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Law, cosmopolitan law, and the protection of human rights

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Abstract

In *Between Facts and Norms*, Habermas articulates a system of rights, including human rights, within the democratic constitutional state. For Habermas, while human rights, like other subjective rights have moral content, they do not structurally belong to a moral system; nor should they be grounded in one. Instead, human rights belong to a positive and coercive legal order upon which individuals can make actionable legal claims. Habermas extends this argument to include international human rights, which are realised within the context of a cosmopolitan legal order. The aim of this paper is to assess the relevance of law as a mechanism for securing human rights protection. I argue that positive law does make a material difference to securing individual human rights and to cultivating and augmenting a general rights culture both nationally and globally. I suggest that Habermas' model of law presents the most viable way of negotiating the tensions that human rights discourse gives rise to: the tensions between morality and law, between legality and politics, and between the national and international contexts of human rights protection.

Keywords

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LAW, COSMOPOLITAN LAW AND THE PROTECTION OF HUMAN RIGHTS

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Abstract: In *Between Facts and Norms*, Habermas articulates a system of rights, including human rights, within the democratic constitutional state. For Habermas, while human rights, like other subjective rights have moral content, they do not structurally belong to a moral system; nor should they be grounded in one. Instead, human rights belong to a positive and coercive legal order upon which individuals can make actionable legal claims. Habermas extends this argument to include international human rights, which are realised within the context of a cosmopolitan legal order. The aim of this paper is to assess the relevance of law as a mechanism for securing human rights protection. I argue that positive law does make a material difference to securing individual human rights and to cultivating and augmenting a general rights culture both nationally and globally. I suggest that Habermas' model of law presents the most viable way of negotiating the tensions that human rights discourse gives rise to: the tensions between morality and law, between legality and politics, and between the national and international contexts of human rights protection.

Keywords: Cosmopolitan law, Habermas, human rights, law and morality, popular sovereignty

In *Between Facts and Norms*, Jürgen Habermas articulates a system of rights, including human rights, within the democratic constitutional state. This system of rights is internally related to popular sovereignty insofar as it sets up the communicative conditions necessary for political will-formation. The connection between the system of rights and popular sovereignty provides the only recognised basis for the legitimation of legal norms. For Habermas, while human rights, like other subjective rights have moral content, they do not structurally belong to a moral system; nor should they be grounded in

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one. Instead, human rights belong to a positive and coercive legal order upon which individuals can make actionable legal claims. Grounding the system of rights in law rather than morality eliminates the cognitive indeterminacy inherent in justifying and applying a morality based on abstract principles, stabilises behavioural expectations, and gives individuals legal avenues of redress. Habermas extends this argument to include international human rights, which are realised within the context of a cosmopolitan legal order. Cosmopolitan law shares the same structural features as that of the liberal, democratic nation-state insofar as it establishes a global order under which all persons have equivalent legal rights and duties. Rights can be secured through international legal channels, and are enforceable against governments who do not comply with human rights norms.

My aim in this paper is to assess the relevance of law as a mechanism for securing human rights protection.¹ Legal codification is a seemingly attractive way of securing human rights because it is able to translate the rhetoric of human rights into precise and carefully constructed positive law (Gearty 2006: 68). As such, codification eliminates the moral uncertainty and ambiguity inherent in rights discourse; it gives human rights a 'thick' legality as opposed to the 'thin' or quasi-legal status that they currently occupy in international law.² However, there are good reasons for being sceptical about the efficacy of legal mechanisms in securing human rights. Firstly, while law has the advantages of being coercive and actionable, it makes very little material difference to human rights protection in the absence of a human rights culture and a vigilant citizenry. Secondly, the emphasis on legality assumes the existence of highly specific institutional structures to secure rights, structures that may not necessarily exist, or that may be unnecessary to securing the object of the right in question. Thirdly, the codification of rights moves rights discourse out of the political sphere in which they were first articulated, and into the legal sphere. This move from politics to law undermines popular sovereignty and political activism, and makes access to human rights protection difficult for oppressed minorities, the poor and the illiterate.

Finally, it is unclear whether the legal form governing the nation-state can be so readily transposed to the international context. Habermas has argued that legal norms are concerned with the self-organisation of particular communities in particular historical circumstances. They express a community's shared form of life and shared identity, their interest positions and their pragmatically chosen ends. If this is the case, then it is not clear that the legal form governing the nation-state is necessarily compatible with the universalistic aspirations of cosmopolitan law. If everything depends on how rights are articulated in the concrete circumstances in which they are applied, then the fact that there are rights in the foundations of a nation-state does not mean, in Jeremy Waldron's words, that there must be rights all the way up (Waldron 1993: 22).

In this paper, I argue that while such scepticism in relation to the juridification of human rights is justified, and while juridification is not going to solve all our rights related problems, positive law does make a material difference to securing individual human rights and to cultivating and augmenting a general rights culture both nationally and globally. I suggest that law in general, and Habermas' version of it in particular, is the most viable way of negotiating the tensions that human rights discourse gives rise to: the tensions between morality and law, between legality and politics, and between the national and international context of human rights protection.

I. International Human Rights Law Framework and the Problem of Enforceability

Since the Second World War, the protection of human rights has been one of the primary purposes of the United Nations. The preamble to the United Nations Charter of June 1945 imposes on its member states a general obligation to respect and promote human rights. The content of these rights was later articulated by the General Assembly in December 1948 in its *Universal Declaration of Human Rights* (the Declaration) and since then, human rights have been further developed in a number of resolutions.³ The Declaration has had an important effect on the development of human rights law insofar as it demonstrated that at least in principle, there is agreement about the importance of human rights, as well as some consensus about the kinds of rights that should be protected.

The Human Rights Committee was established in order to monitor compliance with human rights norms, and to give individuals avenues of complaint against their governments. However, the Committee does not, and cannot place states under an immediate binding obligation to protect human rights because of the inviolable principle of state sovereignty.⁴ The most it can do is make recommendations, criticisms, conduct inquiries into state practices and expose human rights violators, but it cannot order states to remedy a complaint or change its practices. Moreover, the Committee has no real enforcement power of its own, but must rely on the Security Council to impose sanctions or use force in cases of non-compliance. However, neither the Security Council nor member states have any standing commitment to assume the function of enforcing norms for the Human Rights Committee (Nickel 2002: 357).

The high incidence of non-compliance with human rights norms, and the UN's lack of power to enforce compliance have led many writers to argue against the existence of a structure of human rights principles in international law (Watson 1977: 60; 1979: 690), or to suggest that human rights law is nothing more than political rhetoric.⁵ But such cynicism ignores several of the developments and achievements in international human rights law since 1945. International law does have the potential to assist individuals in cases where

national law may be ineffective or oppressive; while states may be reluctant to accept the human rights regime in concrete cases, they are all subject to some level of general obligation not to mistreat their nationals or other persons within their jurisdiction; while international criminal courts have only been convened on an ad hoc basis – at least until the permanent International Criminal Court began operating in July 2002 – they have had some success in prosecuting those responsible for human rights violations, including Nazi officers in the Nuremberg trials (Habermas 2001: 119).

Nevertheless, if human rights discourse is to make any material difference to human rights protection, then it requires a ‘thicker’ legality. That is, for human rights law to actually *be* law, it needs to do more than merely articulate the content of rights in the form of declarations and covenants. To acquire a thicker legality requires that it must also be coercive, actionable and enforceable. To this end, Habermas proposes the institution of a cosmopolitan legal order that would limit the sovereignty of nation-states, and bind governments to respect for its rules, under the threat of sanctions.

Some of the changes required for this new global, legal order are, Habermas argues, already taking place. State sovereignty has already been undermined by economic globalisation, the *Universal Declaration of Human Rights* has been accepted by nearly every state, at least on paper, and there is an emerging global governance regime, which includes the European Union (EU), the UN system, the World Trade Organisation (WTO), the North American Free Trade Agreement (NAFTA), international environmental accords, and the international human rights system (Habermas 1998a: 179). However, these changes do not go far enough. Human rights law remains as contested as ever, state sovereignty is still invoked as a way of evading human rights obligations, and the UN lacks the executive power to enforce rights or bind member states. As such, the United Nations Charter occupies an ambiguous status. On the one hand, it outlaws offensive wars and authorises the Security Council to use appropriate means, if necessary to initiate military action wherever a threat to the peace or an act of aggression occurs. On the other hand, the Charter expressly forbids any interference with states’ domestic affairs and in general, recognises the right of states to military self-defence (Habermas 1998a: 179). Achieving a ‘thick’ legality requires overcoming this ambiguity, and the institution of a number of conceptual and structural changes.

The first concerns how we conceive of state sovereignty and the nature of citizenship. Under cosmopolitan law, state sovereignty would be acknowledged to the extent that the state honours its obligations under the Declaration and respects human rights. In other words, the autonomy of the state will depend on the cosmopolitan legal order, and on the autonomy granted by the state to the individual (Habermas 1998a: 180). Violations of human rights justify recourse to ‘police measures’ in the form of humanitarian intervention or other sanctions. Cosmopolitan law would also directly establish the legal status of individual

subjects by granting them unmediated membership in the association of free and equal world citizens (Habermas 1998a: 181).

Institutionalising cosmopolitan law also requires a radical reform of the existing structures of the United Nations. It requires extending the jurisdiction of the International Court of Justice in the Hague so that it is able to initiate prosecutions, make binding judgments and address conflicts between individuals and their governments (Habermas 1998a: 187). The Security Council would be transformed into a world executive power that would include Germany, Japan and regional organisations, such as the European Union as new permanent members (Habermas 1998a: 187). Finally, Habermas recommends the transformation of the General Assembly into a 'World Parliament' as a genuinely legislative body whose members would be directly elected by their respective peoples (Habermas 1998a: 187).

II. The Nature of Human Rights

For Habermas, human rights are ambiguous in nature. Traditionally, they have been justified on the basis of their moral content, and as moral norms, they refer to every creature 'that bears a human face' (Habermas 2001: 118). In this respect, human rights are a form of basic rights that share some of the structural features of moral norms. Basic liberal and social rights within a constitutional framework are addressed to persons as human beings and not merely to citizens of the state. They thus claim a universal range of application, even in cases where they have not always been equally applied (Flynn 2003: 433). Secondly, basic rights, like moral norms can be justified exclusively using moral arguments, or in terms of what is equally good for all. The right to life and the right to freedom of conscience, for example, are justified by virtue of their being in the equal interest of every person. While other legal norms can also be justified by appeal to moral arguments, they differ from basic human rights because they also require ethical, political and pragmatic considerations for their justification; considerations that are inseparable from the concrete form of life of a historical, legal community or from the concrete goals of particular policies. By contrast, basic rights 'regulate matters of such generality that moral arguments are *sufficient for their justification*. These arguments show why the implementation of such rules is in the equal interests of all persons qua persons, and thus why they are equally good for *everybody*' (Habermas 1998a: 191). However, the justification of human rights on the basis of morality has led us to think of human rights as moral norms.

On the contrary, Habermas points out that human rights discourse is a recent invention, whose roots can be traced back to the *Virginia Bill of Rights*, the *American Declaration of Independence* of 1776 and to the *Declaration des droits de l'homme et du citoyen* of 1789 (Habermas 1998a: 190). These declarations

were inspired by the political philosophy of modern natural law, especially that of Locke and Rousseau. The concept of human rights is thus first articulated in the context of national constitutions and guaranteed by the national legal order. For this reason, Habermas argues that the concept of human rights does not have its origins in morality, 'but rather bears the imprint of the modern concept of individual liberties, hence of a specifically juridical concept. Human rights are *juridical by their very nature*' (Habermas 1998a: 190), even though they also have the appearance of moral rights. What gives them the appearance of moral rights is not their content or their structure, but their mode of validity, which transcends the legal order of the nation-state. That is, the validity of human rights can be determined by appeal to purely universal moral arguments, but this, on its own, is insufficient to enforce such rights. Human rights must assume the legal form of modern, positive law or must acquire a thick legality for them to make any material difference to rights protection.

Human rights thus also share the same structural features of legal norms in a way that has important consequences for their form and function: 'human rights belong structurally to a positive and coercive legal order which founds actionable individual legal claims. To this extent, it is part of the meaning of human rights that they claim the status of basic rights which are implemented within the context of some existing legal order, be it national, international or global' (Habermas 1998a: 190). Situating human rights in a system of law rather than morality means that human rights have the same formal properties as legal norms insofar as they are positive, coercive and individually actionable.

Habermas' account is intended to illustrate the complementary nature of law and morality, and how morality comes into the law making process. The legal integrity of the person is justified as a global norm by appealing to the moral integrity of the person. In determining the content of legal rights we must still appeal to moral arguments, insofar as certain legal rights, including the rights to life, liberty and the right not to be tortured, must be justified on the basis that they are in the equal interests of all. However, as Flynn points out, this does not turn the claims at issue into strictly moral rights, given the legal-political context in which the rights-granting process occurs (Flynn 2001: 441). Morally valid claims are attached to each person, irrespective of whether they are recognised in legal form, but they are insufficient, on their own, to ensuring that such a claim is met.⁶

III. The Form of Law

According to Habermas, the function of modern law is to provide a means for keeping together complex, pluralist and centrifugal societies. This integrative capacity of law is made possible by virtue of certain formal properties that legal norms possess: modern law is both enacted or positive as well as enforced or

coercive; it requires nothing more of its addressees than conformity to its norms, but it also has to meet the expectation of legitimacy. In this sense, modern law is 'Janus-faced': it permits individuals to comply for strategic or prudential reasons – from fear of sanctions – or for normative reasons – from respect for the law's legitimacy.⁷

Legal legitimacy is determined by the discourse principle according to which legal norms are deemed legitimate only if all possibly affected persons could agree to them as participants in rational discourse. Rational discourse refers to any attempt to reach an understanding over problematic validity claims that takes place under conditions of communication. These conditions must enable the free processing of topics and contributions, information and reasons in the public space. The discourse principle is conceived abstractly so as to not limit the kinds of issues and contributions that can be made or the kinds of reasons that can count in each case; nor does it specify the forms of argumentation and bargaining. All that is necessary for the discourse principle to function effectively as a medium for legitimation is the existence of a legal system that guarantees certain liberties to its citizens. Such a political system ensures that the population is '*accustomed to liberty*', and that citizens use this liberty not for the exclusive pursuit of personal interests, but as a form of 'public reason' for the collective good (Habermas 1998b: 461).

The discourse principle thus depends on the existence of a legal code. This establishes a system of rights that assigns equal liberties to each person. The connection between the discourse principle and the legal code gives rise to the principle of democracy. Together, these three elements constitute '*a logical genesis of rights*'. The argument here is circular insofar as the discourse principle leads to equal liberties, but equal liberties must first exist to ensure that all citizens are able to participate in discourse. This circularity is intended to demonstrate that the principle of democracy and the discourse principle are co-original: 'the logical genesis of these rights comprises a circular process in which the legal code, or legal form, and the mechanism for producing legitimate law – hence the democratic principle – are co-originally constituted' (Habermas 1998b: 122). The system of rights forms part of the normative presuppositions of democratic self-governance and is arrived at abstractly or reconstructed *a priori*. The rights it protects include the right to equal liberties, equal rights to membership in voluntary organisations, equal rights to individual legal protection, and the equal right to self-determination.⁸

This account is intended to demonstrate the internal relation between human rights and popular sovereignty. Human rights institutionalise the communicative conditions necessary for a reasonable political will-formation. The capacity to participate in legislation as legal subjects, in turn, presupposes the private autonomy of legal persons in general: 'on the one hand, citizens can make appropriate use of their public autonomy only if, on the basis of their equally protected private autonomy, they are sufficiently independent; on the other hand,

they can realise equality in the enjoyment of their private autonomy only if they make appropriate use of their political autonomy as citizens' (Habermas 2001: 118). While the specific legal norms that citizens will legitimate will differ depending on the particular social, economic and cultural needs of the legal community, the legal form itself is the same; all legal norms are positive, coercive and individually actionable. These features of modern law make up for the weakness of morality in very specific and functionally necessary ways.

Firstly, while moral norms regulate interpersonal relationships and conflicts between natural persons who recognise one another as members of a particular community and as irreplaceable individuals, legal norms regulate interpersonal relationships and conflicts between strangers. Individuals in an abstract community are individuated not through personal identities that developed over a lifetime, but through their capacity to occupy the position of typical members of a legally constituted community (Habermas 2001: 114).⁹

Secondly, legal norms and institutions establish systems of knowledge and action that eliminate the cognitive indeterminacy characteristic of moral norms based on abstract principles. As such, legal norms offset the weaknesses of morality by unburdening the individual from the cognitive, motivational and organisational demands required to act on moral principles. According to Habermas, the person who judges and acts morally must be able to independently appropriate moral knowledge, assimilate it, and put it into practice. Judging and acting morally thus places unprecedented cognitive, motivational and organisational demands on the person that the legal subject does not have to contend with.¹⁰

Thirdly, because coercive law makes up for the motivational uncertainty of morality, it is able to stabilise behavioural expectations. This also has the consequence of unburdening the individual from the motivational uncertainty about action guided by moral principles: 'coercive law overlays normative expectations with threats of sanctions in such a way that addressees may restrict themselves to the prudential calculation of consequences' (Habermas 1998b: 116).

Finally, modern law is based on individually actionable rights, which establish and protect a sphere of individual freedom of choice from moral obligations. Habermas argues that modern law must have these formal characteristics in order to fulfil the functional imperatives of modern societies, which cannot be directly met by morality. This does not mean that moral considerations are entirely absent or irrelevant; only that they are insufficient for regulating the interactions between people and between states in complex modern societies and in a complex global order.

There are two ways in which this framework of rights protection can be established in a global context. On one model, because human rights are basic or constitutional rights, each state ought to articulate them in its fundamental legal texts and ought to make them effective through institutions and policies.

Habermas for example writes: ‘human rights belong, through their structure, to a scheme of positive and coercive law which supports justiciable subjective rights claims. Hence it belongs to the meaning of human rights that they demand for themselves the status of constitutional rights’ (Habermas 1998b: 116). This would require the transformation of existing states into constitutional democracies; a goal that Habermas deems unachievable at this point in time (Habermas 2001: 118–9).

An alternative route is the establishment of a cosmopolitan legal order, where citizens would enjoy human rights protection as world citizens. Violations of human rights would no longer be judged and combated from the moral point of view, but would be prosecuted like criminal actions within the framework of a state-organised legal order, in accordance with institutionalised legal procedures (Habermas 2001: 119). Until this global legal order is constituted and institutionalised, human rights ‘remain only a weak force in international law and still await institutionalisation within the framework of a cosmopolitan order that is only now beginning to take shape’ (Habermas 1998a: 192). Enforcing human rights by treating violations of them like other criminal actions justifies state intervention on humanitarian grounds and requires a transformation of the structures of the UN, especially the General Assembly and the Security Council.¹¹

This suggests that no modern, positive law is possible at a global level without centrally institutionalised mechanisms of force. This is a controversial claim that requires some justification, particularly in light of the way in which military interventions have occurred in the past. Consider, for example, the way Security Council authorisation was used by the United States to provide cover for its illegitimate use of military force, most notably in Haiti; the way in which Council authorisation was not sought at all, as in the cases of Bosnia, Kosovo and more recently, Iraq; or the instances where the Council remained inactive in the face of humanitarian crises where consistency in Council practice would have required intervention, as in Rwanda (Branch 2005: 105).¹² Habermas’ proposed reform agenda for the Security Council would regulate Council decisions and the use of force by a rule of law, rendering intervention on humanitarian grounds justifiable.

The new composition of the Security Council would ensure adequate representation of all continents, and would enable it to act independently of national interests in its choice of agenda and its resolutions. The Security Council would bind itself to rules that stipulate, in general terms, when the UN is not only authorised, but also obligated to take up a case. Both the General Assembly and Security Council require greater forms of legitimation from a well-informed public opinion, such as the continuous presence of non-governmental organisations with observer status in UN institutions. This will ensure that there will be a legal formalisation of the arguments and procedures used by the Council in making its decisions, and will also promote transparency,

accountability, and legalisation (Branch 2005: 105). Further, this legal process of reaching decisions will be facilitated by a developed UN military capacity, able to implement the resolutions of the Security Council (Habermas 2006: 173).

The justification for military intervention in accordance with the rule of law is not an attempt to export democracy by military means. As Habermas himself acknowledges, while a system of rights could be implemented by transforming all nation-states into constitutional democracies, this is not a viable goal at this time, and even if it were achievable, it would not be carried out using military force. Instead, he proposes the adoption of non-violent strategies designed to influence the internal order of sovereign states whose goal is to foster self-sustaining economies, tolerable social conditions, equal democratic participation, the rule of law, and a culture of tolerance. Military intervention would be used as a last resort in cases of humanitarian crisis, and would be carried out in accordance with the rule of law, rather than in accordance with the moral and political interests of individual nation-states.

IV. The Relation between Juridification and Human Rights Protection: Critical Objections

In modern, complex and pluralist societies, the legal form is best suited to regulating transactions in general and protecting human rights in particular. While legal norms must be consistent with universal moral principles for them to be legitimate, they differ from moral norms insofar as they are enforceable, coercive and actionable. But is it the case that law is the most appropriate way of protecting human rights? And does codification make any material difference to rights protection, especially in circumstances where a general rights culture is absent? In this section, I examine four main criticisms of the juridification approach to rights protection: firstly that juridification makes no material difference to rights protection in the absence of a rights culture, and a vigilant and politically engaged citizenry; secondly, that this approach assumes highly specific institutional structures to ensure rights protection, and overlooks the fact that there are more appropriate, non-legal ways of obtaining the same goal; thirdly, that juridification makes rights a legal, rather than political issue; and finally, that arguments for the juridification of rights within the context of a national legal order cannot be so easily transposed to the international context.

According to Pogge, law on its own is an inadequate measure for determining a society's human rights record. Societies may be officially committed to Article 19 of the Declaration, for example, which gives everyone the right to freedom of opinion and expression, and governments may even incorporate the appropriate political and civil rights into their constitutions, but their officials may nevertheless violate these rights frequently and with impunity (Pogge 2002: 60). Even in cases where government officials do not directly engage in

the violation of rights, rights can be undermined and violated in other ways. They could, for example, be violated by rich landowners, who prevent – through disruption, intimidation, and violence – the expression of any political views that promote the interests of poor peasants or migrant workers (Pogge 2002: 60). As Pogge points out, the government does not have to organise or encourage such activities, but it could simply fail to enact laws that proscribe such conduct, or if such prohibitive laws exist, it could fail to enforce them effectively on the grounds that doing so would compromise their popularity (Pogge 2002: 60).

Similarly, a nearly complete absence of interferences with protected conduct such as speech could be due to the fact that people know only too well what sorts of opinions cannot be publicly expressed without serious risk of violent interference or punitive measures against oneself and family. This general climate of fear and intimidation has the effect of muting, intimidating and demoralising the citizenry, even though there is also a decline in the frequency of actual interferences (Pogge 2002: 62). Under these circumstances, it would seem that juridification makes no material difference to rights protection; nor could we say that the society's human-rights record has dramatically improved, just because rights are codified (Pogge 2002: 62).

Secondly, the emphasis on legality assumes the existence of highly specific institutional structures to ensure that the right in question is secured. However, it does not follow that a right to something is best secured through legal channels. As Waldron argues, even if we accept the suggestion that securing human rights requires the mechanisms of law (i.e., the use of force), it does not follow that the normative claim P has a (moral) right to X entails that P (morally) ought to have a legal right to X. However, Waldron argues that there may be all sorts of ways in which X can be secured legally for P, without P having a legal *right* to it (Waldron 1993: 24).

To say that P has a legal right is to indicate the existence of an articulated legal rule or principle entailing P to X. It indicates that P has legal standing to claim X and to file a suit in court to secure X. Further, a legal right to X indicates that officials and administrators have very limited discretion in determining who gets X and who does not (Waldron 1993: 24). For Waldron, it is thus possible to distinguish between legal situations in which X is P's right which she may peremptorily demand, and the law is such that her demand must be met unless there are extraordinary circumstances, and legal situations in which some official has been vested with discretion on a case by case basis how best to distribute limited resources like X to applicants like P. In the first case, we have to assume that the existence of a legal right also entails the existence of a highly specific type of institutional arrangement such that the right to X can be met at all, while in the second, we can assume a more flexible type of legal arrangement that allows for access to X based on circumstances (Waldron 1993: 24). The point for Waldron is that legality entails a certain form of absoluteness and inflexibility, irrespective of circumstances and resources, and assumes specific

types of institutional arrangements that do not necessarily exist in the developed world, let alone the Third World.

Consider, for example, the claim that the homeless have a moral right to shelter. This claim can also entail that something legal should be done about securing such shelter, but without articulating such a right in the language of positive law and thus attaching to it all the baggage that positive law brings (i.e., a lawsuit). Waldron argues that suppose we know the following facts: we know that there are many homeless people, and as things stand, on any given night, there is only limited public housing, hotel rooms and places of shelter that are allocated to them. The circumstances of homeless people vary: some have families, some are alone, some are sick, others are healthy, some have been homeless for months, others have only recently become homeless, and so on. If there is a positive legal right to shelter, then it follows that all homeless people should be immediately provided with it, and that they can bring a claim against an authority or organisation if such a right is not secured. But it is equally possible to urge a more flexible type of arrangement than that of positive law. Such an arrangement would allow officials to match accommodation with need, to make quick judgments about who is sick and desperate and who is not, and to reserve places for those who may be most vulnerable. These decisions can still be made on rights-based grounds; that is, on the ground that, in the circumstances, and given the resources, this arrangement will better serve the moral principle that the homeless have a right to shelter. As Waldron puts it, 'a moral claim that people have the right to shelter is a claim about the importance of their getting shelter. It is not a claim about the importance of their being assigned shelter in accordance with a specific type of legal or bureaucratic procedure' (Waldron 1993: 25). This means that a moral right to something is not always a moral demand for a legal right.

Similarly, Pogge argues that the juridification requirement seems excessively demanding. Consider a human right to adequate nutrition. A society can be so situated and organised that its members have secure access to adequate nutrition, but not a legal right to it. Would this mean that the human right was unfilled, or only carried a weak obligation to secure it? According to Pogge, having the legal rights required by codification is good, to be sure, but hardly so important that it must be built into the concept of a human right. Secure access is what really matters, and if this can be achieved through other means, such as a reliable kinship system backed up by efficient charitable organisations, then an additional legal right to adequate food when needed does not seem necessary. For Pogge, to postulate a human right to X is to declare 'every society (and comparable social system) ought to be organised (or reorganised) that, as far as possible, all its members enjoy secure access to X' (Pogge 2000: 52). Human rights, on this account, are thus identified with the moral claims themselves, rather than the legal (Flynn 2003: 445).

Alternatively, the juridification requirement may render human rights too weak. Pogge argues that even in cases where a human right is appropriately codified and the corresponding legal rights are observed and reliably enforced by the government and the courts, a variety of social obstacles may still prevent citizens from enjoying the object of the human right in question. They may, for example, be illiterate or uneducated, they may not know what their legal rights are, or they may lack either the knowledge or the minimal economic independence necessary to claim these rights through proper legal channels (Pogge 2000: 52).

Related to this is the criticism that juridification transfers rights discourse from the political sphere to the legal sphere, making it not only inaccessible to the groups that rights discourse is intended to protect – oppressed minorities, the poor, illiterate and vulnerable – but also undermines the political process itself. As Conor Gearty writes, ‘with the legalisation of human rights, the custodianship of the idea moves from the political to the legal sphere, from the NGOs, the MPs and so on to the judges and the lawyers. And it is their version of human rights that now matters, not that of the political activists who first promoted the idea’ (Gearty 2006: 71). According to both Gearty and Pogge, what is needed to make the object of a right secure is not law, but a vigilant citizenry that is deeply committed to the rights in question and willing to work for their political realisation.¹³

Finally, it is also unclear whether the system of rights devised for the national context can be so readily transposed to the international context. As was demonstrated, Habermas’ account of legal legitimacy depends on a separation of law and morality. Following Kant, Habermas holds that what makes moral claims distinctive is that they raise a universal validity claim, and so differ from both pragmatic discourses, which are contingent on the commonality of particular ends, as well as from ethical discourses, which are valid only for members of a community which already shares a tradition. In making these distinctions between pragmatic, ethical and moral claims to legitimacy, Habermas sought to address the charge that discourse ethics could not provide an adequate account of legitimacy, because it ignored the importance of pragmatic reasons for the justification of laws (De Greiff 2002). But in doing so, Habermas also compromises the cosmopolitan consequences of his project. Habermas’ account of legitimacy renders law to be a purely internal, national issue, a position which, De Greiff argues, leads him to miss a possible justificatory ground for his later interest in cosmopolitanism (De Greiff 2002).

Habermas argues that only moral norms refer to a group whose scope encompasses humanity in general, whereas the reference system of legal norms is a particular legal community:

With moral questions, humanity, or a presupposed republic of world citizens constitutes the reference system for justifying regulations that lie in the equal interest of all. In principle, the decisive reasons must be acceptable to each and everyone.

With ethical-political questions, the form of life of the political community that is 'in each case our own' constitutes the reference system for justifying decisions that are supposed to express an authentic, collective self-understanding. In principle the decisive reasons must be acceptable to all members sharing 'our' traditions and strong evaluations. (Habermas 1998b: 108)

According to De Greiff, to allow the positivity of law to determine the scope of the relevant legitimating community betrays a degree of 'state-centricity' that is incompatible with the cosmopolitan strains of his position. The fact that historically, these discourses have been territorially bound leaves open the normative question of whether these discourses ought to be more cosmopolitan, as well as the practical question of whether they can be organised effectively in such a fashion (De Greiff 2002: 432).

V. Why Juridification Matters to Rights Protection

In this section, I argue that positive law in general, and Habermas' version of it in particular, is the most appropriate way of securing rights protection both nationally and internationally. Law, I suggest, is the only mechanism capable of creating systems of accountabilities to ensure that individuals and governments responsible for violations of human rights are brought to justice. It is the only mechanism capable of supplementing the deficiencies of morality, both functionally and conceptually, because of its ability to negotiate the complexities and organisational demands imposed in the course of meeting our moral obligations. Finally, law has the capacity to create and promote a general human rights culture, defend human rights values, and set up a framework or point of reference for how rights are to be negotiated and argued for (see McNamara 2007). Given the characteristics of the legal form, it seems appropriate that the protection of human rights at the international level necessitates the existence of a 'thick' legality. A 'thick' legality, on Habermas' account, will neither undermine popular sovereignty or political mobilisation; it is not intended to replace other institutional structures, such as charitable organisations, or NGOs, but to supplement them. In what follows, I defend the use of legal mechanisms to secure rights protection, and demonstrate the way in which Habermas' account overcomes the tensions between human rights and popular sovereignty, politics and law, and the national and international contexts of human rights protection; tensions that have given rise to scepticism in relation to human rights in general.

While it is the case that human rights violations occur despite the existence of human rights law at both the national and international level, this is arguably because human rights law exists in name only, but not in function. The obligations that nation-states have under the Declaration to protect and promote human rights are not conceived as legal obligations because there is

no coercive authority to compel them as such. Instead, there is a reliance on each government's own moral self-obligation. Such trust is however, irreconcilable with the political and legal developments of our time. As Habermas writes: 'the unprecedented nature and scale of the government criminality that spread in the wake of the technologically unfettered and ideologically unrestrained Second World War makes a mockery of the classical presumption of the innocence of the sovereign subjects of international law' (Habermas 1998a: 150). If, as Habermas has argued in relation to Kant, the union of peoples is to be a legal rather than a moral arrangement, then it cannot lack any of those characteristics of a 'good political constitution'. Such a constitution does not rely on the 'the good moral education' of its members, but ideally has the strength to foster such an education in turn (Habermas 1998a: 170). A good constitution not only contains mechanisms for enforceability, but also creates systems of accountability, such that individuals, government departments and public agencies are required to publicly justify their actions, under threat of sanctions.¹⁴

The second aspect of a 'good constitution' is its ability to foster the moral and political education of its subjects. So while a vigilant and politically engaged citizenry is fundamental to securing rights protection, law plays an important transformative and educative function in cultivating such a citizenry. Law acts as a vehicle that enables people to articulate their claims, identify rights abuses when they occur, and agitate and negotiate for change as the need arises. As Habermas argues, a good constitution with adequate rights protections sets up the necessary conditions for a vigilant citizenry and a rights culture such that people are 'accustomed to liberty'. How is such a constitution arrived at, and how would this translate at the global level?

Recall for Habermas, arriving at a system of rights is a circular process in which the legal code and the mechanism for producing legitimate law (the democratic principle) are co-originally constituted or presuppose one another (Habermas 1998b: 122). This system should contain the rights that citizens want to confer on one another for legitimately regulating their lives together by means of positive law. Once in place, such a system sets up the conditions under which future negotiations over rights are to take place. A global constitutional polity would also be intersubjectively and deliberately constituted; it too would set up the necessary conditions for future deliberations over issues that affect the global community, be they issues of human rights, ecological issues or socio-economic ones, and would enable such a community to effectively regulate its interactions. Such a system is set up 'to provide *every* voice with a hearing' (Habermas 2001: 120), or to give people a language with which to articulate their demands through the channels of an international civil society.¹⁵

Waldron and Pogge have both argued that juridification of rights is not necessarily the most appropriate way of securing the object of those rights. For Waldron, having a moral claim to something, such as shelter, is not a claim about being assigned a right in accordance with a legal procedure, but is a claim that

warrants an arrangement of some sort – the existence of charitable organisations for example – that is better able to serve the principle that the homeless have a right to shelter. Similarly, Pogge argues that the juridification requirement is too strong in this respect. While this is certainly the case in less complex societies, where socially integrating forces can be found in the ethos of a form of life, and where people are bound by kinships, this is not the case for complex, pluralist modern societies. Meeting our moral obligations to the impoverished and oppressed is becoming increasingly complex, and therefore must take place along the channels of legal regulation.

Consider again, the moral duty to aid those who are starving or who are in need of shelter. This includes the millions of people who are poverty-stricken and dispossessed in the Third World. To meet this positive duty requires that charitable aid be transmitted along organised paths but the routes taken by food, medicine, clothing, and infrastructure far exceeds the initiative and range of individual action. This illustrates that ‘the more that moral consciousness attunes itself to universalistic value orientations, the greater are the discrepancies between uncontested moral demands, on the one hand, and organisational constraints and resistances to change, on the other’ (Habermas 1998b: 116–7). The moral demands placed on us can only be fulfilled through anonymous networks and organisations, and through systems of rules that can be reflexively applied to the rules themselves. Law does not therefore, unburden us of our moral obligations towards others, but assists us in realising them. To this end, Habermas argues that ‘positive law stands in reserve as an action system able to take the place of other institutions’ (Habermas 1998b: 117). Moral claims cannot, on their own, secure such institutional effectiveness. Pogge tries to alleviate this weakness by building into his conception the idea that societies ought to be institutionally organised such that access to the objects of human rights is secured. However, as Habermas argues, it is law, rather than morality that is better suited to this task (Flynn 2003: 446).

A further objection against the juridification of rights is that it moves rights discourse from the political sphere, where it was first articulated and where it ultimately belongs, to the legal sphere, which is highly technical, inflexible, and inaccessible to those without money or expertise. But such divisions between politics and law are not as clear cut or defined in Habermas’ proceduralist model; a model that he also carries over into the international context. Habermas’ discourse theory is concerned with the ‘higher-level intersubjectivity’ of processes of reaching understanding that take place through democratic procedures or in the communicative networks of public spheres. These processes of reaching agreement take place in a variety of forums, including public opinion-formation, institutionalised elections and legislative decisions. These forums are categorised in terms of informal and formal processes of deliberation and together form Habermas’ two-track model of deliberative democracy: ‘deliberative politics thus lives off the interplay between

democratically institutionalised will-formation and informal opinion-formation. It cannot rely solely on the channels of procedurally regulated deliberation and decision-making' (Habermas 1998b: 308). The two tracks of deliberation perform two different functions.

Informal communication in the public sphere is disorganised, anarchic and uncoordinated. It provides an unregulated space for detecting new problems, bringing them to public awareness without the use of specialised language and suggesting ways to address them: 'because the general public sphere is "unconstrained" in the sense that its channels of communication are not regulated by procedures, it is better suited for the "struggle over needs" and their interpretation' (Habermas 1998b: 314). In this way, 'the communicative structures of the public sphere constitute a far-flung network of sensors that react to the pressure of society-wide problems and stimulate influential opinions' (Habermas 1998b: 300). The public space is founded on a network of associations that 'specialise... in discovering issues relevant for all society, contributing possible solutions to problems, interpreting values, producing good reasons, and invalidating others' (Habermas 1998b: 485). Only after such a public struggle for recognition of issues as political ones can the responsible political authorities take up the proposals, put them on a parliamentary agenda and then legislate and make binding decisions in relation to them. This is referred to as the formal track of the legislative process.

The formal track of deliberative decision-making is how informal deliberation is made into positive law by conventional political institutions and the organs of the state. Formal political processes also include elections, legislatures and courts. Their function is to assess ideas, solutions and make authoritative decisions that will be accepted by those affected.¹⁶ This two-track system displaces the principle locus of participation from formal political institutions to the informal public sphere and provides a way in which the public can come into politics.

This two-track system is also applicable in the global context and serves to legitimate cosmopolitan law. A globally dispersed media facilitates the informal public space, as do networks of NGOs, and virtual realities.¹⁷ This not only leads to the constant reciprocal influence of local and distant events, but can also raise awareness of human rights abuses in remote parts of the world and bring to bear some political pressure on governments (Habermas 1998a: 177). To be sure, many of these global issues, including issues in ecology, population growth, poverty and human rights, are channelled through the informal public sphere of the nation-state. But this does not mean that more permanent, global channels cannot also be institutionalised to enable permanent communication between geographically distant participants who exchange contributions on the same themes with the same relevance.¹⁸

The final objection I want to address concerns the relation between the national and international context of human rights law, more specifically, the

cross-cultural validity of human rights and whether the model of law envisaged for domestic legal systems can be transposed to the international context. The idea of granting all people 'world citizenship' as a way of recognising the legal status of person under cosmopolitan law creates the dilemma of balancing or integrating the universalism that is envisaged by this project and the cultural diversity with which it conflicts. Why is it that the norms of regulated market institutions and liberal democratic practices are better than other norms? Why is the individualism and secular basis of Western legal systems better able to protect human rights than communitarian and religious based systems? Habermas is often accused of Eurocentrism in this context, and it is a problem of which he is well aware.¹⁹ His way of negotiating this tension is to demonstrate how human rights norms are compatible with cultural diversity, notwithstanding their individualistic and secular basis. His claim is that the standards of human rights stem less from the particular cultural background of Western cultures than from the attempt to answer specific challenges posed by a social modernity that has become global. Be that as it may, this does not change the fact human rights discourse is just as much a Western invention as it is modern.

It is still possible, however, to maintain that a thick legality is necessary at an international level and address this charge. As Flynn notes, this version of the criticism focuses on the legal aspect of human rights as the most objectionable aspect, as if the moral ideals behind human rights might be more acceptable if they were not linked to juridification (Flynn 2003: 450). For Habermas, law is an artificially created norm. It is created by legal associations of people who are placed in the situation of determining how best to organise their lives and community. As such, law is functionally, interpretively and intersubjectively derived. This has a number of important consequences for the cross-cultural validity of human rights.

While it is the case that the individualism of human rights has been interpreted in terms of individual self-sufficiency, self-interest, or has been claimed litigiously in Western cultures, it can be interpreted in other ways that are consistent with the ideals and values of different cultures. As Flynn suggests, the system of rights in the abstract does not, on its own, dictate how these rights are to be utilised or realised within specific cultures. Individuals could, for instance, exercise their rights to speak, organise and participate in government in order to cooperatively bring about changes in their common life. In this sense, the recognition of rights would be a communal or collective enterprise, consistent with the community's culture. Alternatively, individuals can choose to individually defend their rights litigiously, with only self-interest in mind. The point is that while rights discourse can be antagonistic, such antagonism is not necessarily inherent in the idea of an egalitarian rule of law (Flynn 2003). A system of cosmopolitan positive law is not then, incompatible with a multi-legal approach to rights interpretation.²⁰

The emphasis on legal legitimacy also makes law seem to be a national, internal affair that is incompatible with the universalistic reach of cosmopolitan law. However, it is necessary to distinguish between the legal form, which is neutral, and specific legal norms, that are contingent on a particular community.²¹ For Habermas, the modern condition is a worldwide fact that all cultures and legal communities have to face, not only Western civilisation. Irrespective of the society, there are no functional equivalents able to replace law in its capacity for 'abstract' social integration of subjects that are 'strangers' to each other:

A functional account suffices as justification, because complex societies, whether Asian or European, seem to have no functional equivalent for the integrative achievements of law. This kind of artificially created norm, at once compulsory and freedom-guaranteeing, has also proven its worth for producing an abstract form of civic solidarity among strangers who want to remain strangers. (Habermas 2001: 122)

All societies use positive law, and they do so for the same functional reasons, particularly in the socio-economic sphere. As Habermas points out, legal certainty is one of the necessary conditions for a commerce based on predictability, accountability, and the preservation of trust (Habermas 2001: 124). The law's functional and integrative dimension does not however, detract from the requirement that it be legitimate. Recall for Habermas, the law is 'Janus-faced.' On the one hand, law serves the function of integrating our relations and transactions with one another both nationally and globally, under the threat of sanctions. On the other hand, compulsory law must also contain a claim to legitimacy.

In the global context, such legitimacy is derived through the channels of an international civil society. Deliberation can occur in the context of international conferences, through the mass media, and through non-governmental organisations such as Amnesty International and Greenpeace, to name but a few. Moreover, the fact that legal discourses have been territorially bound does not mean that they should be, from the perspective of specific legal norms. We have enough in common, including economic interdependence between nation-states, mutual concerns over environmental problems, poverty, population growth, and international terrorism that require the development of consistent legal norms insofar as these are issues that affect us all.

In this paper, I have argued that Habermas' version of law is able to negotiate the tensions that human rights discourse gives rise to: the tension between morality and law, legality and politics, and the national and international context of human rights protection. While it is the case that such a model is contingent on a strong human rights culture in general and respect for the rule of law in particular, I suggest that positive law plays an important function in cultivating and augmenting a culture of rights, and respect for the law's legitimacy.

Notes

- ¹ I take the content of human rights to include security rights, that protect people against murder and torture; due process rights that protect people against arbitrary punishments, and require fair and public trials for those accused of crimes; liberty rights that protect people's freedoms of association, movement, expression and belief; political rights that protect people's liberty to participate in politics by assembling, protesting, voting and serving in public office; equality rights that guarantee equal citizenship, equality before the law, and freedom from discrimination; and welfare rights that require people to be provided with education and protected against starvation, poverty, and social marginalisation. See Morsink (1990) and Nickel (2002).
- ² As Conor Gearty (2006: 92) puts it, 'the inability of this branch of international law to make itself felt on the ground is sometimes so complete that one is left wondering why it is called law at all'. The characterisation of Habermas' version of cosmopolitan law as 'thick' as opposed to the 'thin' legality that currently exists is taken from Adam Branch. Branch (2005: 105) utilises the distinction to argue that in order to compensate for the ease of political instrumentalisation and the temptation of inaction, Security Council decisions need to be regulated by a 'thicker' legality. This includes the legal formalisation of the arguments and procedures used by the Security Council in making decisions so as to promote transparency, accountability and legalisation, and measures that will ensure greater cohesion between the UN and the Security Council.
- ³ The Preamble reaffirms a 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'. Article 55 commits the United Nations to promoting 'universal respect for all without distinction as to race, sex, language or religion' and Article 56 imposes legal obligations on all members to undertake 'joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55'. See also the *International Covenant on Civil and Political Rights*, the *Second Optional Protocol on the Abolition of the Death Penalty*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention on the Rights of the Child*, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.
- ⁴ For example, the UN does not leave the protection of human rights entirely up to member states but has its own mechanisms for establishing that human rights violations have occurred. The Human Rights Commission has a number of monitoring agencies and reporting procedures for basic social, economic, and cultural rights; it also has formal complaint procedures for cases of civil and political rights.
- ⁵ See for example, Carl Schmitt, who argues that the concept of human rights has its roots in the hypocrisy of a legal pacifism that wants to conduct 'just wars' under the guise of peace and cosmopolitan law. For example, he writes: 'When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept in its struggle against its military opponent . . . in the same way as one can misuse peace, justice, progress, and civilisation in order to claim these as one's own and to deny the same to the enemy. The concept of humanity is an especially useful ideological instrument . . .' (Schmitt 1996: 54). Habermas' version of cosmopolitanism is partly a response to this objection.
- ⁶ The legal emphasis on rights also serves the strategic purpose of countering Schmitt's thesis that the politics of human rights is nothing but the moralisation of international relations, used to justify war and police action. If we instead conceive of human rights in terms of law, then their implementation does not depend on the arbitrary categories of 'good' and 'evil' as the basis on which to stage military intervention or justify war, but on the basis of an impartial judiciary and a fair system of enforcement. See Habermas (1998a) and Flynn (2001).
- ⁷ Habermas (2001: 114–5) writes: 'modern law leaves its addressees free to approach the law in either two ways. They can consider norms merely as factual constraints on their freedom and

take a strategic approach to the calculable consequences of possible rule-violations, or they can comply with the regulation “out of respect for the law”.

- ⁸ For full consideration of why these rights in particular are relevant, see Flynn (2003).
- ⁹ According to Habermas (2001: 114), ‘the moral universe, which is unlimited in social space and historical time, includes all natural persons with all the complexities of their life histories. By contrast, a legal community, which has a spatio-temporal location, protects the integrity of its members only insofar as they acquire the artificial status of bearers of individual rights’.
- ¹⁰ Habermas (1998b: 115) writes: ‘The legal system deprives legal persons in their role of addressees of the power to define the criteria for judging between lawful and unlawful. Parliamentary legislative procedures, judicial decision making, and the doctrinal jurisprudence that precisely defines rules and systematises decisions represent different ways that law complements morality by relieving the individual of the cognitive burdens of forming her own moral judgments’.
- ¹¹ A critique of these structural changes is outside the scope of this paper. For a comprehensive critique of Habermas’ position in relation to changes to the UN and Security Council, see Giesen (2004). Giesen (2004: 3) argues that instead of outlining a new world order that is more just towards the peoples and states on the periphery, Habermas does the exact opposite. The future ‘executive’ he envisages would be even more dominated by the countries of the North, while those of the South – which represent 80 per cent of the world’s population – would not have a single seat in the new Security Council. Nor would they have any voice in the new legislature, if their delegation procedures did not match the formal demands of the countries of the North – namely, rich, Western democracies. In these circumstances, they would not only lose their seats, but it would be taken over by an NGO; that is, by a private organisation that would of necessity be based in, or be heavily influenced by the West.
- ¹² Consider, for example, Giesen’s objection that ‘the right of intervention, whatever else it might ideally come to be, is as a matter of fact an instantiation of the right of the stronger over the weaker, a right to choose where and when to intervene and where and when not to’. Giesen asks, ‘who would dare to intervene militarily in the United States or China? And who has intervened during the twenty years of civil war in southern Sudan?’ (2004: 8). Similarly, Danilo Zolo argues that this way of strengthening international institutions is an unusual thematic register for Habermas because it is highly interventionist and repressive, and also inconsistent with the account of legitimacy developed in BFN. Zolo (1999: 439) writes: ‘At times, Habermas seems even to share the idea that democracy can be “exported” by military means, on the model repeatedly tried by the United States in the Caribbean, from Grenada to Haiti. If that is so, the distance between this cosmopolitan normativism and Habermas’ profound tissue of philosophy of law appears quite broad here too, especially considering that for Habermas a legal order is legitimate if it guarantees not only private autonomy – by protecting civil rights – but also the public autonomy of its citizens’. The latter is only possible if the norms that govern public life are developed by the addressees themselves.
- ¹³ As Pogge (2002: 62) argues, ‘more reliable than a commitment by the government, which may undergo a radical change in personnel from one day to the next, is a commitment by the citizenry. This latter commitment tends to foster the former – especially in democratic societies which tend to produce the strongest incentives for government officials to be responsive to the people’. Similarly, for Gearty (2006: 72), ‘rights should not precede politics, or be above it’, but should be ‘achieved (and sustained) *through* politics’.
- ¹⁴ As Habermas (1998b: 117) writes: ‘Law alone is reflexive in *its own right*; it contains secondary rules that serve the production of primary rules for guiding behaviour. It can define jurisdictional powers and found organisations – in short, produce a system of accountabilities that refers not only to natural, legal persons but to fictive, legal subjects, such as corporations and public agencies’.
- ¹⁵ For empirical evidence of the educative effects of rights discourse, see McNamara (2007). McNamara demonstrates the way in which the Canadian Charter of Rights and Freedoms has had a ‘transformative impact on political discourse’ (253–4). He argues that the Charter has not only ensured that human rights considerations feature prominently in public discourse

over controversial issues, but that the Charter rights play a major role in shaping the contours of that discourse.

- ¹⁶ Habermas (1998b: 307) describes this as follows: ‘The operative meaning of these regulations consists less in discovering and identifying problems than in dealing with them; it has less to do with becoming sensitive to new ways of looking at problems than with justifying the selection of a problem and the choice among competing proposals for solving it. The publics of parliamentary bodies are structured predominantly as a *context of justification*. These bodies rely not only on the administration’s preparatory work and further processing but also on the *context of discovery* provided by a procedurally unregulated public sphere that is borne by the general public of citizens’.
- ¹⁷ Although, Giesen does argue that the focus on NGOs as a way of mediating between world citizens and international political bodies is not only inherently undemocratic, but is also inconsistent with the radical democratic elements in *Between Facts and Norms*. Giesen suggests that in his ‘post-national’ writings since 1992, Habermas has considerably simplified the conceptual framework: transnational civil society is now supposed to be the source of cosmopolitan law. However, this represents a double modification of the initial theory outlined in *Between Facts and Norms*. Firstly, there is no mediating role for the public space in any proper sense; secondly, the actors of transnational civil society are far more disconnected from the lifeworld than those who are active at the state level, and thus cannot but display a considerable degree of representative elitism. Giesen (2004: 6) writes: ‘It follows that the Habermasian extrapolation of the concept of civil society to the international context reduces the scope of application of the notion to a few privileged actors who intervene at a world level, while increasing its normative force and scope on account of these actors themselves becoming the source of cosmopolitan law’. But this could simply be a way of negotiating the pragmatic and functional complexities of deliberative democracy at the international level. These complexities necessitate the existence of a more representative type of democracy, rather than a deliberative. Moreover, a genuine, deliberative public sphere could be achieved by way of virtual realities, international conferences and the mass media.
- ¹⁸ This also addresses the objection raised by Zolo that Habermas’ version of cosmopolitan law is inherently undemocratic because it gives ultimate authority to institutions like the United Nations. For Zolo (1999: 438), these international institutions do not ‘only reproduce in formal legal terms the international hierarchy of economic and military power, but are a point by point denial of the principles of the state based in the rule of law, even in its most moderate and formalist versions: from the formal equality of the subjects of law to the principle of legality and of parliamentary and judicial control over the exercise of power’. Habermas’ proposed restructuring of the UN, and the implementation of his two-track model of deliberation overcome this objection.
- ¹⁹ In *The Postnational Constellation*, he characterises it in terms of a tension between the universal meaning of human rights and the local conditions of their realisation (Habermas 2001: 118).
- ²⁰ Consider, for example, the ways in which human rights law is interpreted differently by Western nation-states. As Flynn (2003: 450–1) points out, even if we limit our focus to Western societies, there are significant differences in rights interpretation. Western European countries contain many economic and social rights that are not included in the US Constitution. Consider also the way that restrictions on hate speech are viewed in the US as opposed to Germany or Canada. See also McNamara (2007) for an account of the differences in rights interpretation in Canada, New Zealand, Australia and the United Kingdom.
- ²¹ There is the further relevant question with regard to whether democracy is possible outside the nation-state if, as Ralf Dahrendorf (cited in Zolo 1999: 440) has maintained, it is true that the coherence and political loyalty of citizens is an essential variant in a democratic system. Coherence and political loyalty presuppose the existence of pre-political links among members of the group or to a ‘collective identity’. Democracy thus requires familiarity and solidarity that does not always succeed in integrating those who are not ‘the same’. Law in this respect does not link, as Habermas seems to think, subjects that are strangers to each

other in this sense. Proof to the contrary is being supplied by the widespread phenomena of intolerance and racism in so-called multicultural societies, which the formal mediation of law is not able to prevent or repress.

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