cases he lays out as examples of societies whose ordering is reasonable enough to be tolerated. Among the criterion that must be met in order for a people to count as 'decent' from the perspective of the society of peoples—other than the requirements that they refrain from external aggression and recognize the human rights of their citizens—is the demand that they uphold a "common good idea of justice that takes into account what it sees as the fundamental interests of everyone in society."[395] Furthermore, even if decent societies are allowed a margin of discretion in terms of their political organization and are not held to liberal democratic standards, political decision making is to be organized in such a manner that allows different voices to be heard.[396] Although individuals may not be recognized or represented as political-moral equals in the strict sense, they are represented as members of groups, an thus don't feel that their interests and commitments are being marginalized. "As responsible members of society, they can recognize when their moral duties and obligations accord with the people's common good idea of justice."[397]Cohen as well seems to be endorsing the individual-centered conception of toleration when he writes that the profound importance of the value of toleration is "owed in part to the connections between the respect shown to a political society, when it is treated in global public reason as beyond reproach, and the respect shown to members of that society, who ordinarily will have some identification with that political society and its way of life."[398] Further, this he argues that a plausible element in any conception of human rights is the principle of collective self-determination, the satisfaction of which "requires that collective decisions be based on a process that represents the interests and opinions of all those who are subject to the society's laws and regulations."[399] When this principle is satisfied, argues Cohen, we cannot justifiably hold

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[395] *Lop* 68
[396] ibid 72
[397] ibid 71
[398] Cohen (2004) 212
[399] Cohen (2004) 211

a society to a standard of justice that has been rejected by its own members.[400]

To sum up, a conception of human rights may be justifiably limited by the principle of toleration, when the later is understood in moral, rather than purely prudential terms and its aim is directed at individuals or collectives of individuals acting through their governments. Thus considerations of the background conditions of a stable consensus on the basis of public reason are awarded priority over the immediate demand for protection of the social and economic rights of all the world's citizens. The human rights which do make it on to the list are those which protect the most minimal conditions of moral agency, which is required to maintain any stable system of social cooperation.

5.1.7 Is there reason to hope?

Neither Rawls nor Cohen wishes to close off the possibility that a consensus on a broader list of human rights—one which understands all citizens as deserving equal respect—could come to evolve over time. The inclusion of the very basic (yet unequal) political rights is intended to allow citizens to put pressure on their governments in order to facilitate this transformation.[401] Rawls readily acknowledges the considerable evidence that a full set of liberal democratic rights is necessary to support human rights generally, but none the less believes it would be unreasonable to to persuade countries to embrace universal suffrage if they are not ready to do so on their own accord. Putting pressure on nations to democratize, in Rawls words overlooks the great importance of maintaining mutual respect between peoples and of each people maintaining its self-respect, not lapsing into contempt for the other, on one side, and bitterness and resentment, on the other. [402]

Although Cohen, like Rawls rejects a human right to democracy, he advocates a

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[400] ibid

[401] Rawls makes this clear in *LoP* in his discussion of how the rights of women might expand with time.

[402] *LoP* 123

slightly broader reading of the right to political participation, writing that " any reasonable conception of collective self-determination that is consistent with the fundamental value of membership and inclusion, will . . . require some process of interest representation and official accountability, even if not equal political rights for all.[403] Still he rejects the idea that we should put pressure on non-democratic (yet otherwise decent) societies to change. He remains adamant however, that the point of tolerating undemocratic societies does not imply a type of relativism about justice. "Instead, the point is that a political society can, within limits, be unjust but beyond reproach, from the point of view of an acceptable global public reason."[404]

This last point is the source of much of the criticism of political liberalism from discourse theorists and comes down to a primary point of contention between Rawls and Habermas. How can public reason serve the basis of a stable ongoing consensus when certain individuals and groups are systematically barred from equal participation in the public discourse? Seyla Benhabib has articulated a version of this criticism, arguing that identifying the constituent addressees of global public reason 'peoples' rather than individuals, results in an unacceptable "methodological holism. " Returning to Rawls example of Kazanistan, in the fictional country as Rawls describes it, there is a dominant culture which allows various other sub-groups to exist. But without a principle of equal representation, we have no good way of knowing that the political culture we are tolerating is really representative of the constitute individuals and groups. As Terence Turner argues, methodological holism risks "overemphasizing the internal homogeneity of cultures in terms that potentially legitimize repressive demands for communal conformity; and by treating cultures as badges of group identity, it tends to fetishize them in ways that put them beyond the reach of critical analysis. "[405] This is a threat to the stability of the international order, in so far as it is to be understood as an extension of the domestic principle of

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[403] Cohen (2004) 211

[404] Cohen (2004) 212

[405] This quote is reprinted in *DA* 19

toleration and as a value that should support a stable moral consensus. If individuals feel their interests are being marginalized they are likely to loose faith in the international order as a cooperative enterprise. This is why discourse theorists like Habermas and Benhabib insist that a right to democracy is necessary to support the procedure of public justification that would allow for the type of stable moral consensus that most all liberal theorists (Rawls and Cohen very much included) realizes is necessary to the continued stability of the international order. The conception of legitimacy and public justification which takes the incommensurability of values as given, is what Habermas identifies as the serious weakness in political liberalism. The goal of securing a factual basis for consensus comes at a detriment to the prescriptive force of a theory of rights. Thus, the overlapping consensus begins to appear less like a stable agreement based on moral trust, and more like a *modus vivendi*.[406]

Ultimately the debate between Rawls and Habermas comes down to their respective understandings of public justification. For both Habermas and Rawls, if the law is to be legitimate, individuals must perceive it not as arbitrary, but as reasonably worthy of their consent. This requires that they see themselves as (actual or potential) co-legislators in some manner. For Rawls, given the irreducible plurality of comprehensive doctrines, it would be unreasonable (and illiberal) for regime to impose a particular comprehensive conception doctrine —even a liberal conception of human rights— on its citizens, as this would be perceived by them as an arbitrary imposition. For Habermas, citizens won't perceive themselves as co-legislators, unless they are assured that they may speak to one another as free and equal moral subjects. Only liberal democratic rights can provide this necessary assurance. This line of reasoning may appear to come down to an argument between the merit of Rawlsian moral psychology and Habermasian 'formal pragmatics' as an accurate description of the realities of human discourse. Were this the case, it would be

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[406] Ingram (2003) 364

extremely difficult to put forward the merits of one over the other: while both are highly ambitious attempts to root a conception of justice in the realities of the social and political universe testing the empirical validity of either is nearly impossible. Although I am inclined to agree with Habermas that the possibility of meaningful communication entails the possibility of reaching an agreement from the start, there is also considerable evidence—studies and literature on cognitive biases for example—that points to an inherent difficulty in reaching rational consensus. This, however is not the point I wish to make. At issue here is the fact that these abstract starting points should constrain the normative principles that each theorists recommends for the organization of institutions. In so far as Rawls' project in *LoP* is establishing the limits of liberal legitimacy (as opposed to justice) in international relations, he is not concerned with describing what is best, but what is tolerable. As I have pointed out in the section devoted to Rawls' actually has a very robust conception of human rights which are realized within the framework of liberal democracies—the provocative feature of Rawls conception is his identification of external sovereignty constraints with international "human rights proper". The question then becomes whether this project of toleration, as part of an overlapping consensus aimed at ongoing "stability with respect to the distribution of power"[407] will ever really lead the the well ordering of the basic structures of societies that would lead them to embrace a full set of liberal rights.

This is not only a point about political rights, but rights the social and economic rights that are equally important for individual wellbeing. Since a society's economic development is held by Rawls to be largely a matter of institutional design,[408] we would hope that cooperation in the international order would allow the worlds diverse societies to gradually become well-ordered enough to support the social and economic rights for their citizens. Rawls supports this notion by way of the democratic peace thesis. "What makes peace among liberal democratic peoples possible" Rawls tells us, "is the internal nature of peoples as constitutional democracies and the resulting change of the motives of

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[407] *PL* 148

[408] *LoP* 108

citizens"[409] Although toleration requires that we not persuade non-liberal societies to democratize, we can none the less partake in international commerce and trade.

> [C]ommercial society tends to fashion in its citizens certain virtues such as assiduity, industriousness, punctuality, and probity; and…commerce tends to lead to peace. Putting these two ideas together—that social institutions can be revised to make people more satisfied and happy (through democracy), and that commerce tends to lead to peace—we might surmise that democratic peoples engaged in commerce would tend not to have occasion to go to war with one another.[410]

The democratic peace thesis has both staunch supporters and vehement detractors,[411] but even if we charitably grant Rawls the assumption that democratic countries are less likely to go to war, there is a serious flaw with the idea that free commerce will fashion the "virtues such as assiduity, industriousness, punctuality" in citizens which will lead to a progressive well being. With his comparison between Japan and Argentina (which I discussed at length in the section on his conception of human rights) he argues that a society may be relatively poor in resources and yet economically successful (Japan) or resource poor and yet suffer economically (Argentina). He explains that " [t]he crucial elements that make the difference are the political culture, the political virtues and civic society of the country, its members' probity and industriousness [and] their capacity for innovation."[412] Notice that these are similar to the values that these are similar to the virtues he expects commerce to bring. To be clear, there are two theses combined into one: cooperation (come-toleration) in the society of peoples should encourage (through cultural osmosis as it were) a progressive convergence on liberal values. Because Rawls understands society's economic well-being to be determined not by its initial allocation of resources but by the well-ordering of sits basic structure, cooperation in the society of peoples should foster not only liberalization (in terms of rights) but also economic well-

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[409] *LoP* 29, n. 27

[410] ibid 46, citing Montesquieu

[411] For an excellent overview of some of the main arguments (and empirical evidence) for and against the democratic peace thesis see: Sebastian Rosato, 'The Flawed Logic of Democratic Peace Theory', *American Political Science Review*, 97.4 (2018)

[412] *LoP* 108

being, as the well-ordering of societies will allow them to put to good use the benefits of cooperation in the global market.[413] But is this really the case?

In terms of political rights, Rawls's decision to exclude them from his list of human rights proper follows from his goal of securing a stable (moral rather than prudential) consensus among the broadest possible set of actors. The pragmatic decision to achieve global stability by being maximally inclusive, privileges the toleration of illiberal and undemocratic (yet minimally decent) states.[414] While this may be good for the self-respect of some religious societies, it may be bad for the stability of the world order generally. One of the biggest criticisms of US foreign policy is the way we tend to overlook the illiberal tendencies of our economic and military allies in the interest of continuing cooperation. Here we might think of the horrendous and systematic human rights abuses of migrant workers in Saudi Arabia, or the Israelis' treatment of their Palestinian neighbors. Of course its unlikely that Rawls would consider Saudi Arabia a decent society, after all noncitizen workers—over nine million of whom make up roughly a third of the country's population—have no political rights what so ever, and since citizenship is transferred patrilineal they have no possibility of obtaining it.[415] These workers face appalling conditions of servitude and economic dependency as well: according to Human Rights Watch, it is common practice for employers to withhold wages and confiscate passports, effectively forcing migrants to work against their will. [416] This of course goes far beyond the mildly (by comparison) illiberal practices of the hypothetical Kazanistan. The question then becomes, from the perspective of the society of peoples what to do about the Saudis?

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[413] For a good overview of exactly how the democratic peace thesis relies on economic liberalization see: Hyunseop Kim, 'A Stability Interpretation of Rawls's The Law of Peoples', *Political Theory*, 43.4 (2015), 473–99.

[414] Ingram, 'BETWEEN POLITICAL LIBERALISM AND POSTNATIONAL COSMOPOLITANISM Toward an Alternative Theory of Human Rights'. (2003) 363-4

[415] https://www.hrw.org/world-report/2018/country-chapters/saudi-arabia, https://freedomhouse.org/report/freedom-world/2018/saudi-arabia

[416] https://www.hrw.org/world-report/2018/country-chapters/saudi-arabia

They are not externally aggressive (for the most part), and they are an important ally of the West, and they are most certainly not burdened.

Ultimately the point I want to stress is this: international trade, while it may improve the economic conditions in some states, none the less does not foster any progressive liberalization in the form of greater social and political rights for individuals. And why should it? Time and again, powerful countries like Saudi Arabia are forgiven for their bad behavior[417] while they to continue to benefit from economic and military alliances. In in May of 2017 during a visit to Riyadh, president Trump announced $110 billion USD arms deal with the Saudis,[418] one month later the sale of about $500 million USD in precision-guided munitions to Saudi Arabia passed in the Senate. Saudi Arabia has seen that the world is still more than willing to cooperate despite the deplorable conditions of its foreign labor force, what interest does it have in sacrificing the benefits of dirt cheap labor? Saudi Arabia is not by no means an anomaly either, as the growing economic and political importance of China on the world scene also demonstrates that trade is not a harbinger of democracy.[419] As Michael Ignatieff puts it: "It is quite conceivable to combine authoritarian politics with free markets, despotic rule with private property." [420]

What then of the second component of the thesis, that cooperating in the global market will improve the economic well-being of individuals? For all his egalitarian intuitions in the matter of domestic societies (which lead him to imagine that reasonable people would opt for the difference principle privileging the interests of the worst-off), at

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[417] Workers rights by far not the only area in which Saudi Arabia violates human rights. Last year, the UN Secretary General placed the Saudi-led coalition in Yemen on his "list of shame" for violations against children in that country.

[418] Despite opposition from members of Congress, many of whom were concerned about Saudi conduct in Yemen

[419] Michael Ignatieff, 'I. Human Rights as Politics II. Human Rights as Idolatry', *The Tanner Lectures on Human Values, Delivered at Princeton University*, 2000, 287–349. 302

[420] ibid.

the international level Rawls sounds suspiciously libertarian in terms of economics, expecting countries to 'pull themselves up by their bootstraps' as the saying goes. Rawls seems to presuppose a world in which states still enjoy a virtual monopoly on the political and economic decision making that effects citizens' well-being. This empirical reality was perhaps best approximated among many of the Organization for Economic Co-operation and Development (OECD) states during the 1960s, [421] but the ultimate authority Rawls associates with nation-states is no longer the reality in our globalized world. Empirical evidence suggests an increasingly complex, multi-layered system of economic power and authority at the global level that impacts national performance in a way that Rawls (and his contemporaries) tend to neglect. [422]Many economists and political theorists have observed the ways in which global economic institutions like the WTO and its trade policies work to benefit wealthy countries at the expense of poor countries and their citizens. [423]To be fair, the WTO and IMF tend come under undue criticism and are, often vilified in popular discourse. Although neither organization formally recognizes human rights responsibilities, they both acknowledge that they must do their part to promote human interests and economic development. While international trade policies are by no means nefarious in their intent, they none the less tend to work in the advantage of the already powerful and economically well-off. For example, rich countries tend to be protectionist when it works in their advantage, imposing 'anti-dumping' duties on imports they deem "unfairly cheap". They tend to be particularly protectionist in the sectors of agriculture and textile and clothing manufacturing, and it is precisely in these sectors where developing countries are often best able to compete.[424] Although trade negotiations are open to all

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[421] Scheuerman. (2016) 339

[422] Beck, 'Reframing Power in the Globalized World'; Gilpin and Gilpin; Robert Gilpin, *Global Political Economy*, *Chemistry (Weinheim an Der Bergstrasse, Germany)*, 2002 <https://doi.org/10.1002/1521-3765(20020715)8:14<3233::AID-CHEM3233>3.0.CO;2-0>.

[423] Lafont and Frank. (2012)

[424] Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, *Cambridge, Polity Press*, 2002; Thomas Pogge, 'Are We Violating the Human Rights of the World's Poor? Responses to Four Critics', *Yale Human Rights and Development Journal*, 2014; Cristina Lafont and Manfred Frank, 'Global Governance and Human Rights and Human Rights'; Cristina Lafont,

participating members of the WTO, the negotiation process does not take place on equal footing. In an article about Uruguay[425] round of multilateral trade negotiations, the magazine *The Economist* which is by no means critical of the WTO generally, had this to say about the bargaining arena:

> Many [poor countries] had little understanding of what they signed up to in the Uruguay Round. That ignorance is now costing them dear. Michael Finger of the World Bank and Philip Schuler of the University of Maryland estimate that implementing commitments to improve trade procedures and establish technical and intellectual-property standards can cost more than a year's development budget for the poorest countries. Moreover. in those areas where poor countries could benefit from world trade rules. They are often unable to do so .... Of the WTO's 134 members, 29 do not even have missions at its headquarters in Geneva. Many more can barely afford to bring cases to the WTO.[426]

5.1.8 On completeness

Until now I have avoided rating the various conceptions of human rights according to David Ingram's criteria of completeness, with the rationale that this would have had the effect of stacking the deck in favor of the discourse theories from the very beginning. Ingram argues that a *complete* philosophical theory of human rights should be able to account for all categories of rights (cultural, political and economic), as well as be able to tell us how these are to be prioritized.[427] In the discussion on toleration and stability, I have

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'Accountability and Global Governance: Challenging the State-Centric Conception of Human Rights', *Ethics and Global Politics*, 2010.

[425] The Uruguay Round, spanning from 1986 to 1994 brought about the biggest reform of the world's trading system since General Agreement on Tariffs and Trade (GATT) was created at the end of the Second World War. https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm

[426] This article is reprinted in Pogge's *World Poverty and Human Rights.*

[427] Ingram (3003) 360

tried to show from the perspective of cosmopolitan realism, that stability for the right reasons requires that individuals not feel themselves subject to arbitrary rule. This means that ideally, the global institutional order should be reformed in the direction of a cosmopolitan democracy in the manner discussed by Habermas, David Held Daniele Archibugi, etc.[428] Short of this long term goal, it means that individuals acting through their governments should feel they have the ability to effect change in the global order, which in turn demands a right to participate in democratic governance. Thus, in so far as a human right to democracy is a vital element in a stable *moral* consensus at the global level, a human right to democracy should be a primary desideratum for a cosmopolitan realist conception of human rights.

Ultimately the biggest difference between Habermas' and Rawls' conceptions of human rights—and thus the difference between discourse theories and political theories generally—boils down to whether a full set of liberal democratic rights is included in a schedule of human rights proper. For Rawls, the incommensurability of values in the global arena precludes the possibility of agreement about theses rights from the very beginning, meaning they cannot be considered as human rights proper without threatening the legitimacy of the international order. In the discussion above I have highlighted the fact that despite their not being considered human rights proper, Rawls and his followers seem hope, with time, that the benefits of cooperation in the society of peoples will have a transformative effect on the basic structures of societies to the point where they are able to foster the conditions for a full schedule of equal rights. Habermas and his followers take the opposite rout. They are willing to sacrifice a factual consensus on liberal democratic rights from the start, with the hope that one will emerge over time. I hope that throughout

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[428] Daniele Archibugi and David Held, 'Cosmopolitan Democracy: Paths and Agents', in *Bottom-Up Politics: An Agency-Centred Approach to Globalization*, 2011 <https://doi.org/10.1057/9780230357075>; D Held and D Archibugi, 'Cosmopolitan Democracy', *Cambridge: Polity*, 1995 <https://doi.org/10.1017/UPO9781844654741.011>; David Held, 'Globalization and Cosmopolitan Democracy', *Peace Review*, 1997 <https://doi.org/10.1080/10402659708426070>.

the course of the discussion I have succeeded in demonstrating the implausibility of Rawls' and his supporters' thesis that democratic rights will emerge over time. Thus we can conclude, pace Habermas that the stability of the international order requires a conception of human rights that doesn't marginalize individuals in the tolerated societies from the very beginning, by supposing, already at the ideal abstract level of analysis that the full scale of human rights don't apply to them.

This brings me to the issue of social and economic rights. It is clear form Habermas advocates for a global "politics of human rights" as necessary to offset the destructive power of economic globalization,[429] Seyla Benhabib follows him in this logic as well. From the perspective of cosmopolitan realism, this is perhaps the most important role that human rights could serve. The structure of the global economy has detrimental effects on human well-being, and tends to concentrate power in areas that escape legitimate institutional ordering. But as the various critics of the discourse theoretic approach have pointed out, the rights that stand on the firmest grounds in these theories are those that support democratic participation.

Interestingly, Habermas relies on his 'progressive modernization thesis' in much the same manner as Rawls relies on democratic peace, to describe the conditions in which progressive economic wellbeing (and thus more robust rights) could be expected to come about. Habermas' understanding of markets goes back to his dialectical understanding of modernity which I discussed in chapter 3. His theory of modernity begins from one of the the central preoccupations of critical theory, the increased rationalization of social life in Western capitalist societies in which individuals are subsumed in systems ruled by efficiency and technological control. As Horkheimer and Adorno warned in the *Dialectic*

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[429] *PNC,* especially chapter four (58-113) on the 'postnational constellation and the future of global democracy.'

of Enlightenment "The individual is entirely nullified in face of the economic powers [which are] taking society's domination over nature to unimagined heights."[430]

With his theory of communicative action, Habermas differentiated between genuine social interaction grounded in communication, and purposive rational action aimed at domination and control. Only the former could offset the ill effects of the latter that now plague modern societies. While he understands communicative action to be elemental, purposive rationality permeates modern society, and almost completely dominates certain spheres—such as the market economy. Still, the market economy is functionally necessary to the reproduction of life in modern societies. While I cannot go into Habermas' complex and controversial systems theory here in any depth, as it relates to the modernization thesis it is important to note that he distinguishes between the 'lifeworld' which pertains to the sphere of social interaction which is reproduced through communicative action, and the various 'systems' that are necessary for the maintenance of life together in a society. In modern societies, there is a tendency of the market economy to 'colonize' the lifeworld, converting action coordination from consensus formation through language, to "the imperatives of subsystems differentiated out via money and power and rendered self-sufficient."[431] Only the the presence of a legitimate legal infrastructure which protects the communicative competence can safeguard the lifeworld from being subsumed by the imperatives of systems, and individuals from objectification.

In chapter 3 I discussed Habermas' list of human rights, which includes (1) "rights that result from the politically autonomous elaboration of the right to the greatest possible measure of equal individual liberties"; (2) "rights that result from the politically autonomous elaboration of the status of a member in a voluntary association of consociates

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[430] Horkheimer, M., Adorno, T. W., & Cumming, J. (1972). *Dialectic of enlightenment*. New York: Herder and Herder. xvii

[431] *TCA* 213

under law"; (3) rights that result immediately from the actionability of rights and from the politically autonomous elaboration of individual legal protection"; (4) " rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law", and (5) "basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4)."[432].As David Ingram has pointed out, Habermas seems to qualify the fifth category of rights, with the addition of the phrase "insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize…civil rights."[433] If this is true, then although Habermas construes economic rights at a higher level of importance than Rawls does,[434] it seems that they are still secondary to civil and political rights in his theory. To be clear, Habermas does advocate for economic redistribution. But it seems that the civil and political rights are doing the heavy lifting in his theory in terms of offsetting the harmful effects of the global market on individuals.

5.2 Institutions and Obligations

In the previous section I have argued that the stability of the international order based on mutual trust would require that individuals be secured in entitlements that go beyond negative liberties. Surely, as both Habermas and Rawls have argued, the democratic nation state is the ideal setting in which rights may institutionalized. Yet we are still a long way off from either a global society of well-ordered peoples or a post-national cosmopolitan democracy, and the reality is that many states simply are not able to secure the objects of these rights for their individuals. In so far as the structural features of

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[432] *BFN* 122-3

[433] *BFN* 122-3

[434] See the section on social and economic rights in the introduction.

the the global economy call into question the plausibility Rawls' democratic peace thesis, we will have to find a more immediate solution than patiently waiting for history to unfold. The treaties and covenants of international human rights law contain the political and social rights that could mitigate the destabilizing effects of economic globalization, but the shortcoming of the international human rights regime is that it, at least for now, fails to recognize systematic threats to human rights that escape state control. This state-focused logic was born out of a time when states (and sometimes regional alliances) were the sole loci of concentrated power around the globe. Only states had the ability, through the coercive apparatus to impact (positively or negativity) the lives of their citizens in a manner that would warrant discussion about their fundamental rights. Today, the standard threats to individuals well-being are diffuse and polymorphous, although their source may not be immediately identifiable they are not the the arbitrary workings of nature or the actions of nefarious actors breaking the law. When the structural adjustment packages demanded the worlds major financial institutions negatively impact the welfare of individuals in the already economically disadvantaged societies, and when a large clothing manufacturer targets lax labor laws to build sweatshops, both are acting within the confines of the law. When Beitz writes that "[t]he central idea of international human rights is that states are responsible for satisfying certain conditions in their treatment of their own people"[435] this is not an empirical mistake on his part. The allocation of human rights responsibilities and obligations in the global political practice places the responsibility for individuals' human rights squarely on the shoulders of states. The question becomes, whether in the interest of creating a realistically informed theory of human rights with the potential for action guidance, taking up status quo allocation of responsibilities will accomplish this end. If the goal of a stable cooperation based on mutual trust among the worlds individuals, societies and groups requires a reconceptualization of this relationship of obligation, then

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[435] Charles R. Beitz, *The Idea of Human Rights*, *The Idea of Human Rights*, 2012. 13

we have good reason to pursue this task at a higher level of priority than fidelity to the status quo.

5.2.1 Holding non-state actors to account

Motivated by an awareness of the the problematic nature of the state-centric ascription of human rights in an era in which many of the standard threats to individuals well-being often escape state control, several authors have recently tried to reconceptualize this relationship of obligation. One notable such effort has been Laura Valentini's recent article *Human rights, the political view and transnational corporations: an exploration.*[436]Here she addresses the phenomenon of powerful transnational corporations (TNCs) and their record of activity which tends to undermine both individuals' well-being and their governments ability to protect it. Her article is of particular interest here, as she tries to account for the responsibilities of transnational actors without falling back onto a traditional moral account of human rights. She argues that a *prima facie* desideratum of any theory of human rights is an ability to account for the human rights responsibilities of non-state actors, especially TNCs. To this end she offers what she calls a "sympathetic reconstruction" [437]of the standard political conception of human rights.

As Valentini notes, many of the recent political conceptions of human rights in the literature tend to rely on a 'two level' model of human rights obligations said to mirror the current human rights practice. This of course is the model described by Charles Beitz which I have discussed in the first chapter. The idea is that states as as *primary* duty-bearers, are under *stringent obligation* to secure the objects of human rights for a relevant set of rights holders which in this instance refers to their citizens. As a *secondary* duty bearer, the

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[436] Valentini, Laura (2017) *Human rights, the political view and transnational corporations: an exploration.* In: Campbell, Tom and Bourne, Kylie, (eds.) Political and Legal Approaches to Human Rights. Routledge, Abingdon, UK, pp. 168-186.

[437] Valentini (2017) 1

international community has only remedial responsibilities to correlative to the set of all individuals in every part of the world.[438] As I mentioned in the first chapter, recently this model has been criticized for either failing to accurately describe, or offer solutions for, many of the real world scenarios in which human interests and well-being come under threat. As Valentini—who has written extensively about political conceptions of human rights elsewhere—points out, if the goal is to offer actionable solutions for human rights problems today, a political approach to theorizing human rights should take seriously the stipulation that 'ought implies can'. Thus it would seem that if a state presently lacks the capacity to secure human the objects of human rights for its individuals, it would be implausible to burden it with with a primary responsibility to do so. Only the long term responsibility to develop its capacity in this regard might be realistically assigned. However, this line of reasoning seems to imply the outcome that "when states are weak, no agent carries primary responsibility for securing some people's (citizens') human rights." [439] For Valentini, this solution is unacceptable. Again, this lack of prescriptive determinacy at the international level is seen as problematic for political conceptions of human rights—both theoretically in terms of explanatory completeness, and in terms of action guidance in so far as they are unable to offer solutions for pressing human rights issues. John Tasioulas, discourse theories or juridical conceptions. Generally more cosmopolitian in nature. ..Valentini's novel solution is not to make the political conception more cosmopolitain but to couch TNCs within the statist framework by making them, at least conceptually, more state-like.

Valentini correctly points out that although theorists tend to adhere to the two level model out of fidelity to the current international practice, there must be other reasons to justify this feature beyond the status quo. In so far as a theory is to be normative, rather than purely descriptive, there must be some normative standard by which the practice can

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[438] Valentini (2017) 4
[439] ibid 1

be judged (even if its merely in terms of consistency with its own goals).[440] Admittedly Beitz's model is rather opaque in this regard, thus in her reconstruction of the political view, Valentini relies more on the political conception proposed by Andrea Sangiovanni in his article *Justice & the Priority of Politics to Morality.* Here he argues that because contemporary human rights regimes presuppose the modern state and all of its salient institutional components— a comprehensive legal system and centralized mechanisms for resource distribution and coercion— what human rights *are* is cannot be understood without reference to their role within this context. The role of human rights is to "mitigate the worst consequences for human well-being likely to emerge within a political system with exactly those features." [441] Thus, as the point and purpose of human rights Sangiovanni identifies two components: first, they "serve to justify various forms of (coersive and noncoersive) inteference in the interational affairs of other states" in the form of "hummanitarian intervention...economic and diplomatic sanctions, the cessation of aid and membership in international organizations", and second, they "require states to commit resourses to their enforcement, promotion and protection". [442]

While the role, point and purpose of human rights Sangiovanni identifies is quite similar to Beitz, the features of the state which he describes as pertinent—comprehensive legal system and centralized mechanisms for resource distribution and coercion—provides a distinctly institutionalist account of the nature of human rights. Here, the familiar institutionalist strand of the global justice debate is applied to human rights. In his famous article *The Problem of Global Justice,* Nagel gave the institutional approach its definitive articulation when he wrote

> Sovereign states are not merely instruments for realizing the preinstitutional value of justice among human beings. Instead their existence is precisely what gives the value of justice its application, by putting the fellow citizens of a sovereign state into a relation that

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[440] Eva Erman and Niklas Möller, 'What Not to Expect from the Pragmatic Turn in Political Theory', *European Journal of Political Theory*, 2015 <https://doi.org/10.1177/1474885114537635>; Eva Erman and Niklas Möller, 'Practices and Principles: On the Methodological Turn in Political Theory', *Philosophy Compass*, 2015 <https://doi.org/10.1111/phc3.12245>.

[441] Sangiovanni *Justice & the Priority of Politics to Morality.* 152-3

[442] Ibid 155

> they do not have with the rest of humanity, an institutional relation which must then be evaluated by special standards of fairness and equality that fill out the content of justice.[443]

This is of course an expansion of the Rawlsian idea that the subject of justice is the first virtue of the institutions of the basic structure. I have digressed here in order to characterize Sangiovanni's model because it becomes important for Valentini's solution to the status quo state dependency of the political conception. The institutional approach introduces a relational understanding of rights and certain 'morally mandatory' functions of the state back into an account of human rights. This move would be meaningless from point of view of the pragmatic conception of human rights advocated by Beitz, which wholly detatches human rights from issues of justice, institutional or otherwise. Valentini argues that the primary reasons why it "makes moral sense" place states in the foreground of human rights theorizing because of certain salient features of states which mark them out for this role. These two features are states' 'capacity' to secure the human rights of their citizens, and what she refers to as the 'authority plus sovereignty package' which refers to a combination of states' *de facto* authority over their citizens and their external sovereignty.

The 'capacity' rationale for attributing human rights responsibilities to states is, as the name suggests, is derived observations about states ability to secure the objects if human rights for their citizens.[444] Given that states are (under normal circumstances) "particularly well placed" to fulfill the rights of their citizens, and in so far as the practical conception embraces the proviso that 'ought implies can', we have a *prima facie* reason to attribute human rights responsibilities to the state.[445] The 'authority plus sovereignty package' is the fairly straightforward understanding of states internal and external sovereignty. In the first instance she agues that states have only *de facto* internal authority,

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[443] Nagel, 'The Problem of Global Justice' 120

[444] Valentini (2018) 6

[445] ibid

as a socially accepted right to rule, combined with *de facto* sovereignty vis-à-vis outside agents which corresponds to an entitlement to non-interference. Importantly, this *de facto* bundle of privileges only becomes legitimate "if states rule their subjects consistently with their most important (i.e., human) rights." Human rights legitimate both aspects of the bundle because a government that violates its citizens' human rights would not be perceived as having legitimate authority. They trigger legitimate interference in a state's external sovereignty because "when a state fails to secure the objects of its citizens' human rights, it is no longer performing its morally mandatory functions, and those individuals who live under its power require [446]outside protection." Thus, to sum up, on Valentini's reading, human rights obligations apply in t first instance to states because they have the capacity to protect them, and their doing so is what legitimates the essential features of their statehood.

The next move in Valentini's argument is to show that there may be instances in which TNCs display the the same relevant features of states which mark them out as the bearers of human rights obligations. Their enormous economic power means that they may have the capacity that weak states lack to secure human rights, while their authority derives from the considerable impact they have on citizens in the locations where they operate. Their *de facto* sovereignty lies in that fact that they are allowed to operate without interference from national governments in their host states. namely that they may have Her argument for 'politicizing' the TNC is similar in many respects to that made by Florian Wettstein in his *Multinational Corporations and Global Justice* [447] Here he writes that

> Mainstream economic thought is based on a sharp institutional separation of the economic and the political spheres. Both the market and its main actors—corporations—are perceived as inherently apolitical. In other words, the goal of the

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[446] ibid

[447] In fact Valentinin refers to Wettstein's *Multinational Corporations and Global Justice* book throughtout her article

> neoliberal ideology is not only to foster the illusion of the corporation as a purely private institution but also to make us embrace its allegedly apolitical nature. [448]

The perception of the corporation private institution, he argues, obscures question of corporate power, disassociating it from the political sphere and shielding it from public scrutiny. [449] There are many cases (several of which I have discussed in the introduction) in which corporations may have detrimental impacts on the wellbeing of individuals in their host countries. They also, as both Wettstein and Valentin have pointed out, have tremendous economic power that rivals that of many national governments. Thus, Valenini supposes that to claim TNCs often have the 'capacity' to secure the objects of rights for individuals, at least in their home states should be accepted without much controversy. The more demanding move will be to demonstrate that TNCs have what she calls the 'authority plus sovereignty package'. She begins by arguing that there are many ways in which corporations take on state-like roles. For example, argues that in areas of weak governance, corporations are the ruling institutions vis-à-vis *at least* their employees, "who may be regarded as full members: they set some of the most consequential ground-rules affecting their existence, and enforce them."[450] Citing the sheer amount of time that individuals spend at work (as much as 75% of their active time according to Wettstein), [451] and the fact that during this time, as the corporation has the ability to make and enforce rules, the corporation has *de facto* authority, at least with respect to its local employees.[452] Valentini considers the objection that is likely to arise, namely that being an employee of a corporation is voluntary, in way that being a state is not, which of course has important implications for whether or not we can consider corporations as political actors. She responds to this objection by arguing that in many cases, especially in the impoverished

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[448] Wettstein *Multinational Corporations and Global Justice*, 181
[449] ibid
[450] Valentini (2018) 13
[451] Wettstein, *Multinational Corporations and Global Justice*, 214,.
[452] Valentini (2018) 18

areas where corporations are likely to exploit weak state governance by locating their most exploiative enterprises—sweatshops and the like—individuals might have no other option than to take this kind of work, as the other option might be starvation. Further, not only do corporations have *de facto* authority, argues Valentini, but *de facto* sovereignty as well, which she defines as "immunity from external interference on the part of the state within which they operate."[453]

On the basis of these observations then, Valentini supposes that in so far as TNCs exhibit the same morally salient features of states that mark them out for human rights obligations, we can extend human rights obligations to these corporations as well. The problem with this argument, which Valentini acknowledges is that it might understood alternately as overly demanding or not demanding enough. Recalling the UN *respect, protect, fulfill*, framework, whether or not it is too demanding comes down to how we understand the duties to be imposed on TNCs. Regarding the duty to respect human rights, this is fairly uncontroversial, but if If TNCs were expected not only to protect human rights of individuals in the areas where they operate but also to fulfil them by securing the necessary goods they require, this seems not only over-demanding but also implausible. We are after all, talking about private economic actors with their own interests, and the tax on operational costs would surely raise the ire of corporation making this a politically infeasible option. On a minimalist view, TNCs would only have a duty to respect human rights, which would have little impact on the areas of weak governance in which the need for a discussion of corporate human rights responsibilities initially arose. Valentini instead argues for what she calls a 'proportional view' [454]where corporations have a duty to respect protect and fulfill the human rights just in those areas in which they have 'sovereignty', namely vis-a-vis their local employees.

Whether or not TNCs hold these duties, and thus the appropriate reaction to their failure to carry them out depends on the situation of the state in which the corporation is

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[453] ibid

[454] ibid

operating. If the host state has the capacity to secure the rights of its citizens, it remains the primary duty bearer correspondent to their rights. In areas of weak governance "TNCs that failed to constrain their behaviour in accordance with human-rights requirements, within their spheres of authority, would be correctly classified as human-rights violators, and directly accountable to the international community."[455] She argues that this feature should help to dispel worries about over demandingness, as it is up to corporations to choose where to carry out their operations. Only by setting up shop in areas of weak governance do they acquire her *de facto* 'authority plus sovereignty package' "and hence the relevant human-rights duties."[456]

Valentini's argument succeeds in reformulating the political conception (at least in its institutionalist variety) to speak to the obligations of TNCs. This is helpful especially in so far as it would allow theorists who believe in the merits of a political conception of human rights to be able to weigh in on the current public debate surrounding the UN's ongoing effort to reign in the detrimental practices of large corporations. In so far as the Guiding Norms are already an important part of the international regulatory landscape, and negotiations on a binding treaty are still ongoing this is of course an important desideratum for a conception of human rights.

5.2.2 Weak governance

The stipulation that TNCs acquire human rights duties only in areas of weak governance is vital to the plausibility of her theory. If they were expected to respect protect and fulfil the human rights of individuals in every area in which they operate (even if the relevant set of individuals is only understood to be their employees), they would effectively replace states in this function. This is not only politically unfeasible for the obvious reason

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[455] ibid 17
[456] ibid

that corporations would resist it with all the force and sophistication of their impressive lobbying capacity, but also morally cringe-worthy, as the idea of privatizing human rights in this way seems like the final stage in a hopelessly dystopian future—Michel Foucault would sit up in his grave. The problem then becomes how to determine when the weak governance condition is met. Presumably we would have to assume some metric whereby to judge governments on their human rights performance. The obvious place to look is the standards laid out in international law according to the UDHR and its subsequent treaties and covenants. These include a robust set of rights including political economic and group rights. Yet as we have seen from the various political conceptions of human rights discussed thus far, including those which Valentini references directly, they tend to advocate a much shorter list of human rights restricted to negative liberty. In so far as Valentini refers to fair working conditions, environmental standards and health as goods that TNCs would be responsible for securing, [457] it is clear that she intends something beyond this minimum. Perhaps these might be couched in terms of 'urgent human interests' but it seems that if these corporate duties are going to be effectual in remedying the types of problems that TNCs are accused perpetuating, a fairly broad set of social and economic rights would be required. At the very minimum, labor rights, including the right to fair pay and the right to organize would be needed to protect employees from the predictable threats they face from corporations.

The well known phenomena of corporations seeking to exploit lax labor and environmental regulations is relevant to this point as well. In these instances, corporations are not breaking any national law, but rather taking advantage of low regulatory standards in the interest of profit maximization. States with lax regulation are often the very same weak states which may not be able to secure the objects of human rights for their citizens in the first place, and may maintain these low standards out of economic necessity, in an effort to attract global business. On the standard political view, a state's regulation of its

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[457] Valentini (2018) 16

economic and labor laws is understood to be, within reason, a matter of a state's internal discretion. In political practice as well, it has not been the habit of the international community to step in when a country's labor practices fall below the standards set out in the declaration. Since it would be impossible to determine when the condition of weak-governance obtained without referring to some metric, then we are presumably forced to choose between the labor standards established by international law and those which hold locally. The former would have the effect of holding corporations to a higher standard than governments, the latter would have the effect of perpetuating the very same practices—sweatshop labor for example, human rights advocates are worried about in the first place. There is also the issue of states which are not weak in any sense of the word, yet none the less have internal labor regulations that fall below he UN standards (here China is the best example).[458] Wouldn't this incentivize corporations to flock to these places where they can take advantage of minimal labor laws without being saddled with human rights duties?

While her argument may have succeeded in showing one possible way in which corporations could be seen as accountable for human rights from the perspective of a political conception, the move has required her alter the understanding of the political conception considerably. On the political view of Rawls, Beitz, Cohen, Raz and Sangiovanni, international human rights are only those which warrant international concern (or those which presuppose the existence of a certain type of instititions). Thus human rights are usually limited to those negative liberties for which the international community would or could get involved in the sovereign affairs of state. There are a variety of reasons for limiting rights in this way, either out of a concern for stablitiy (moral or otherwise) or feasibility in so far as efforts to interfere with the aim of facilitating more robust rights is assumed to be futile. With her capacity and 'authority plus sovereignty' argument, she tries to show that there are other, non-status quo dependent reasons for

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[458] Compa, L. (2004). Justice for all: The struggle for worker rights in China [Electronic version]. Washington, DC: American Center for International Labor Solidarity. Retrieved [insert date], from Cornell University, School of Industrial and Labor Relations site: http://digitalcommons.ilr.cornell.edu/reports/33/

prioritizing the state, which might be applied to TNCs, however, in doing so she widens the political conception of human rights considerably. Interestingly as the object of human rights she uses Thomas Pogge's characterization of "fundamental—social and material—goods needed to lead a decent life"[459] which he used in the course of his cosmopolitan conception. The question becomes whether the upshot of her model for holding businesses to account for their performance in terms of individual material and social well being would the effect of holding governments to these same standards. It may be the case that the real insight of her analysis is that if the political conception is to have anything to say about the responsibilities of transnational actors, then it must include economic and social rights on its minimal list.

5.3 Concluding remarks

Human rights are not universal moral rights grounded in nature or a universal capacity or reason in a certain way. Human rights were created by political communities to ensure that fair terms of cooperation would be safeguarded among individuals. But these terms cannot be established outright by politicians (or even philosophers), they must be must be continually renegotiated in an ongoing discursive process. Charles Beitz entirely correct to argue that the practice of human rights is more than just human rights law itself and he is also correct when he claims that "as in the case of law, agents accept a certain normative discipline by availing themselves of the resources of the practice of human rights."[460] To give human rights a single, definitive moral interpretation would be to close off their potential for human rights to serve as a common ground for political

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[459] Thomas Pogge, 'The International Significance of Human Rights'.
[460] *IHR* 212

discourse and critique.[461] Beitz is also correct that human rights serve a very important political function in mediating the balance of power on the world stage. He resists any moral notions associated with human rights, even Rawls' intersubjectivley justified account of 'stability for the right reasons'—in fact he disagrees that a concern for international stability should play a significant role in determining the concept of human rights generally. [462] To this end, the theory put forward in *IHR* offers almost no plausible action guidance whatsoever, except that the international community should refrain from meddling in the case of non-urgent human interests and step in to defend urgent ones if they are able and so disposed.

Rawls' and Cohen's theories offer much more in the realm of action guidance because the emphasis on stability for the right reasons means they avoid being, in Rainer Forst's words "political in the wrong way." [463] They are able to provide an account of the human rights practice that explains its existence and why it is an essential component of the global institutional order. Thus in so far as a political conception of human rights should be able to speak to the function al role of human rights in the international order, we can follow Rawls and Cohen as understanding human right as a vital component in a stable moral consensus between individuals and groups . However, in their admirable desire to avoid parochialism, they risk cutting human rights off from their function, further marginalizing individuals and groups within the tolerated societies. Ultimately the biggest difference between Habermas' and Rawls' conceptions of human rights—and thus the difference between discourse theories and political theories generally—boils down to whether a full set of liberal democratic rights is included in a schedule of human rights proper. For Rawls, the incommensurability of values in the global arena precludes the possibility of agreement about theses rights from the very beginning, meaning they cannot

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[461] Ignatieff. 41
[462] *IHR* 132
[463] *RTJ* 94

be considered as human rights proper without threatening the legitimacy of the international order. In the discussion above I have highlighted the fact that despite their not being considered human rights proper, Rawls and his followers seem hope, with time, that the benefits of cooperation in the society of peoples will have a transformative effect on the basic structures of societies to the point where they are able to foster the conditions for a full schedule of equal rights. Habermas and his followers take the opposite rout. They are willing to sacrifice a factual consensus on liberal democratic rights from the start, with the hope that one will emerge over time. I hope that throughout the course of the discussion I have succeeded in demonstrating the implausibility of Rawls' and his supporters' thesis that democratic rights will emerge over time. Thus we can conclude, pace Habermas that the stability of the international order requires a conception of human rights that doesn't marginalize individuals in the tolerated societies from the very beginning, by supposing, already at the ideal abstract level of analysis that the full scale of human rights don't apply to them.

But a stable and ongoing consensus in an international order legitimated through human rights will require more than just civil and political rights. The factors that threaten the 'self respect' of individuals and nations (Rawls' concern) and bar them from communicating on equal footing (Habermas' worry) are endemic in structure of the global economy . This problem will require more than equal civil and political rights and more than imposing human rights obligations on multinational corporations and international monetary organizations (although this is a good start) . To this end, I think it is important to simply bite the bullet on what Laura Valentini argues is an overly broad reading of the implications of Seyla Benhabib's 'right to have rights'. The conditions that would support 'reciprocity of communicative roles ' [464] are indeed put into jeopardy by the presence of power and resource inequalities in society, at the global level as well as the national. A whole host of social guarantees are needed to secure equal footing in the discursive

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[464] *DA* 71

procedure, including not only liberal-democratic rights, but also strongly egalitarian redistributive policies. While Valentini argues that this move jeopardizes the desiderata of non- parochialism, making a discourse theoretic account "substantively, no different from those routinely accused of Western-liberal imperialism",[465] it is actually quite the opposite. For too long, the powerful nations in the world have been imperialist in our economic ventures and policies. The idea that the realm of private economic activity is a value free sphere somehow separated from politics is a dangerous ideology and it is as much of a 'comprehensive world view' as a robust liberal conception of human rights. In an interview with the Washington Post, the chief lobbyist for the US owned Rice Corporation of Haiti— who was formerly in charge of the Reagan administration's food aid program that tanked the Haitian economy— joked that rice is "4% protein, 96% politics".[466] He was right.

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[465] Valentini (2014) 677-8

[466] https://www.washingtonpost.com/archive/politics/2000/04/13/us-haiti-trade-the-politics-of-rice/84e92c8d-6941-486a-9e32-f399b2b3259f/?utm_term=.5deb8e14ec53

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