Human Rights and Post-Imperialism: Arguing for a Deliberative Legitimation of Human Rights

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HUMAN RIGHTS AND POST-IMPERIALISM:
ARGUING FOR A DELIBERATIVE
LEGITIMATION OF HUMAN RIGHTS

Amy Bartholomew*

A new architecture of rights, based on a new foundation
and with a new justification, is called for.¹

INTRODUCTION:
MULTICULTURALISM, GLOBALIZATION, POST-METAPHYSICS
AND THE PROBLEM OF LEGITIMATING HUMAN RIGHTS

The question of how to justify and legitimate human rights has
taken center stage in the current conjuncture of multiculturalism and global-
ization, on the one hand, and the post metaphysical turn, on the other hand.
Susan Mendus, for example, has argued that we would do well to resist
questions of justification in favor of a turn to “the political” itself. She
premises this suggestion on the claim that the problem we currently face is
not a weakening or contested political commitment to human rights, since it
is just as the “political commitment to human rights has grown, [that] philo-
sophical commitment has waned.”² On the strength of this diagnosis she
encourages approaching rights from the vantage point of political practice,
rather than political theory, and suggests that by adopting a position of pes-
simism we can best articulate what we stand to lose in political practice “if
we renounce the language of human rights.”³ This strategy may then pro-
vide a pragmatic defense of human rights aimed at addressing philosophical
doubts while avoiding what she apparently considers to be a necessarily
foundationalist reliance on justification. I agree with positions like
Mendus’s that argue a turn to “the political” is necessary. Yet I question
the diagnosis and guiding assumption that underlies such positions that it is

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¹ BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCI-
³ Id. at 17.
a tattered *philosophical* commitment to rights that must be addressed by a turn to political practice, because *political* commitment to human rights has "grown." I also question the pragmatic solution that approaches like hers endorse and the apparent interpretation of justification as always-already infected by a now discredited foundationalism.

Whether the claim that the political commitment to human rights has grown is premised on the emergence of a wide variety of social movements and non-governmental organizations pressing for human rights, the flourishing of international and regional human rights declarations, and the expansion of human rights discourses, as it is in Mendus’s case, or whether it is associated with the spread of modernity as it is for others, it threatens to neglect some problems currently besetting human rights broadly construed to include international, regional and constitutional rights by oversimplifying the character of existing political commitments to them. While it seems true that human rights have become the *lingua franca* of late modernity, it is because political commitments to them have been *challenged* in a variety of ways by political elites, social movements and processes connected with multiculturalism and globalization, as well as by the post metaphysical turn in philosophy, that issues of their justification and legitimation are currently pressing.

Multicultural claims and movements raise questions for and in the constitutional regimes of established liberal democracies and elsewhere by bringing different cultures into close contact while also maintaining that equal respect requires the recognition and protection of cultural differences. In their milder forms, such movements may challenge the adequacy of universalistic conceptions of citizenship rights for meeting the needs of cultural minorities. More radical claims may be directed at the very nature and interpretation of rights and their apparently liberal underpinnings. Similarly, claims of cultural differences at the global level sometimes raise challenges to the content and roots of existing articulations of international

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human rights, or, more radically, to their legitimacy. Thus, one of the more intractable debates has been whether human rights—heirs of the Enlightenment project—are truly universal, or rather, whether they represent merely Western sentiments and commitments. And, not just philosophers and political and social theorists express these concerns; they are also expressed in social movements, in their struggles and strategies, and by political elites.

Processes of globalization are complex, still obscure and apparently contradictory. On their cultural, social and political side they may involve the nascent emergence of global public spheres and global civil society as well as global interpenetration bringing different cultural groupings and societies into closer proximity raising the question of "whose" norms and "which" understandings shall govern global relations and under what conditions. These processes of globalization are such that they may bring with them possibilities for new political projects, transnational solidarities and transformative forms of cosmopolitanism. As well, however, globalization has brought breathtaking increases in global inequality and expanded possibilities for both global and local injustices and forms of domination. Increasingly, some perceptive critics view the new situation as involving important democratic deficits and a new form of imperialism view the new situation. Boaventura de Sousa Santos suggests, for example, "[e]ven if it is true that the intensification of cross-boundary encounters and interdependency have created new terrains hospitable to tolerance, ecumenicism, world solidarity and cosmopolitanism, it is no less true that, side by side, new forms of intolerance, chauvinism and imperialism have likewise developed."

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7 See, e.g., JURGEN HABERMAS, Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years Hindsight, in Perpetual Peace: Essays on Kant's Cosmopolitan Ideal 113-154 (James Bohman & Mathias Lutz-Bachmann eds., 1997); JAMES BOHMAN, The Public Spheres of the World Citizen, in Perpetual Peace: Essays on Kant's Cosmopolitan Ideal 179-200 (James Bohman & Mathias Lutz-Bachmann eds., 1997).

8 See Cosmopolitics: Thinking and Feeling Beyond the Nation (Pheng Cheah & Bruce Robbins eds., 1998), for discussions of different forms of cosmopolitanism.


10 SANTOS, supra note 1, at 257.
In this context, from one point of view, the discourses of human rights seem increasingly pertinent, as human rights movements take the stage demanding that nation-states, capital, regional blocs and international and local actors live up to human rights norms. Yet it is painfully clear that rights can be wielded in multiple and contradictory ways, as both emancipatory and regulatory forces.\textsuperscript{11} Emphasizing the regulatory dimensions in an important contribution to thinking about the implications of the rise of cosmopolitan law, Ulrich Beck suggests that it is precisely insofar as demands for human rights are legitimate that we may neglect to notice "how neatly they can be dovetailed with old fashioned aims of imperialist world politics."\textsuperscript{12} Human rights imperialism may have many faces—military, cultural and political to name the most obvious—but it is the cultural face of human rights, which has perhaps been most significantly contested recently. The processes of globalization have been identified as involving the imposition of a "globalized Western localism" in the form of the imposition of dominant conceptions of human rights on societies, cultures or actors that reject them, who have not been equal participants in the development and interpretation of human rights norms,\textsuperscript{13} or who wish to renegotiate the boundaries, interpretation and content of existing conceptions of human rights and develop new ones. All of this should caution us against "triumphalist" conclusions about the emergence of cosmopolitan law and the evasions that the claim that commitment to human rights has grown may engender.


\textsuperscript{12} Beck, supra note 9, at 86.

\textsuperscript{13} SANTOS, supra note 1, at 339. "It is a common complaint in the non-Western world that 'international' human rights instruments [like the Universal Declaration of Human Rights] have been shaped largely by the values and aspirations of Western liberal societies and they have not yet adequately incorporated non-Western views." Daniel A. Bell, Which Rights are Universal? 27 POL. THEORY 849, 849 (1999).
Under these conditions of a variety of challenges to human rights, a
defensive and dogmatic "pro human rights" position cannot be sustained for
such a position threatens to treat unjustly those who feel excluded and mis-
recognized—to say nothing of feelings of more abject violation—precisely
by various aspects of current human rights regimes. Yet, we should not
give up the ground of human rights as a potentially emancipatory project.
This seems especially important now when the processes of economic
globalization bring with them an almost unimaginable expansion in the pos-
sibilities for oppression and exploitation while cultural globalization threat-
ens a neoimperial homogenization and military hegemony threatens violent
destruction. It is in this context that I think we should seek to deepen politi-
cal and social commitments to human rights globally, but this may require
opening the door to a new legitimation of them. Under these conditions,
legitimation must countenance the resistance to, and the demands for, the
reexamination and possibly the reinterpretation of human rights norms,
rather than relying on a dogmatic defense of existing rights against all chal-
lengers. This may allow address of one aspect of the problem of the
'dovetailing' between human rights and imperialist politics—the aspect of
cultural imposition.

If a problem currently besetting human rights is that they are in fact
politically contested, then a turn to "the political" like Mendus's is incom-
plete. The presence of a variety of doubts about and contests over rights is
expressed in everyday political practices, not just by philosophers and politi-
cal theorists of an anti-foundational stripe. De Sousa Santos maintains that
the "record of violations of human rights across the world system in the
postwar period is a cruel comment on the human rights dominant discourse
and a flat denial of the practical validity of international declarations on
normative consensus."\textsuperscript{14} I am unconvinced that such violations constitute
flat denials of validity—practical or otherwise. But there is a range of politi-
cal challenges to international, regional and domestic human rights regimes
that can only effectively be met through renewed attention to enhancing
their social and political legitimacy, a problem that strategies like Mendus's
of identifying what we stand to lose if we renounce rights is insufficient to
address. While I agree that we should seek to avoid foundationalist ver-
sions of justification, a monological approach is inadequate under these
circumstances.

The role attributed to the justification and legitimation of human
rights should thus be clarified. If it is the case that commitments to, and
interpretations of, human rights face a variety of political challenges, then a
turn to "the political" requires a turn to \textit{political and social legitimation}.

\textsuperscript{14} \textit{Santos, supra} note 1, at 332.
Many commentators recognize that the gap between the “theory and practice” of rights hinders their effectiveness. For example, Abdullahi An-Na’im says, “the process through which the current international human rights standards were formulated and adopted did not address issues of cultural legitimacy in relation to most of the cultural traditions of the world.”\(^{15}\) James Nickel suggests, “it is very doubtful whether there is sufficient agreement worldwide to support anything like the full range of rights declared in contemporary manifestos.”\(^{16}\) Similarly, Jurgen Habermas maintains, “[h]uman rights provide the sole recognized basis of legitimation for the politics of the international community; nearly every state has by now accepted, at least on paper, the United Nations Declaration of Human Rights. Nevertheless, the general validity, content and ranking of human rights are as contested as ever.”\(^{17}\)

We should resist foundationalist or metaphysical conceptions of justification for they are both unconvincing after the post metaphysical turn and, under these conditions of contestation, they are counterproductive. The post metaphysical turn rejects the metaphysical assumptions so deeply embedded in much rights discourse, maintaining that there are no ultimate foundations on which we could hope to ground an objective morality, or a set of incontestable, inalienable human rights.\(^{18}\) Thus, we cannot, as Nickel


\(^{18}\) Seyla Benhabib indicates the outlines of the “metaphysical illusions of the Enlightenment” as including “the illusions of a self-transparent and self-grounding reason, the illusion of a disembedded and disembodied subject, and the illusion of having found an Archimedean standpoint, situated beyond historical and cultural contingency”. These illusions, she maintains, have “long ceased to convince.” A postmetaphysical version of “interactive universalism”, on the other hand, involves “the universal pragmatic reformulation of the basis of the validity of truth claims in terms of a discourse theory of justification; the vision of an embodied and embedded human self whose identity is constituted narratively, and the reformulation of the moral point of view as the contingent achievement of an interactive form of rationality rather than as the timeless standpoint of a legislative reason. Taken together, these premises form a broad conception of reason, self, and society.” **Seyla Benhabib**, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* 4, 6 (1992).
suggests, "discount disagreement" on human rights. Furthermore, adherence to a foundationalist justification is positively counter-productive for addressing the most pressing problems of human rights in late modernity because it fails seriously to address the variety and force of the claims that are launched against human rights in political struggles lapsing instead into "moral imperialism," a position that can be expected to foment further objections and resistances to human rights.

Yet, we require justifications and legitimations for human rights for, as Michael Freeman has put it, "rights without reasons are vulnerable to denial and abuse." Arguments like Mendus's that provide a reasoned, pragmatic defense of human rights by specifying the political functions they fulfill are an important part of this process despite the fact that she denies that her reason-giving takes the form of a justification. But justification need not be "foundationalist" in the sense of relying on ultimate truths about human nature that are treated as self-evident or above rational contestation. As Freeman further recognizes, "[t]o avoid the charge of moral imperialism, human rights advocates must vindicate the philosophical correctness of their position." It is the "vindication" of human rights that must be undertaken in an effort to enhance their political and social legitimacy, and this, I will suggest, may best be approached deliberatively, since legitimacy, after the post metaphysical turn, depends on rational acceptability. On the Habermasian version of the turn, for which I will argue, the loss of ultimate foundations does not issue in the rejection of reason, of conceptions of moral rightness or of universalism. Rather, these aspects of rights
discourse are recast in intersubjective, discursive and procedural terms, leaving rights bereft of ultimate guarantees, yet not rendered so contingent that "all that is solid melts into air."

The confluence, then, of multiculturalism, globalization and postmetaphysical thinking has the following consequences. First, while natural rights language continues to be employed in political and social struggles, natural rights theory is no longer convincing to many. Second, under conditions of globalization and multiculturalism we seem to require the resources of rights in order to challenge the new and multiplying forms of domination both to protect and to limit multicultural claims and to respond to processes of globalization. But, third, these transformations signal the necessity for opening human rights up to reinventions and reinterpretations in order to respond to new challenges and, crucially, to legitimate human rights as (possibly) genuinely universal. Conceived by and put into place largely through the ministrations of "the West," it is time that human rights receive the political and social legitimation that only intra- and cross-cultural dialogues can provide in order, as de Sousa Santos has so compelling put it, to begin to develop a "post-imperial" conception, legitimation and hopefully practice, of human rights.

I will argue that a turn to the deliberative proceduralism that lies at the heart of Habermasian Critical Theory, bolstered by Santos's suggestion that the most pressing issue of our time "consists in transforming the conceptualization and practice of human rights from a globalized localism into a cosmopolitan project,"24 holds the promise of developing such a post-imperial approach to human rights aimed at justly developing the political and social legitimacy necessary (but not necessarily sufficient) for their just implementation and cross- and intra-cultural acceptance. Globalization, multiculturalism and postmetaphysical thinking require that we legitimate human rights standards through radically open, potentially transformative dialogues and justificatory discourses, dependent on political projects and more and less contestatory social movements which press for their reinvention and relegitimation. I will argue that Habermas's conception of deliberative proceduralism is well-suited to this task.

In the first section of this article I consider the interpretive and agonal approaches that, with the postmetaphysical turn, vie for the acceptance that procedural approaches like Habermas's also seek, providing alternative versions of the relationship between "the political" and human rights. Interpretive approaches thematize the importance of everyday political, societal and cultural practices that may congeal into "shared understandings" establishing the legitimacy of human rights or they thematize a pragmatic

24 Santos, supra note 1, at 339.
“persuasive” strategy for extending the recognition of rights. Agonal approaches emphasize the importance of unbounded agonistic or contestatory politics, in particular to the expression of difference. In the second section I will argue that Habermasian approaches, on the other hand, are premised on a discursive theory of democratic legitimacy highlighting the importance of a procedurally governed, deliberative legitimation of human rights. I maintain that we require attention to both the often contestatory politics of rights as is sometimes illuminated in interpretive and especially in agonal accounts and to their deliberative legitimation. Attention to the necessary relationship between the political struggles around rights and the conditions for their just redefinition and legitimation may be accommodated by developing a discourse-theoretic approach to rights on the basis of Habermas’s procedural theory of deliberative democratic legitimacy.

I. INTERPRETIVISM AND AGONISM

From Rawls to Rorty, Walzer to Warnke, the project of philosophically justifying rights seems to have given way to one of “articulating” rights,25 that is, articulating the “deeper understandings” shared by a community or the world,26 articulating the “overlapping consensus,”27 or articulating “sad and sentimental stories” that are said to provide the only available basis for the recognition of rights and the extension of “our human rights culture.”28 The appeal of an interpretive approach under conditions of postmetaphysics, multiculturalism and globalization seems obvious. It avoids foundationalism and in the hands of authors like Michael Walzer and Georgia Warnke, at least, it seeks to respect pluralism and difference. In Walzer’s case this is sought by relying on an empirical version of universalism coupled with a limited cultural relativism, while for Warnke it is sought by appealing to forms of pluralistic, hermeneutic conversation.29 But some of the problems that an interpretive approach faces are also clear. I will

25 For the idea that these approaches “articulate” rather than justify rights see Mendus, supra note 2, at 15. See also Shane O’Neill, Impartiality in Context: Grounding Justice in a Pluralist World 7 (1997).
26 Michael Walzer, Spheres of Justice (1983) [hereinafter, Spheres of Justice]. See also Michael Walzer, Thick and Thin: Moral Argument at Home and Abroad (1994) [hereinafter, Thick and Thin].
focus on Walzer’s and Rorty’s positions in order to clarify what I take to be the nature of these problems.

Michael Walzer’s interpretive approach to matters of justice and human rights seeks to resist the “philosophical impulse” to clarify the moral point of view of impartiality. According to Walzer, there is no such singular thing, no “moral equivalent of Esperanto,” no Archimedean point dissociated from context and history capable of providing a ground zero or neutral point of view. He thus rejects proceduralism for this one overarching reason; that what is considered the procedural minimum by authors as diverse as Rawls, Hampshire and Habermas actually constitutes quite a substantive basis, reflecting a particular way of life. In place of such proceduralism, Walzer seeks to interpret and articulate what “people like us would choose,” “situated as we are.” This, then, requires attention to shared understandings of social goods and our relations to them and this, in turn, requires attention to our “deeper understandings” of social goods—those “roughly knowable standards” that are “not necessarily mirrored in the everyday practice of domination and monopoly.” With the emphasis on interpreting cultural understandings, Walzer suggests that justice requires respect for the specific creations of particular societies, thus respecting the “universalism of ‘self-determination.’”

Walzer does not deny that there may be universal moral principles like human rights. For Walzer, moral principles may be found in the “thick” social understandings of a particular community where they express societal shared understandings and where they are reiterated across communities to form “thin,” morally universal, but empirical or conventional, and “reiteratively particularist” commitments. By “reiteratively particularist” Walzer means that such universal commitments are not foundational in character. Rather, they designate reiterated features of thick particular moralities expressing common responses to societal problems. Human rights are one type of such reiterated commitments providing the conventional ground rules for “peaceful coexistence” between societies and cul-

30 SPHERES OF JUSTICE, supra note 26.
31 THICK AND THIN, supra note 26, at 9.
32 RAWLS, A THEORY OF JUSTICE (1971); STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000); Morality and Ethical Life, supra note 22; THICK AND THIN, supra note 26, at 12.
33 SPHERES OF JUSTICE, supra note 26, at 18, 10, n.3, 26, 314.
34 THICK AND THIN, supra note 26, at x.
36 THICK AND THIN, supra note 26.
37 Id. at 10.
Such thin, but widespread, minimum morality is, according to Walzer, important for expressing mutual recognition and providing grounds for both solidarity and criticism. While seeking to be pluralistic by respecting the moral equality of different peoples, however, I believe that Walzer's approach to issues of justice and rights exemplify some weaknesses of postmetaphysical approaches of the interpretive or hermeneutic sort.

By expressly rejecting proceduralism interpretive approaches like Walzer's cannot deal adequately with multiculturalism or globalization. While immanent interpretation coupled with a culturally relativist stand may appear to accommodate multicultural concerns by respecting cultural plurality, in fact it is hard-pressed to deal with the increasingly relevant phenomenon of multicultural, multinational states like Canada and the U.S. In such cases, where a variety of conflicting "shared understandings" are likely to meet and clash, what are the principles of justice to be recognized and how are they to be chosen? This remains unclear despite Walzer's recent attention to modes of toleration. The underlying problem here, as in his earlier work, remains the interpretive approach that he employs to discern appropriate modes of toleration under various conditions. As illuminating as his thick descriptions are, his normative analysis remains a subjective, rather than an intersubjective, interpretation of purportedly extant practices and understandings. In this work, as in earlier ones, we find no non-interpretive way of judging between his account and other possible accounts for he offers, and given his approach can offer, no criteria for judging...

39 Thick and Thin, supra note 26, at 17.
40 One pitfall that I do not think Walzer falls into, but others do, is conventionalism or conservatism. Benhabib's interpretation of Walzer's position as a "normative hermeneutic" which seeks not just to read, but rather to revise, common cultural understandings with "better" and more progressive ones and Warnke's that his are "partisan interpretations" are correct, I think. See Benhabib, supra note 18, at 79-80; Warnke, supra note 29, at 37. By appealing to a society's "ideals" and interpreting them in this normative way, Walzer seeks to avoid mere conventionalism. This is made especially clear in his response to critics. See Thick and Thin, supra note 26, at 41-61.
41 Thick and Thin, supra note 26, at 12. See also Walzer, supra note 38, at 1-7; Spheres of Justice, supra note 26; Walzer, A Critique of Philosophical Conversation, in Hermeneutics and Critical Theory in Ethics and Politics 182-195 (Michael Kelly ed. 1990) [hereinafter, A Critique of Philosophical Conversation].
42 Walzer, supra note 38.
Furthermore, if there can be no limits to particular cultural practices other than those that all cultures have more or less spontaneously reiterated—an empirical thin universalism—or those which are immanent within the practicing culture—a matter of thick morality—is not the possibility for limiting multicultural claims, as Walzer acknowledges may be necessary,\textsuperscript{44} hampered? Reliance on reiterated commitments to provide the substance of moral universalism seems inadequate to conceptualize such limits since, in the absence of reiteration, there would be no legitimately binding norms to which we could appeal. While we will see that vulnerability to some level of agreement or mutual understanding is an aspect of Habermasian approaches as well, as it is all other postmetaphysical approaches that reject unrestrained power politics, in Walzer’s interpretive approach there is no consistent commitment to a procedure that might provide the possibility of transforming existing understandings through argumentation and the confrontation of views as there is in Habermasian theory.

Perhaps most damagingly, an attempt to articulate human rights on the basis of shared understandings and reiteration seems incapable of distinguishing between “truly shared” commitments or genuine universalism and the imposition of rights standards or particular conceptions of rights on either resisting or simply vulnerable actors and groups within a culture and across cultures. Similarly, the claim that those human rights are legitimate that have achieved “historical essentiality”\textsuperscript{45} worldwide neglects to inquire into the conditions under and processes by which rights have developed, thereby threatening to confuse a “genuine” empirical universalism with a “false” one. Thus, while consistently maintaining an interpretive rejection of proceduralism, such approaches cannot distinguish adequately between human rights standards that have been imposed as a “globalized Western localism” and those, as Walzer would like to understand reiteration, that are extended as acts of “mutual recognition.” Yet the entire history of human rights development is littered with impositions, at the level of the regulatory deployment of human rights in order to justify armed or otherwise coercive intervention by hegemonic nation-states, at the level of the recognition and

\textsuperscript{43} Forst, \textit{supra} note 22, at 145. \textit{See also} Warnke \textit{supra} note 29, at 30.

\textsuperscript{44} \textit{Thick and Thin}, \textit{supra} note 26, at x.

\textsuperscript{45} Pauline Johnson, \textit{Feminism As Radical Humanism} 11 (1994). The incoherence of the idea of “historically acquired essentiality” appears later in Johnson’s argument. She claims that certain rights have acquired an historical universality “\textit{for those who recognize them}” but this qualification both seems to undermine the claim of universality and evades the question of how to identify who has “recognized” them. \textit{Id.} at 130 (emphasis added).
construction of human rights documents and declarations and at the level of their interpretation.

This difficulty can be illustrated further by considering Walzer’s discussion of gender and cultural practices in On Toleration. Describing the transformation from a “virtually universal male domination” that posed strict limits to political discourse over issues involving gender roles and family arrangements, he maintains that “[t]oday, widely accepted ideas about equality and human rights call those limits into question.”46 But of course Walzer provides no justification for those human rights—indeed, he cannot do so given his theoretical position. So we cannot determine whether they are impositions of unequal power or acts of mutual recognition. Yet the arbitrariness of his position becomes evident when, discussing female circumcision in immigrant communities in France, he confidently proclaims “toleration surely should not extend to ritual mutilation.”47 However, as protracted and divisive debates over these practices reveal,48 this is a matter of considerable complexity and contestation and Walzer’s “culturally intolerant” position is neither sufficiently grounded in a normative analysis—because it is based simply on conventional or social acceptance of the relevant rights and the hegemonic objections to these practices—nor in a respect for other cultural practices that surely require at least a “hearing” rather than dismissal on the basis of a merely, on this account, conventional norm. In recent work, Walzer has sought to answer some of his critics’ charges, but in so doing his approach seems to be inflected increasingly toward a procedural position, in fact, not unlike Habermas’s, while he still explicitly rejects the validity of such an approach. Walzer’s replies to his critics, therefore, seem to provide further evidence of the untenability of a strictly interpretive approach. For example, Walzer has clarified that for

46 Walzer, supra note 38, at 60.
47 Id. at 63.
“shared understandings” to be considered genuine they “must meet certain
criteria—nonsubstantive but not merely formal. They must actually be
shared across a society. . .and the sharing cannot be the result of radical
coercion.” Yet, he insists that such understandings need not “be worked out
in anything like the Habermasian ideal speech situation. All that it requires
is that the extorted agreement of slaves to their slavery, to take another easy
example, should not count. . . .We must look for real agreements. . . .We
reach such a view at the end of a complex historical process.”49 More re-
cently, in the face of controversies over multiculturalism, he suggests that,
in contrast to responses that counsel the re-hegemonizing of high culture in
order to stabilize (read re-homogenize) the society, “there is a better re-
response to pluralism, it seems to me: democratic politics itself, where all the
members of all the groups are (in principle) equal citizens who have not
only to argue with one another but also, somehow, to come to an agree-
ment.”50 How can this agenda be advanced? Walzer suggests we need to
“sustain and enhance associational ties including trade unions, family ties,
and cultural associations which are crucial, he argues, to “democratic learn-
ing.”51 But Habermasian Critical Theory which relies on discursive prin-
ciples of legitimation is also, precisely, oriented toward identifying
systematically distorted communication (Walzer’s “extortion” and “radical
coercion”), envisions ongoing conversations in the network of communica-
tive practices (rather than a knock-down argument and agreement in a
mythical ideal speech situation which amounts to “philosophical talk”
rather than “real talk”)52 and emphasizes the importance of public spheres
and civil societies that are composed, crucially, of a variety of “associa-
tional ties” oriented toward the “democratic learning” that Walzer seeks.53

49 THICK AND THIN, supra note 26, at 27.
50 WALZER, supra note 38, at 97.
51 Id. at 105.
52 A Critique of Philosophical Conversation, supra note 41.
53 See Forst for a brilliant articulation of this idea in the context of Walzer’s ap-
proach to critique. Forst suggests that Walzer’s reliance on the idea of “shared
understandings” leads him to a position that differs only in emphasis from
Habermas. When one asks “what is the criterion for right and valid criticism?”
Forst claims that even for Walzer it is, “what is generally justifiable to all the
members of a community without the exclusion of some.” And he concludes, “as
long as internal criticism can only appeal to those social norms that can be shared,
its vindication can only be general consensus.” In a more wide-ranging considera-
tion, we might usefully ask whether this is generally true of interpretive ap-
proaches. Forst seems to imply this when he says: “That is the idea of justification
on which ‘immanent criticism’ rests — an idea of reasonable justification, of recip-
Walzer’s interpretive approach actually appears to be moving toward a more deliberatively procedural one, yet he continues to deny the validity of such an approach.

While Walzer’s position now appears to be in flux, or at least includes a deep tension between an interpretive and a more procedural position, the pitfalls of an interpretive position’s apparent inability to distinguish between imposed and consensual “agreements” to human rights and the appeal of a more deliberative version of proceduralism becomes stunningly clear in Richard Rorty’s work. In his argument for adopting a pragmatic position toward extending the legitimacy claim of rights beyond what he calls “our Eurocentric human rights culture” to others, he explicitly calls for a “manipulation of the sentiments” of others, a telling of sad and sentimental tales in order to expand the boundaries of those whom we consider part of “our moral community” and making our “morally superior” human rights culture “more powerful” and widespread. The appreciation that Rorty shows for the political advocacy work that may be undertaken to persuade others of one’s own human rights position and his plea for the relevance of emotion, sentiment and imagination (what would it be like to walk in her shoes?) are, I believe, necessary for, but not sufficient to, the just expansion of human rights culture. Rorty’s pragmatism also evinces a corrosive, albeit famously self-conscious, ethnocentrism. But, such an approach is more than ethnocentric. It is, as well, neo-, rather than post-, imperial. Here the advocacy mission is conceived as a manipulative persuasion, treated as a one-way street inattentive to lessons that may be learned from, or critiques that may be launched from, others, requiring no attention to the claims of other cultures or traditions, and certainly displaying no sense that our own cultural understandings may contain blind spots and weaknesses. Ultimately, Rorty’s position is inattentive to a distinction between a political project aimed at advocatory persuasion, even by manipulation or imposition, on the one hand, and securing the sorts of conditions that would be necessary to view the results of persuasive practices legitimate, on the other hand.

55 Note that others, besides the “party of humanity,” may rely on a manipulation of sentiments as well. For example, recounting An-Na‘im’s work, Santos reports that absolutist Muslims have attempted to counter reformists by proposing the Shari’a “as a miraculous cure for all the ills of Muslim societies, but it is in fact a...
When rejecting proceduralism entirely, interpretive positions that urge the articulation, rather than the justification or political and social legitimation, of human rights thus founder on the shoals of legitimacy. Furthermore, despite their attempt to illuminate the politics of rights, politics is rendered placid or structural, as in Walzer's case, where shared understandings and reiterations are treated as rather mysterious cultural and political byproducts, or politics is rendered singularly instrumental, as in Rorty's analysis, where attention to the desirability of politics as deliberation is ignored in favor of politics as a "manipulation of the sentiments." Such approaches seem incapable of doing what Walzer so ably identifies as central to pursuing "justice justly." To pursue justice justly, he says, we must show "a decent respect for the opinions of mankind. Not the opinions of this or that individual. . .I mean those deeper opinions. . ." But that "decent respect for the opinions of mankind" cannot sufficiently be shown by employing monological, interpretive approaches. I wish to suggest that it may, however, be honored on the basis of a deliberatively conceived procedural approach to the legitimation of human rights that provides conceptual resources for distinguishing between false and legitimate understandings and that is rooted in the normative ideal of humankind determining jointly, freely and equally that such norms are justified via the emergence of inter-subjective reasons for supporting rights—as Walzer, himself, avers in his less interpretive moments.

But there is another prominent approach that attempts to address the relationship between "the political" and human rights. Agonal positions aligned with Hannah Arendt's work and with postmodernism may be viewed as an antidote to the ultimately apolitical character of interpretive positions like Walzer's, while they threaten to exacerbate the legitimacy deficit implicit in approaches like both Walzer's and Rorty's. Yet, while having little to say specifically about human rights, they maintain an important political impulse and an attention to power and contestation that needs to be attended to in any postmetaphysical legitimation of rights.

When agonal positions understand politics as "resistibility, openness, creativity, and incompleteness" they capture one side of the coin. 

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56 Spheres of Justice, supra note 26, at 320.
58 Bonnie Honig, Toward an Agonistic Feminism: Hannah Arendt and the Politics of Identity, in Feminists Theorize the Political 215-235 (Judith Butler & Joan W. Scott eds. 1992). See also Judith Squires, Liberal Constitutionalism, Identity
We must accept, it seems to me, that incessant questioning and the ever-present possibility of resistance and resistibility are necessary and desirable aspects of post-traditional societies, national and global. It is through such practices that human rights get elaborated, placed on political agendas, questioned, contested and reconceived. It is also how they remain self-reflexive. In this way, the sociological side of rights may be understood. If, on the other hand, agonal positions reject proceduralism entirely, because they view procedures, rules, constitutions and the like as "constative" and necessarily antipolitical, as Judith Squires suggests they do, in fact they do not take their own agonal inclinations seriously enough.

Such a version of agonism can be found in Wendy Brown's work. On this version agonism is equated with a rejection of procedural norms and moral claims or any commitment to normativity. This is made clear when Brown counsels that "[s]urrendering epistemological foundations means giving up the ground of specifically moral claims against domination . . . and moving instead into the domain of the sheerly political: 'wars of position' and amoral contests about the just." On this understanding, agonism is both dangerous and inconsistent. It is dangerous for it proposes no way to conceptualize the means by which to accommodate the diversity so pressing in contemporary life in a noncoercive manner. It appears inconsistent when, like Walzer's later defence of interpretivism, it also often seeks procedures. For example, just after counseling us to give up moral claims against domination and engage in 'wars of position', Brown calls for "the deliberative development of postmoral and antirelativist political spaces, practices of deliberation, and modes of application." But it is only...
on an understanding of the "moral" as defined by foundationalism that we would require postmoral spaces, and "antirelativist" political spaces and deliberative practices clearly make reference to some sort of commitment to proceduralism. From a discourse-theoretic point of view, constitutions—to take a key example—are not constative and antipolitical. Nor are rights treated as self-evident truths, lacking any requirement for "'argumentative demonstration or political persuasion,'" requiring no element of mutual understanding for their validity. Neither does a deliberative view indicate that the content of constitutions and rights must be fixed, immune to transformation. If we understand the core of agonism to mean something like continual openness to contestation, resistibility and redefinition—a commitment to transformative possibilities—and understand human rights in postmetaphysical terms, then there is room, I suggest, for the combination of such agonal inclinations and deliberative procedural commitments, with proceduralism supplying a possible answer to the legitimation gap that is position regarding democratic institutions, human rights and the public spheres is inconsistent and inconclusive. For example, she conflates Rawls's and Habermas's versions of rational politics and universalism and, on the basis of a review of Rawls, concludes that we must reject any form of rationalism and yet she also claims that we must be able to distinguish between subordinating forms of difference, which must be limited or excluded, and emancipatory forms. But how is this to be done while avoiding all forms of rationalism? Chantal Mouffe, Democracy, Power and the 'Political', in Democracy and Difference, 245-256 (1996).

65 See Brown, supra note 57, at 51 for further confirmation of the inconsistency in agonal positions. Here, Brown calls for democratic political spaces where "political conversation oriented toward diversity and the common [sic]. . . offers us the greatest possibility of countering postmodern social fragmentations and political disintegrations." Id.

66 Honig relies on the distinction made by Austin between constative and performative uses of speech. In constative speech, the speaker states something. In performative speech, she does something. Using this distinction to probe Hannah Arendt's work, Honig emphasizes the difference in the American Declaration of Independence between the performative "we hold" and the constative "truths to be self-evident." Bonnie Honig, Toward an Agonistic Feminism: Hannah Arendt and the Politics of Identity, in Feminism and the Interpretation of Hannah Arendt 135, 161 n. 5 (Bonnie Honig ed., 1995).

67 Hannah Arendt quoted in Honig, supra note 58, at 217. In this revealing passage, Honig reviews Arendt's treatment of the American Declaration of Independence. Arendt claims that the Declaration of Independence receives its authority from the performative "we hold" rather than the "constative" "truths to be self-evident." Id.
necessarily left open in at least these versions of agonism and agonal commitments to jettisoning moral discourse and any and all commitment to rationality, mutual understanding or procedural justice.

Interpretive and agonal approaches to “the political” often end up, then, in one of two untenable positions that have negative implications for human rights. Either they reject proceduralism entirely, in which case there is no way to evaluate the legitimacy of human rights norms, leaving them entirely to the play of “amoral power politics,” or they are inconsistent in rejecting proceduralism while also falling back into it. The latter problem is a serious one less because of its conceptual inconsistency and more because it can maintain only a casual, radically underdeveloped conception of proceduralism.

II. HABERMASIAN CRITICAL THEORY AND THE LEGITIMATION OF RIGHTS

Scholars of human rights have begun to develop more intersubjective and deliberative orientations than that which is sometimes inconsistently and unevenly present in interpretive and agonal approaches. Abdullahi An-Na’im and de Sousa Santos have been at the forefront of these developments, but others have also adopted more or less self-con-

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68 Thus combining “juridical settlement” with “the perpetuity of political contest.” O’Sullivan, supra note 63, at 745. My interpretation is consistent with Markell’s interpretation of Habermas’s politics as requiring agonistic politics, and Benhabib’s apparent agreement with this. My interpretation also makes sense of a tension in Squires’ analysis of agonism. She contends that theorists of agonism necessarily reject proceduralism, yet she later acknowledges that some agonal theorists, like Mouffe, in fact attempt to combine the two. See Patchen Markell, Contesting Consensus: Rereading Habermas on the Public Sphere, 3 Constellations 377 (1997); Democracy and Difference, supra note 58, at 74; Squires, supra note 58, at 96.

69 There are important differences in “procedural” positions. Rawls’s use of the “original position” is also procedurally oriented, for example. I focus here only on deliberatively interpreted versions of proceduralism. Rawls, supra note 32. See Kenneth Baynes, The Normative Grounds of Social Criticism: Kant, Rawls, Habermas (1992); Benhabib, supra note 18; Simone Chambers, Reasonable Democracy: Jurgen Habermas and the Politics of Discourse (1996); Between Facts and Norms, supra note 22; Jurgen Habermas, Three Normative Models of Democracy, in Democracy and Difference, supra note 58, at 21-30; Jurgen Habermas, Paradigms of Law, in Habermas on Law and Democracy: Critical Exchanges 13-25 (Michel Rosenfeld & Andrew Arato eds., 1998) [hereinafter Paradigms of Law]; O’Neill, supra note 25, for discussions of deliberative proceduralism.
De Sousa Santos and An-Na’im begin from the proposition that the dominant discourses of human rights bear Western marks, in their predominately individualistic and secularist orientation, in the processes of their constitution or in their regulatory deployment. They maintain that official recognition does not signify internal or cross-cultural legitimacy and, in fact, the majority of relevant actors had no input into crucial documents like the Universal Declaration of Human Rights. Deliberatively oriented analyses and conceptions of human rights—international, regional, national and local—emphasize the importance of intra-cultural and cross-cultural deliberations and contestations premised on political equality and mutual recognition in order to enhance or secure the openness of, the resistibility to, and the legitimacy of, human rights. De Sousa Santos, for example, proposes a “diatopical hermeneutics” that “requires a production of knowledge that must be collective, interactive, intersubjective and networked.” Such deliberatively achieved legitimacy is crucial for the practical effectivity of human rights and suggests a process which may open human rights up to a variety of challenges, redefinitions and the possibility of legitimating both “old” and new rights justly.


There is, as well, a growing literature in development studies. See Rosalind P. Petchesky, Spiralling Discourses of Reproductive and Sexual Rights: A Post-Beijing Assessment of International Feminist Politics, in WOMEN TRANSFORMING POLITICS 569-587 (Cathy J. Cohen, Kathleen B. Jones, & Joan Tronto eds., 1997); Ann Ferguson, Resisting the Veil of Privilege: Building Bridge Identities as an Ethico-Politics of Global Feminism, 13 HYPATIA 95 (1998). In international ethics, see Alison M. Jaggar, Globalizing Feminist Ethics, 13 HYPATIA 7 (1998); David L. Blaney and Naeem Inayatullah, Prelude to a Conversation of Cultures in International Society? Todorov and Nandy on the Possibility of Dialogue, 19 ALTERNATIVES 23 (1994). In social theory see generally, DALLMAYR, supra note 5; James Tully, Struggles Over Recognition and Distribution, 7 CONSEQUENCES 469 (2000).


72 SANTOS, supra note 1, at 345.
These analyses point in promising directions. But, it is Jurgen Habermas who has provided the most sophisticated procedural theory of deliberative democratic legitimacy that may be helpful in refining the pursuit of a deliberative legitimation of human rights, while authors broadly associated with Habermasian Critical Theory, like James Bohman and Peter Swan, further develop these insights. These analyses offer a more productive approach to human rights and "the political" than what is available in interpretive and agonal approaches.

The rejection of, or inconsistent commitment to, procedural norms in interpretive and agonal approaches to human rights and justice, is addressed in Habermasian approaches to the dilemmas posed by postmetaphysical, multicultural and globalizing conditions. Habermas maintains that "the democratic process bears the entire burden of legitimation" as the "only postmetaphysical source of legitimacy." Seizing on the call for the conceptualization and development of deliberative democratic spaces that is inconsistently posed by authors like Wendy Brown, and the call for resistibility to "the consolidations and closures of administrative and juridical settlement" by Bonnie Honig, Habermasian approaches to legitimacy offer the promise of opening up human rights discourses to the sorts of questioning and contestation properly countenanced in agonism, while providing the deliberatively interpreted procedural ideals by which legitimacy may be evaluated and possibly secured. They seem, in other words, to have the resources to be both sociologically aware of the facts of the contestatory side of rights as well as the normative and practical need for political and social legitimation rather than success by mere power politics or a manipulation of sentiments. Such an orientation may offer substantial promise under conditions of multiculturalism and globalization because of its commitment to legitimation by open, inclusive intra- and cross-cultural deliberation.

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74 Between Facts and Norms, supra note 22, at 450, 448.

Habermas's analysis of human rights is two-tiered. First, he attempts to produce a "discourse theoretical justification of basic rights." Second, he develops a deliberative conception of the interpretation, expansion, contestation and legitimation of human rights. As articulated in his moral theory and developed in his political and legal theory, Habermas's discourse-theoretic view of legitimacy is premised on an intersubjective, communicative conception of reason that emphasizes that the achievement of deliberative conditions is the key to political legitimacy and normative rightness. He seeks to locate the justification of norms, including rights, in a postmetaphysical way that falls neither into liberal natural rights theory nor into civic republican, communitarian, conventionalist, or "articulationist" accounts. Ultimately, the thrust of Habermas's discourse-theoretic approach to legitimacy indicates that the determination and legitimation of human rights standards must rest on public justification and deliberation, aimed at producing mutual understanding, under procedural conditions of freedom, political equality and publicity, free of coercion, thus permitting argumentation based on the "exchange of information and reasons among parties who introduce and critically test proposals." Elaborating the requirements of discourse ethics and rendering them appropriate for political opinion-formation and decision-making, Habermas suggests that the key to a proceduralist understanding of law is that legal orders and human rights owe their legitimacy to "undistorted forms of public communication" as found in the "presuppositions and procedural conditions of democratic opinion- and will-formation."

In his discourse theoretic approach to the justification and legitimation of rights in Between Facts and Norms Habermas relies on a self-conscious circularity between these two tiers that, I believe, cannot entirely be

76 The principle "D" — discourse — stipulates that only those norms "are valid to which all possibly affected persons could agree as participants in rational discourses." BETWEEN FACTS AND NORMS, supra note 22, at 107.

77 See, e.g., id. at 178-186.

78 Id. at 305.

79 Id. at 409.

80 Id. at 450. Elsewhere, Habermas suggests that legal orders and human rights owe their legitimacy to "the forms of communication in which civic autonomy alone can express and prove itself." Note Habermas's distinction between the idea that law "owes" its legitimacy to civic autonomy, while a legal order "is" legitimate to the extent that it secures public and private autonomy simultaneously. See Paradigms of Law, supra note 69, at 19. Benhabib similarly suggests that fundamental laws should be the outcome of "collective deliberation conducted rationally and fairly among free and equal individuals." Benhabib, supra note 68, at 31.
avoided. The circularity reveals itself in different ways. A stark description of it runs as follows: like other norms, human rights must be legitimated discursively, for the only rationality capable of legitimatory promise under postmetaphysical conditions is discursive. Yet, the procedural conditions for the emergence of rational acceptability require something like the core of the very human rights we seek to legitimate, defend, reinterpret, expand and so on through deliberation. Habermas conceives of these basic rights constitutive of democratic practices as "unsaturated placeholders." But these "unsaturated placeholders" or "legal principles" which lie at the heart of discursive procedure must themselves be deliberatively interpreted, or, as Habermas puts it, human rights and popular sovereignty are "co-original." For present purposes, I wish to suggest that this circularity can not be "explained away" and should not be viewed as undermining the project of the discursive legitimation of rights. Rather, it is a circularity that may be self-consciously recognized and constantly held open to question. I shall return to this point below.

Habermas's work may be viewed as an attempt to fill the legitimacy deficit emergent with the death of natural rights and which is apparent in interpretive and agonal approaches to human rights. Legitimacy is based on rationally motivated understanding and agreement that may be produced in "undeformed public spheres" through actual processes of deliberation.

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81 Between Facts and Norms, supra note 22, at 126.

82 For one instance of the circularity, see id. at 453. Various formulations, and in some cases purported solutions, are offered for this circularity. See Frank I. Michelman, How Can the People Ever Make the Laws? (A Critique of Deliberative Democracy), LXXIV The Modern Schoolman 31 (1997); Kenneth Baynes, Deliberative Democracy and the Regress Problem: Response to Michelman, LXXIV The Modern Schoolman; Benhabib, supra note 18, at 30ff. Michelman puts it as follows: Habermas remains in some respects "a true blue deontological liberal when it comes to the question of political rightness. Nevertheless, his thought — which I take to be representative in this respect of blue thought — makes political rightness dependent from the start, or dependent all the way down, on validation supposed to be obtainable only through the constant availability of broadly participatory, actual democratic political processes to take up any question whatever of fundamental law." Michelman, at 323-324. It is Michelman's opinion that this problem of "infinite regress" may "immobilize" deliberative democratic theory. See id. at 316. Benhabib also recognizes the tension within the discourse-theoretic approach. But, viewing this as a hermeneutic, rather than a vicious, circle she is convinced it affects "all reasoning about morals and politics", not just deliberative ones. Benhabib, supra note 18, at 78. Baynes suggests that "institutionalization" is the solution to the "problem of regress," See Baynes, at 333.

83 Between Facts and Norms, supra note 22, at 122.
and contestation. In this conception of deliberative democracy, civil society, autonomous public spheres and the expansion of the political equality of those affected are of critical importance such that the public sphere is conceived not as the mere "back room" of democratic politics, but rather as the "impulse-generating periphery that surrounds the political center: in cultivating normative reasons, it affects all parts of the political system without intending to conquer it." In keeping with this, Habermas emphasizes both public and private autonomy maintaining that rights "cannot even be adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions . . . and then mobilized communicative power for the consideration of their newly interpreted needs.

One more passage from Habermas will help clarify the groundwork that is laid within a discourse-theoretical approach for a politics of rights, and illuminate the importance attributed to deliberation for the formulation and transformation of conceptions of normative rightness. Habermas argues that intellectuals and spokespersons for social movements may be certain they have not prejudged anything or treated anyone as inferior only if all those affected have an effective opportunity to voice their demands for rights on the basis of concrete experiences of violated integrity, . . . The concrete relations of recognition, mirrored in the mutual attribution of rights, always emerges from a 'struggle for recognition'; this struggle is motivated by the suffering incurred by . . . disrespect.85

He finishes this thought with: "This contest over the interpretation of needs cannot be delegated to judges and officials, nor even to political legislators."86 Rather than monological declaration by experts, or by interpreters of philosophic or political sorts, according to the discourse-theoretic position we must find answers to our substantive problems—moral, ethical and legal—under our own steam, premised on the procedural conditions implied by a discursive theory of legitimacy.

84 Id. at 442, 450.
85 Paradigms of Law, supra note 69, at 25 (emphasis added).
86 Id. at 25. See also Nancy Fraser, Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory (1989). Note that this sort of commitment to inclusion is not viewed by Habermas as contradicting his "structuralist" rendering of communicative power. See, e.g., Between Facts and Norms, supra note 22, at 480, where he criticizes the "anti-institutionalist" thrust of anarchism with its model of "face to face interactions [which] were supposed to coalesce into an intersubjective practices of deliberation . . .".
The conception of proceduralism at work in Habermas's procedural theory of democracy is complex and multilayered, but what may be most relevant for the problem of legitimating rights under conditions of multiculturalism and globalization is his conception of the "two-track" model of deliberative democracy. Here, there is dual and differentiated attention to the importance of "undeformed" informal or "weak" public spheres where public opinion may be formed, as stressed above, and more formal sites of institutionalized dialogue, the "strong" or "arranged" public spheres, which must be open to influence from the weak public spheres turning influence into a "jurisgenerative communicative power." Thus does Habermas conceive of informal or weak public spheres as "contexts of discovery" where, under conditions secured by something like constitutional rights, the social movements, voluntary organizations, media and the like of civil society can articulate interests, express needs and identities and challenge or contest prevailing interpretations. Arranged or strong public spheres, on the other hand, are characterized as "contexts of justification" which are regulated by democratic procedures.

By thematizing procedure in terms of "undeformed public spheres" open to communicative action and the generation of communicative power with the possibility of the production of democratic public reasons and opinion or rationally motivated agreement that is constituted in "noncoercive communication," Habermas's approach provides criteria that may help to distinguish conceptually, between communication oriented toward

87 Kenneth Baynes usefully analyzes Habermas's complex conception of "procedure" concluding "as Habermas uses the term, it designates the attempt to realize the rights of public and private autonomy through an institutional design that incorporates various practical discourses. Procedural democracy is thus closer to what has recently been called a 'public reasons' approach... [in contrast with republican views]. What is central is not a shared ethos, but institutionalized discourses for the formation of rational political opinion." Kenneth Baynes, Democracy and the Rechtsstaat: Habermas's Faktizitat und Geltung, in THE CAMBRIDGE COMPANION TO HABERMAS 201, 214-215, (Stephen K. White ed., 1995). See also William Rehg, Translator's Introduction, in BETWEEN FACTS AND NORMS, supra note 22, at ix-xxxvii, xxix-xxxiv [hereinafter, Translator's Introduction].


89 "Communicative power" is borrowed from Arendt to refer to the sort of power which "'springs up between men [sic] when they act together, and... vanishes the moment they disperse.'" This is connected by Habermas to communicative action such that "jurisgenerative communicative power" must underlie law's legitimacy. BETWEEN FACTS AND NORMS, supra note 22, at 147.
mutual understanding and mutual recognition, on the one hand, and instrumental action or mere imposition, on the other hand. This is a distinction which, as we saw, interpretive approaches are incapable of making, and agonal approaches appear to reject. Recognizing that the "quality" of public opinion is an empirical issue, Habermas argues that from a normative perspective the procedural criteria that demarcate the features of an open public sphere provide[s] a basis for measuring the legitimacy of the influence that public opinion has on the political system. Of course, actual influence coincides with legitimate influence just as little as the belief in legitimacy coincides with legitimacy. But conceiving things this way at least opens a perspective from which the relation between actual influence and the procedurally grounded quality of public opinion can be empirically investigated.

By retaining the normative ideal of nondistorted communication and legitimate influence leading potentially to mutual understanding, Habermasian discourse theory is capable of thematizing and criticizing conditions where communication is distorted, where public spheres are deformed, and where supposedly "shared understandings" cannot rationally be called "shared," because relations of domination or subordination obtain, or because nothing

90 I say "at the conceptual level" for, as Frank Michelman has pointedly argued, what empirical conditions are required in order actually to render democratic deliberation "fair and open to all" is left open. Michelman treats this as a debilitating problem in Habermas's theory. He asks, for example, is fair and open democratic deliberation advanced by controls on economic equality or not? By affirmative action or (merely) formal equality of opportunity? By the imposition or not of "hate speech" restrictions? Michelman, supra note 82, at 326-328. I am unconvinced that this is a debilitating problem, for these matters seem to be precisely the sorts of issues about which we may deliberate. See also William Rehg, Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jurgen Habermas, in HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES, 257-271, supra note 69; Translator's Introduction, supra note 87. See also Thomas Risse, International Norms and Domestic Change: Arguing and Communicative Behaviour in the Human Rights Area, 27 POL. & SOC. 529 (1999)(on the relationship between strategic and communicative action).

91 BETWEEN FACTS AND NORMS, supra note 22, at 362, (emphasis added). For critiques of the concept of the public sphere see, for example, Jodi Dean, Civil Society: Beyond the Public Sphere, in THE HANDBOOK OF CRITICAL THEORY, supra note 22, at 220-242; Villa, supra note 60.
like fair, open and effective access is available to all affected parties. This is crucial for assessing the legitimacy of human rights.

The normative ideal of open deliberation under “fair” procedural conditions may foster analyses of the conditions and procedures that have attended the development of human rights theory, the discourses of human rights, and the development and interpretation of national constitutions, regional human rights regimes and international human rights norms. It supplies procedural criteria of evaluation that may help us to judge whether or not human rights regimes have been produced and interpreted under the conditions implied by the idea of undistorted public spheres and undistorted communication open to all potentially affected parties. The discourse-theoretic approach then provides a conceptual means by which we may consider whether dominant conceptions of human rights have indeed been turned from a local idiom into a “globalized localism” by imposition, as authors like de Sousa Santos\textsuperscript{92} claim, rather than developed through mutual recognition based on genuinely open processes of deliberation. We may consider, for example, whether national constitutions, acts of unification or international human rights regimes have been generated through the interaction of public opinion formulated deliberatively in open and accessible public spheres, whether all affected parties were able to exercise their political autonomy in a relatively free (uncoerced) and politically equal manner in order to thematize their needs and concerns, whether deliberatively produced public opinion and information were present and whether argumentation amounted to the generation of communicative power influencing the institutionalized bodies, political systems or international institutions involved. As Habermas says,

Discourses conducted by representatives can meet the condition of equal participation on the part of all members only if they remain porous, sensitive, and receptive to the suggestions, issues and contributions, information and arguments that flow in from a discursively structured public sphere, that is, one that is pluralistic, close to the grass roots, and relatively undisturbed by the effects of power.\textsuperscript{93}

Or, has it been the case that such actions have taken place under conditions that James Bohman calls “political poverty”?

Bohman provides an important assessment of the consequences of “political poverty” that may fruitfully be applied to the dominant human rights politics that took place after World War II. Defined in opposition to

\textsuperscript{92} Santos, supra note 1.

\textsuperscript{93} Between Facts and Norms, supra note 22, at 182, (emphasis added).
political equality, which, he suggests, "requires a minimum threshold: that all must have access to the public world," political poverty is defined as a form of poverty in the public sphere which is "manifested in the inability of groups of citizens to avoid being excluded from effective participation." Such exclusions may take the form of an inability to initiate or influence public deliberation of relevant matters due to suffering extensive social inequality. Importantly, Bohman maintains that it is often the case that groups suffering extreme social inequality may not be able to avoid being falsely included either. Their inclusion is false where, unable successfully to initiate dialogue or produce influential public input,

their silence is turned into tacit consent by the more powerful deliberators who are able to ignore them. In these cases, powerful groups can make presumptive claims about the ‘we’ that has deliberated publicly or come to an agreement, a ‘we’ that does not pass the test of plurality and publicity contained in conceptions of political equality.

Such “asymmetrical inclusion” is, moreover, extremely difficult to contest by the very parties who suffer political poverty in the first place.95

The patriation in 1982 of the Canadian Constitution with its new Charter of Rights may, on this account, be considered an example of a process marked by political poverty. The Constitution has remained controversial since its patriation due primarily to the claim of political exclusion by the province of Quebec. Quebec refused to endorse the Constitution, the groundwork for which was paved by the Supreme Court of Canada’s decision in the Patriation Reference case.96 In that case, the Liberal Trudeau government, which strongly supported a Charter, argued that the Federal

94 The Moral Costs of Political Pluralism, supra note 73, at 60.
95 Id. at 64. See also Habermas where he indicates that the “structures of a power-ridden, oppressed public sphere exclude fruitful and clarifying discussions.” Between Facts and Norms, supra note 22, at 362-363. For further discussion of Habermas’s complex conception of political equality see Baynes, supra note 82; Jack Knight and James Johnson, What Sort of Equality Does Deliberative Democracy Require? in Deliberative Democracy: Essays on Reason and Politics, 279-319 (James Bohman & William Rehg eds., 1997); James Bohman, Deliberative Democracy and Effective Social Freedom: Capabilities, Resources, and Opportunities, in Deliberative Democracy: Essays on Reason and Politics 321-348 (James Bohman & William Rehg eds., 1997).
96 Reference re Patriation of the Constitution 1 SCR 914 (1984). This is called the “most important decision” ever rendered by the Supreme Court of Canada by Peter Russell, one of Canada’s foremost constitutional experts. See Peter H. Russell, The Judiciary in Canada: The Third Branch of Government (1987).
Government had the power to request the British Parliament to patriate the constitution, despite the refusal by several provinces, including Quebec, to agree to it. The Supreme Court of Canada decided that the government had the legal power to do so, despite the fact that it was a "constitutional convention" that it obtain the provinces' consent. But, the move this decision initiated, unilateral patriation of the Constitution despite Quebec's continuing dissent and claim of exclusion, has called into question the political legitimacy of the Canadian Constitution.97

The Canadian constitutional debates also reveal an effort at providing the groundwork for addressing political poverty by enhancing the discursive quality of the public sphere understood from a more deliberative perspective following the failure of the Meech Lake Accord (1989) to achieve consensus of the ten provincial premiers and federal government. That process was constituted as "politics as usual" in the sense that it was "dominated by elite bargaining, trade-offs, and pressure tactics." As Simone Chambers suggests, the ensuing attempts to gain more widespread acceptance of the Constitution indicate that Canadian political elites learned that "discourse must be inclusive to be fair and that agreement means more than getting the ten premiers at one time and one place to sign on the dotted line." Instead, more discursively oriented politics aimed at developing mutual understanding, including a whole host of mechanisms like public consultations and citizens' forums, were initiated in efforts to "create public spaces for the articulation and exchange of ideas, grievances, and claims."98 While the ensuing Charlottetown Agreement was voted down in a Canada-wide referendum, it is possible, as Chambers maintains, to interpret this as a rationally motivated disagreement.99

A further example of the results of a deliberatively stunted constitutional process comes to light when Habermas criticizes the process by which the unification of Germany occurred in 1990, lamenting the "manipulative mode and the hurried tempo" of unification which undermined the

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97 Thus, as Chambers says, "Canada is in the position of having a legal constitution the legitimacy of which is not universally accepted." Consensus was crucial in this case both because the Canadian Constitutional convention required it and because the 1982 Constitution that resulted from the process stipulated consensus "as the standard of all future structural amendments." Simone Chambers, Discourse and Democratic Practices, in The Cambridge Companion to Habermas 233, 251 (Stephen K. White ed., 1995).

98 Id. See also O’Neill, supra note 25, at 181-199, on attempts in Northern Ireland to grapple with the legitimacy of its constitutional status.

99 Chambers, supra note 97, at 254.
possibilities for much-needed deliberations and normative agreement. Turning to European citizenship, Habermas further questions whether European citizenship "can even exist at all" since "citizens [there] have no promising opportunities to bring up issues and influence European decisions" due to the underdevelopment of the European political public spheres, despite institutions like the European Parliament, and the lack of extra-national rights of political participation.

Applying the notion of political poverty to Santos’s argument that international human rights have been imposed by imperialist powers and politics on cultures, societies and groups who have resisted dominant conceptions of human rights and their subsequent interpretations, we may see that, by discourse-theoretic understandings of political equality, such impositions would be *prima facie* illegitimate. If it is true that human rights standards have been imposed under conditions of political poverty—either in the form of exclusion or asymmetrical inclusion—rather than having been developed as instances of mutual recognition, those rights standards stand as expressions of misrecognition, functioning as regulatory forces demanding redress in the form of serious efforts at gaining deliberative legitimation, rather than as emancipatory ideals produced through civic or political autonomy. As Habermas himself has recognized, the relationship, for example, between the so-called “Occident” and “Orient” and between the so-called “First” and “Third Worlds” “continues to bear the marks of a denial of recognition.” Under such conditions, a “nonimperialist process of reaching understanding with and learning from other cultures” is required. It is this general procedural orientation of deliberative legitimation that should orient our analyses of human rights today.

Several matters that are important to the deliberative legitimation of, and the further development of a deliberative approach to, human rights may now be addressed. First, we can view the claims of the imposition of “globalized Western localisms” somewhat differently than they have tended to be viewed so far in the literature on human rights. Second, we are brought back to consider the problem of circularity in deliberative justifications of human rights, which now appears in the light of ethnocentrism.

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101 *Between Facts and Norms*, *supra* note 22, at 502-503.

102 *Struggles for Recognition*, *supra* note 6, at 119, (emphasis added). Habermas further argues: “Eurocentrism and the hegemony of Western culture are in the last analysis catchwords for a struggle for recognition on the international level.” *Id.*

103 Habermas, *Citizenship and National Identity*, Appendix Two of *Between Facts and Norms*, *supra* note 22, at 507.
And, third, we may begin to develop a fuller appreciation of the importance of experiences of misrecognition for legitimating and possibly reconceptualizing human rights.

A. Globalized Localisms

A deliberative approach to the legitimation of human rights permits a reorientation toward the claim marshalled by Santos and others in the human rights debates that the dominant discourses and practices of human rights have been imposed on other cultures, societies and actors as “globalized Western localisms.” The outstanding question from a discourse-theoretic perspective is whether all viewpoints have been and are afforded political equality and mutual respect or whether “non Western” or other views and actors were or are effectively excluded or suffer asymmetrical inclusion. Therefore, from a discourse perspective, the issue of “Western imposition” is shifted from a culturally essentialist claim predominantly about whether the content of human rights norms is “Western” to one about political equality and mutual recognition in the constitution, interpretation and application of norms. A discourse-theoretic perspective thus requires investigation into the conditions of the development and deployment of such norms. If public spheres have not been discursively structured, that is, if they have been marked by political poverty and misrecognition, efforts at deliberative legitimation must be forthcoming.

While a discourse theory of democratic legitimacy emphasizes these procedural questions, the claim often raised by cultural relativists of various stripes regarding the “Western content” of human rights norms should not be ignored. It is not a claim reserved for authoritarian political positions—ranging from some Asian elites to the Vatican at Beijing. It is also raised by actors, perhaps especially from “the South,” in the international women’s movement and feminist development politics, as well as by human rights scholars like Santos. But, even if we view the claim that human rights have a Western content in the form of elevating “Western” values of individualism and secularism as contestable or unconvincing, as I think it is, from a deliberative procedural perspective it is a claim that must remain open to democratic deliberation. Here, the onus would seem to be

104 SANTOS, supra, note 1, at 339. See also Santos, supra note 11.
105 See Constitutionalism and Political Culture, supra note 70; The Price of Rights, supra note 70. See also Pheng Cheah, Positioning Human Rights in the Current Global Conjuncture, 9 PUB. CULTURE 233 (1997).
107 See Jaggar, supra note 70; Ferguson, supra note 70; Lewis, supra note 48.
equally on those of us who claim extant human rights norms are not specifically Western in content or meaning to convincingly make our case and on those who maintain the obverse in open and fair deliberation. As an interlocutor in the human rights debate, but one who would claim no special status in it, I would wish to maintain, for example, that because even individual rights are rooted in intersubjectivity they are not individualistic, atomistic or "Western" in the way typically cited by their critics. But the important point is that such arguments must be made in the context of mutual respect and open public spheres of argumentation and contestation.

This procedural orientation permits us to avoid the potentially imperial flip-side of the claim about the so-called Western content of human rights norms, as well. One argument runs that norms claiming universality, like human rights, are not "globalized localisms." For example, Seyla Benhabib suggests that they are simply the consequences of the spread of modernity with its constituent elements, which, while "first assembled in the West, is [currently] a world-wide phenomenon." According to this reading, there is no contest over "whose" norms or "which" understandings have been instantiated in current conceptions of human rights. But this suggestion runs the risk of confusing the actual development and spread of "modernity" with its power imbalances, imperialisms, injustices—including its political poverties and misrecognition—and "globalized localisms" for something already approximating an international moral community rooted in the adherence to norms of political equality, reciprocity, mutual respect and recognition. Such an analysis of the spread of modernity would ig-

108 Benhabib, supra note 18, at 252.

109 Benhabib critiques Lyotard and Rorty for their cultural relativism, claiming it is based on "poor man's" sociology [sic], that is, it is naive, treating cultures as hermetically sealed, failing to recognize their integration into a global conversation/interdependence. To the Rortyian challenge that one cannot overcome ethnocentrism Benhabib replies:

"I think the only honest and sensible response in the face of this observation is that indeed these norms only make sense against the background of the hermeneutic horizon of modernity; but also to point out that modernity, although the most significant elements constituting it were first assembled in the West, is a world-wide process and phenomenon."

Id. Thus does Benhabib seem to conflate the actual development of "modernity" with its "globalized localisms" for something approaching an international moral community. This she can only do by ignoring the asymmetrical relations which have been involved.
nore the asymmetrical relations of power that have been involved. But a deliberatively interpreted procedural orientation that is consistently applied may help to clarify or thematize those relations and suggest that, even if human rights are a functionally necessary part of social modernity which has now spread across the globe, injustices of misrecognition marking their constitution and interpretation must be addressed, and they must be addressed under deliberative conditions. Habermas acknowledged this when he recently argued that an interpretation of human rights is needed which "does justice to the modern world from the viewpoint of other cultures as well as our own."^111

B. Circularity as Ethnocentrism?

Now the circularity problem, introduced earlier, appears anew, this time in a possibly more insidious guise. A considerable challenge to a deliberative legitimation of human rights lies in the possible criticism that the presuppositions and commitments of even such a procedural approach are themselves ethnocentric and imperialistic. Judith Butler, for example, suggests as much when she maintains that

to assume from the start a procedural or substantive notion of the universal is of necessity to impose a culturally hegemonic notion on the social field. To herald that notion then as the philosophical instrument that will negotiate between conflicts of power is precisely to safeguard and reproduce a position of hegemonic power by installing it in the metapolitical site of ultimate normativity.\(^112\)

To avoid such consequences and not "foreclose in advance future claims for inclusion," we would have to leave open the term "universal" to permanent contest and contingency; it must be rendered a "site of permanent political contest."\(^113\) Now we are also back to the agonal critiques of proceduralism, a fuller response to which can no longer be deferred. The possible ethnocentrism of even a deliberatively interpreted procedural universalism is a highly complex matter that has fostered a variety of responses

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110 See Beck, supra note 9; Dallmay, supra note 5; Santos, supra note 1; Falk, supra note 11.

111 Habermas, supra note 17, at 163.

112 Judith Butler, Contingent Foundations: Feminism and the Question of 'Postmodernism', in Feminist Contentions: A Philosophical Exchange 35, 40 (Seyla Benhabib, Judith Butler, Drucilla Cornell & Nancy Fraser eds.).

113 Id. at 41.
from Habermasian scholars. Leaving a fuller interrogation of these varied and protracted attempts to defend such an approach to universalism as "truly universal" for another occasion, let me suggest several reasons why it is not as susceptible to Butler's sort of critique as it might appear at first glance.

Of course, Habermas proceeds on the argument that the pragmatic presuppositions of communication are universal and unavoidable, a claim he seeks to justify on the basis of a conceptual argument about communication and empirical and developmental hypotheses about the significance in social life of mutual understanding. I wish to treat Habermas's argument as a hypothesis, much as Habermas does, and briefly outline some support for the general claim that may be found in the struggles over human rights.

As I argued above in my consideration of interpretive and agonal approaches to human rights, deliberative proceduralism is more conducive to recognizing, accommodating and limiting differences than either non- or anti-procedural approaches, like interpretivism and agonism, or monological procedural approaches, like Rawls's earlier work on the "original position." Thus, it would seem more inclusive than either a nonprocedural or an Archimedean approach. Furthermore, Georgia Warnke's argument in favor of interpreting the basis of a discourse-theoretic view of procedural universalism as central to the mutual recognition of a wide variety of cultural differences seems apt. Reflecting on the debate between Charles Taylor and Habermas over the politics of difference, Warnke suggests that the "survival and flourishing of a culture" presupposes its ability to be critically self-reflective and an ability to communicate its values to the next generation in order to reproduce itself. This process seems to "entail its capacity to show its worth in relation to the worth of other cultures," and to "enrich itself with what it takes to be valuable in other cultures." On this thesis, the survival or possible flourishing of a culture is dependent on the survival


115 See Morality and Ethical Life, supra note 22; Justification and Application, supra note 22; William Outhwaite, HABERMAS: A Critical Introduction (1994); O'NEILL, supra note 25.

116 RAWLS, supra note 32.

117 Taylor, supra note 6; Struggles for Recognition, supra note 6; Georgia Warnke, "Communicative Rationality and Cultural Values" in THE CAMBRIDGE COMPANION TO HABERMAS, supra note 87, at 139.
of others against which we may test our own cultural interpretations. Therefore, the conception of tolerance built into deliberative approaches is a condition of possibility of both "my" and "your" cultural survival. This suggests that a variety of cultural orientations have a stake in the "possibility of nonexclusive and nondiscriminatory discussions in which we review our values against those of others." ¹¹⁸

Deliberative proceduralism in fact entails desirable normative and functional attributes from a variety of perspectives. Viewed from the perspective of historically subordinated cultures, groups and societies, it highlights the obligation on the part of historically dominant cultures, groups and societies to show respect, at least to the extent of engaging in reflective and fair dialogue with, and listening to, "the Other." As Habermas shows, the critique of human rights which suggests that they express a distinctively Western idea of reason misses the function of human rights which is "set up to provide every voice with a hearing." The basic rights which inhere in the notion of deliberative proceduralism provide some of the very standards by which the "latent violations of its own claims can be discovered and corrected." ¹¹⁹ Thus, following Lutz Wingert, Habermas maintains that "human rights, which demand the inclusion of the other, function at the same time as sensors for exclusionary practices exercised in their name." ¹²⁰ This sort of orientation toward difference displays, I believe, what William Connolly calls an "ethos of critical responsiveness," ¹²¹ short-circuiting absolutist appeals by, say, "Western" states or human rights organizations to the idea that human rights are set in stone, above debate, unquestionable or irresistible. In other words, deliberative proceduralism's orientation toward human rights requires abandoning all dogmatic reliances on absoluteness. On the basis of a discourse-theoretic understanding of legitimacy, which insists that legitimacy may only be achieved through intersubjective understanding, the response of absoluteness is illegitimate. Viewed from the perspective of historically dominant cultures, groups and societies, deliberative proceduralism highlights the obligation of historically subordinate groups, cultures and societies, as well as challengers to human rights of all stripes, also to engage in deliberation, and thus short-circuits appeals to an absolutist cultural relativism in its defensive, closed and non-reflexive forms.

Furthermore, the acceptability of at least the general orientation toward such a position to a wide variety of actors is suggested by its incorporation by scholars ranging from Habermas and Benhabib, to Santos, Ân-

¹¹⁸ Id. at 140.
¹¹⁹ Habermas, supra note 17, at 162-63.
¹²⁰ Id. at 163.
Na'im, Taylor and Parekh, to scholars like Connolly, Nandy, and Todorov.\textsuperscript{122} Blaney and Inayatullah, for example, view both Todorov and Nandy as suggesting that "an ideal form of othering involves respect for the other as an equal, making possible conversation or dialogue."\textsuperscript{123} While such convergence on the desirability of something like fairly conducted cross- and intra-cultural deliberations based on mutual respect and recognition is insufficient to prove definitively the superiority of a deliberative, procedural position to all affected actors, it does go some way toward suggesting its broad-based acceptability. This seems to be especially true since even many of the critics of proceduralism and universalism call for non-hierarchical, "non-assimilative"\textsuperscript{124} or agonal and postimperial dialogue\textsuperscript{125} as do many post-colonial theorists including post-colonial feminists.\textsuperscript{126} As Thomas McCarthy has pointed out, alongside claims of western imposition and imperialism emerge "traces of cosmopolitan ideas in postcolonial critiques of neoliberal globalization" often premised on the same sort of "universalist moral impulses" as found in human rights discourses.\textsuperscript{127} All of this suggests that the broad terms of deliberative proceduralism may be viewed as just since they are treated as reasonably acceptable from a wide-variety of perspectives.

Linked to this wide cross-cultural and "cross-theoretical" support for something like a deliberative proceduralism is a cognitive orientation in its favor. It seems that scholars and representatives of many perspectives and social movements call for a "conversation of cultures" or a form of


\textsuperscript{123} See Blaney and Inayatullah, \textit{supra} note 70, at 24.

\textsuperscript{124} See Dallmayr, \textit{supra} note 5; Butler, \textit{supra} note 112; Brown, \textit{supra} note 57; Connolly, \textit{supra} note 121.


agonal dialogue because it is viewed as an antidote not just to the denial of self-determination and the injustice of misrecognition, but also to the cognitive deficits of other forms of opinion-formation and decision-making. Deliberation is widely viewed as an antidote to what Isabelle Gunning has called the “arrogant perception”128 associated with monological approaches for, by including the voices of those affected, such arrogance or paternalistic imperialism is capable of being challenged. Listening to the voice of all further encourages critical reflection by all parties and brings contextuality into universalism. And, as one moves from the more informal “contexts of discovery” to more “arranged” public spheres which function as “contexts of justification” regulated by democratic procedures, the requirement of issuing public reasons imposes reflexivity on the formation and expression of individual and group preferences such that “articulating good reasons in public forces the individual to think of what would count as a good reason for all others involved.”129 This further suggests that a deliberative proceduralism that is self-reflexive, oriented toward its own fallibility and constantly on-guard for the exclusions and “remainders” that it may produce offers the promise of fair, non-ethnocentric deliberations.

While a deliberative proceduralism may be generally and reciprocally justifiable as the above suggests, it may not be susceptible to convincing demonstration to be empty or devoid of any content. However, because it is ethically thin it avoids the sort of vicious or dogmatic circularity about which scholars like Butler worry. That it is not empty indicates why it is a critical theory. Deliberative proceduralism does not elevate one form of life exclusively over others but at the same time, as Benhabib argues, it inclines against “[w]ays of life and conceptions of the good in which domination, repression, exploitation, disrespect, violence, contempt, silencing, marginalization, exclusion, irrational authority and hierarchical human relations are advocated.”130 So long as a deliberative approach remains vigi-

128 Gunning, supra note 48.
129 Benhabib, supra note 18, at 71-72.
130 Seyla Benhabib, On Reconciliation and Respect, Justice and the Good Life, 23 PHIL. AND SOC. CRITICISM 97, at 105 (1997). Such an orientation is also present in William Connolly’s “post-Nietzschean” position: “cultivating the experience of contingency in identity does not entail the celebration of any and every identity. It does not open itself to a politics of racism or genocide, for instance. For identities that must define what deviates from them as intrinsically evil (or one of its modern surrogates) in order to establish their own self-certainty are here defined as paradigm instances to counter and contest. They stifle cultivation of care for the ambiguous relations of identity/difference through the way they constitute good and evil.” See WILLIAM E. CONNOLLY, IDENTITY/DIFFERENCE 14-15 (1991).
lantly deliberative and does not slide imperceptibly into a more monological and substantive orientation toward these issues, by determining monologically, for example, in the absence of deliberation that polygamy or female circumcision are illegitimate, it may offer a critical, nonauthoritarian theoretical position. Finally, and crucially, it entails openness of the sort the agonal theorists emphasize; they are right that “foundations” must remain contingent and contestable. This is accounted for precisely in the reflexive dimensions of deliberative proceduralism. But, deliberative proceduralism is critical in a further respect as well; it relies on a built-in requirement for open public spheres thus demanding the opening up of discourses to a wide recognition of voices and violated integrities in human rights debates.

C. Experiences of misrecognition, struggles for recognition and the deliberative legitimation of human rights

Habermas’s suggestion, quoted above, that human rights are “set up to provide every voice with a hearing”\(^\text{131}\) grasps rights as inclusive and participatory but also may treat the existing canon of human rights prematurely as sufficiently so. Work like Peter Swan’s\(^\text{132}\) and Richard Falk’s\(^\text{133}\) argue for enhancing the “expansionary” and “exclusion detecting” logic within basic rights by extending the analysis to demand more robust procedural rights as responses to the injuries of misrecognition. The work of these authors is instructive for it may indicate both the potential and limits of a theory of deliberative proceduralism for human rights under contemporary conditions.

Peter Swan employs a broadly Habermasian analysis in order to justify new “procedural ecological rights” in an argument that displays the potential democratizing implications of a deliberatively interpreted proceduralism. He describes environmental risks—contra Ulrich Beck—as falling disproportionately on the poor and racial minorities who all too often continue to bear not just the lion’s share of ecological risks themselves but also the injustice of exclusion from decision-making that dramatically affects their lives. Swan describes the political poverty that the disadvantaged face in terms of failures to be consulted, exclusion from participation and the general subordination of local and non-specialist to expert knowl-

\(^{131}\) Habermas, supra note 17, at 162.

\(^{132}\) See Swan, supra note 73. See also Peter Swan, Rights, Civil Society and Dualistic Social Theory, 58 ARSP-BEIHEFT 239-48 (Aleksander Peczenik & Mikael M. Karlsson eds., 1995).

\(^{133}\) See Falk, supra note 11. See also SANTOS, supra note 1; Constitutionalism and Political Culture, supra note 70.
edge. Drawing on the work of Rainer Forst, Axel Honneth, and Habermas, he argues that the felt sense of injustice experienced as misrecognition and disrespect has issued in demands emanating from ecologically-oriented social movements in the informal public spheres for procedural rights in the more institutionalized "emerging ecological public sphere." Viewed as extending an "oppositional discourse," Swan argues that attempts to address such experiences of injustice must be premised on a "procedural notion of normative justification in which all patently affected persons are permitted to participate."

Interpreted within a theory of deliberative democracy, new procedural rights may be justified on the basis of their contribution to securing a deliberatively conceived conception of political equality—that is, one in which all perspectives have the opportunity to participate in processes of public deliberation over questions of environmental risk. In the absence of such rights within institutionalized public spheres, Swan argues that it is unlikely that disadvantaged groups vulnerable to political decision-making would have a reasonable expectation of influence. But with such new procedural rights in place, he suggests that decision-making and political opinion- and will-formation may be premised on a genuine "confrontation between views" thus enhancing not just opportunities for participation but also the cognitive qualities of opinion- and will-formation by insisting that information be equally available to all and creating the conditions whereby local knowledge can effectively confront expertise. Swan concludes that expanded participation in public fora like hearings on environmental risks can reinforce forms of deliberative democracy. Such public spheres may then be viewed as spaces for questioning, contesting and influencing policy and legal decisions on environmental matters of risk, as well as contributing to the further development of ecological public spheres.

Swan’s analysis may be viewed as stretching Habermas’s analysis in an important way. He promotes an especially robust deliberative democratic account of the proceduralization of institutionalized or "arranged" public spheres thus possibly expanding Habermas’s call for "institutional imagination" and "cautious experimentation" beyond what Habermas may

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134 Swan, supra note 73, at 187.
135 See Forst, supra note 22. See also AXEL HONNETH, THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS (1996); BETWEEN FACTS AND NORMS, supra note 22.
136 Swan, supra note 73, at 190, 245, and 190.
137 Id. at 198.
138 Id. at 193.
think appropriate for a "proceduralized sovereignty." Yet, or perhaps for this reason, this is an important line of analysis that illustrates the possibilities of a critical Habermasian perspective on rights for it theorizes one way in which political equality and mutual recognition may be enhanced by the expansion of rights, political will-formation may be linked more effectively to the informal public sphere via the communicative generation of power and such power may have a hope of legitimately influencing political and administrative systems. Thus, ultimately, such an analysis seems to promise to enrich Habermas's commitment to enhancing democratization by improving the "discursive quality of public debates." 

The interpretation of demands for new procedural rights as emanating from experiences of the injustice of misrecognition may be further applied to interpret demands in international human rights debates over the quality of human rights as "globalized localisms." If we can say that demands by a variety of social movements and NGO's are demands for addressing the injustices of misrecognition, then proceduralism seems an especially appropriate response to the claims that are being articulated. Such demands are made, for example, by feminist movements for the conceptualization of women's rights as human rights, by post-colonial feminisms for an effective voice in debates over cultural practices that "First World" feminists routinely denounce summarily as human rights abuses and for reinterpreting heretofore Western-dominated interpretations of reproductive rights and development and population policy. Such demands are also made in Indigenous peoples's struggles for self-determination. We may further explore this issue by considering the work of Richard Falk. For the question remains, even if a deliberatively interpreted proceduralism provides criteria that may help us distinguish between past actions that amount

139 See Swan, supra note 132 (for a defense of going beyond "Habermasian border skirmishes"). See also Bohman, supra note 83, at 924-925 (for a defense of "democratic" rather than "proceduralized" sovereignty); William E. Forbath, Shortcircuit: A Critique of Habermas's Understanding of Law, Politics, and Economic Life, in HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 272-286, supra note 69.

140 BETWEEN FACTS AND NORMS, supra note 22, at 304.


142 See Gunning, supra note 48; James, supra note 48; Tamir, supra note 48; Lewis, supra note 48; Obiora, supra note 48; Winter, supra note 48. See also Jaggar, supra note 70.

143 See Spiraling Discourses of Reproductive and Sexual Rights: A Post Beijing Assessment of International Feminist Politics, supra note 70; Roy, supra note 126.
to impositions of "globalized localisms" and acts of mutual recognition, and even if it can provide a fruitful mode of analyzing demands like those for procedural ecological rights within developed national public spheres, as analysed by Swan, how might it be used to orient a post-imperial reconceptualization and legitimation of international human rights?

Richard Falk echoes Santos's analysis of human rights as "globalized Western localisms" when he argues that, from the standpoint of cultures or "civilizations" that have felt the sting of the "geo-politics of exclusion,"

human rights discourse is unavoidably perceived, with varying degrees of justification and opportunism, as tainted by false universalism and its relations to Western hegemony, one feature of which has been, and continues to be, the suppression of civilizational identity and difference.\textsuperscript{144}

Indigenous peoples thematized the false universalism of dominant human rights discourses in the 1980's and 1990's, expressing their sense of exclusion and misrecognition and the consequent failure of existing human rights satisfactorily to account for their "claims, values, grievances and outlooks." Falk uses indigenous peoples and their struggles in and around the UN as an example of how transnational activism has produced "alternate conceptions of rights."\textsuperscript{145} Extending this analysis to the case of Islam, he maintains that false universalism and political poverty, conceptualized in this case as "intercivilizational inequality," may be addressed by means of a collective right to "civilizational participation."\textsuperscript{146} While recognizing that "intra-civilizational differences" must also be "democratically negotiated," the emphasis in Falk's proposal is on promoting inter-civilizational equality at the international institutional level via collective participatory rights. Falk maintains that unless authentic participation in the rights-creation process occurs, the results are not likely to be genuinely representative and the whole process will be regarded as illegitimate and alien. . . participatory rights are integral to the acceptance of a political order as legitimate and to a reliable clarification of grievance, demand and aspiration.\textsuperscript{147}

\textsuperscript{144} False Universalism, supra, note 11, at 9.
\textsuperscript{145} Id. at 11.
\textsuperscript{146} Id. at 9.
\textsuperscript{147} Id. at 11.
For Falk, authentic participation entails "inter-civilizational representation in the main authority structures of the world."  

What might we make of Falk's proposal from a discourse-theoretic perspective? I suggest that there are two interrelated dimensions of such an analysis, one which calls into question the emphasis on civilizational representation as a collective right and the other, which becomes more contested within deliberative democratic theory itself, is the orientation we should adopt toward addressing democratic deficits by turning to global institutional reform—that is by emphasizing the enhancement of democratic sovereignty globally.

At this point the somewhat ambiguous implications of Habermas’s analysis of proceduralized sovereignty must be noted. Despite his emphasis on discursively structured public spheres in deliberative democracy, the extent to which Habermas’s position points us in the direction of a further deliberative democratization of arranged public spheres and political systems remains somewhat unclear. James Bohman interprets his two-track theory of deliberative democracy as a retreat to a less robust version of deliberative democracy, drawing a too sharp distinction between the institutionalized decision-making bodies of arranged public spheres and informal, public spheres of opinion-formation. On Bohman's interpretation, Habermas's recent work allows only for further deliberative democratization of the informal, opinion-formation public spheres. But, Bohman objects that this leads to a virtual abandonment of the "democratic constitution of power by citizens" since the public is thus provided only the capacity for opinion-formation rather than any direct democratic power. This may overstate the limitations of Habermas's current theoretical position, but I agree that, given Habermas's elliptical comments about the possibilities for "cautious experimentation" and the like there is room for doubt. Regardless of one's interpretation of Habermas on this point, it is clear that for Habermas it is the linkage between informal and formal public spheres, and then between them and systems (political and economic) that is crucial. Swan's argument for procedural ecological rights may, as I have argued, be taken as one way to enhance this linkage and enhance the "democratic constitution of power" within a broadly Habermasian frame. But, the emphasis on linkage might also be used to call into question an analysis like Falk's that emphasizes collective participatory rights in key authority structures of

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148 Id. at 12.

the international system as a mode of increasing the democratic constitution of power.

In the absence of a further, considerable development toward genuinely global, genuinely public, public spheres, as well as the development of discursively structured public spheres at more local levels, where needs, interests, interpretations and identities may be debated and contested under conditions of political equality, and in the absence of anything approaching effective global citizenship rights, emphasizing collective civilizational rights to participation in “key authority structures” may be problematic for at least two reasons. First, a “civilizational participatory right” in key authority structures such as Falk proposes threatens to gloss over important differences and inequalities within cultures. While Falk recognizes that intra-cultural differences exist, and suggests they need to be democratically negotiated, he subsumes such considerations to the more general goal of global, intercivilizational participatory rights. Group-differentiated rights may be justifiable where they support equal rights to co-existence. But, such rights must respect the private and public autonomy equally of all those affected. The problem with supporting a collective right of civilizational participation, as Falk does, rests primarily on the failure to deal adequately with the fact that where the interpretation and legitimation of human rights are at issue, contests over them are often as much intra-cultural or intra-“civilizational” as they are inter-cultural. Struggles by feminists in a variety of “civilizational” contexts over the interpretations and implementations of women’s rights as human rights are indicative of this. At a very minimum, therefore, a proposal like Falk’s would need to specify how public and private autonomy might be protected in the context of such global collective rights. In fact, Falk does not address who would be considered a “civilizational representative” or how such representatives might be selected. But, even if it is NGO’s that he has in mind as such representatives, he neglects to inquire into the processes and procedures by which the articulation of needs, interests, identities and the like can be generated in the “contexts of discovery.” This failure to consider the character of the informal public spheres is the second weakness in his proposal. Failure to raise these sorts of questions threatens, in turn, to leave NGO’s at risk of ineffectiveness for want of open public spheres, for lack of representativeness, or for capitulation to systemic pressures associated with being directly involved in the “authority structures” of global governance. In each case, the crucial linkage between informal and formal public spheres may be compromised. It is unclear, then, whether this sort of proposal would enhance the “discursive quality of public debates” or permit influence to de-

150 Struggles for Recognition, supra note 6.
Guides provided by the PC, who had prepared the rooms for the visit, showed the task force members around the basement. Some victims of torture at the Nyayo House torture chambers were also present.

Nyayo House was built in 1983 and has 12 torture chambers, six each on the right and left side. The cells were designed as “strong rooms” with very poor ventilation. Some of the rooms are painted red.

The victims described their ordeal in the cells and asked the task force members to seek explanation from the government and the architects as to the purpose for which the underground chambers were intended. The task force members heard from former detainees present that people died in the cells of pneumonia and torture while some would be thrown out to the street and reported as having committed suicide. Former victims wanted the country to remember the alarming number of persons who committed suicide from the higher floors of the Nyayo house in the 80s, especially in 1986, and others who just “disappeared”.

**Kamiti Maximum Security Prison**

The task force members visited Kamiti because it is symbolic of the role the criminal justice system played in repressing citizens. Task force members were able to visit cells that held former political detainees.

The task force members also wanted to see the hangman’s noose but it was not possible. There has been no hangman since 1987. It was also not possible to see Kimathi’s grave. Prison authorities were not sure if Kimathi was buried in Kamiti.

Silas Gacharia, the director of inspections, gave task force members a history of Kamiti before they were given a tour of the prison and to listen to two groups of prisoners. The prisoners mainly complained about corruption and delay in hearing their cases, which had caused them to spend more time in remand. The task force heard that prisoners often waited for as long as ten years for their appeals to be heard.

**Statistics**

No. of submission - 39  
In support of a commission - 31  
Opposed to a commission - 5  
Conditional support - 3
**Overall Response to TJRC in Nairobi Province**

![Bar Chart](chart1.png)

- For TRC: 34
- Against TRC: 5

**Male and Female Contributors in Nairobi Province**

![Bar Chart](chart2.png)

- Female: 7
- Male: 32

**List of Contributors:**

1. Ng’ang’a Thiongo [Chair, RPP]
2. Hon. Njeru Kathangu
3. Mr. and Mrs. Patel
4. Kenneth Kituma Murichia
5. Rosemary Gadiha Karuiki
6. Cyprian Nyamwamu
7. James Watenge (Special Branch Inspector)
8. Otieno
9. Wafula Buke
10. Otieno MakOnyango
11. Mr. Paul Amina
key demand today in the interest of developing a post-imperial reconceptualization and legitimation of human rights is open to question. From a deliberative democratic perspective, the question we need to pose is: what procedures and struggles offer the most promise for developing discursive public spaces and then linking these informal sites and practices of opinion-formation in culturally mobilized public spheres with the more formally institutionalized will-formation bodies? The key question must be: how can the latter be rendered more “porous” and “sensitive” to public opinion generated in the former? Legitimate opinion formation depends on something approaching open and discursively structured public spheres. But if the latter are currently rarer than we would wish, what are the conditions for such developments? On my reading of Habermasian Critical Theory, the crucial issue now concerns the dual demand of democratization of key authority structures in global governance along with building the conditions and capacities—global, societal, national, cultural, group and individual—for improving the “discursive quality of public spheres”\(^\text{160}\) and developing the meaning and practicability of a “right to justification.”\(^\text{161}\) Whether this will permit or require an increase in the democratic constitution of power as well as the proceduralization of cosmopolitan sovereignty is an open question. But, it is this sort of orientation that may provide an avenue for developing a post-imperial legitimation of human rights capable of enhancing a democratic rather than an oligarchic and neo-imperial transition to globalization.

**Conclusion**

Such a conclusion should issue in the call for reinvigorating deliberations, in the face of current struggles for recognition, in order to attempt to secure the legitimacy of human rights through fair intra- and cross-cultural dialogue. We might best approach a position that pursues “justice justly”\(^\text{162}\) by developing a conception of deliberative democracy that highlights the importance of fighting for spaces and finding mechanisms by which the voices of the oppressed may enter into deliberation and contestation with others based on political equality and mutual recognition, rather than political poverty. This implies the requirement of developing global, and developing and protecting national, regional and local, public spheres, 

\(^\text{160}\) *Between Facts and Norms, supra* note 22, at 304.
\(^\text{162}\) *Spheres of Justice, supra* note 26, at 320.
civil societies and networks\textsuperscript{163} capable of sustaining the sort of fruitful, mutually recognizing deliberations in which all traditions may recognize their own blind spots and be oriented toward learning in order to begin to develop a post-imperial and just conceptualization and legitimation of human rights. By holding out the normative ideal of open and fair intra- and cross-cultural deliberation, based on argumentation and the genuine confrontation of views, the potential for responding to radical questioning aimed at human rights discourses understood as "globalized Western localisms" may be made possible. Such an approach may foster transformative discourses while seeking to avoid reliance on something like a "manipulation of the sentiments"\textsuperscript{164} or the naturalistic and evolutionary view of the development of human rights discourses sometimes implied by interpretive positions. While remaining vulnerable, therefore, to the requirement of some level of agreement in order for human rights to be viewed as legitimate (as is true of all other postmetaphysical approaches which reject unrestrained power politics as the basis for human rights), a discourse-theoretic approach to the legitimation of human rights holds out an ideal that the force of the better argument may orient opinion-formation with the possible (but by no means guaranteed) result of generating both insight or enlarged thinking and solidarity, rather than leaving understandings in tact as interpretive approaches tend to do. Such a deliberative democratic approach to the formulation and legitimation of rights seeks to accommodate the current challenges posed by multicultural claims and globalization by its commitment to a "multivo-cal process of opinion-formation."\textsuperscript{165}

We must be on guard, however, to give the metaphor of cross-cultural dialogues real substance by emphasizing the necessity of the politics of struggles for recognition and redistributions of power to motivate and nourish the emergence of deliberative conditions. The metaphor is important for it gestures to the procedural requirements for mutual recognition and discursive public spheres and the attitudes of respect, generosity and reciprocity that are required. But the proliferating metaphors of a "conversation of cultures," of "diatopical hermeneutics" and "cross-cultural exchange" must be brought back down to earth, not taken too literally or too idealistically, otherwise we run the risk of falling back into either a triumphalist cosmopolitanism or an imperialist version of human rights or both. This is where deliberative theory may make its most important contribution. The experiences of misrecognition, of economic injustices, and of a


\textsuperscript{164} Rorty, \textit{supra} note 28.

\textsuperscript{165} \textit{Between Facts and Norms}, \textit{supra} note 22, at 476.
renewed imperialism that have developed under conditions of political (and other) poverty must remain the object of transnational struggles both on the basis, and over the very terms, of human rights in order to legitimate and reconceptualize them in a post-imperial direction. A discourse-theoretic approach to the legitimation of rights thus lays the basis for further political contestation over the meaning of rights—it assumes the "perpetuity of political contest" that agonal theorists, like Bonnie Honig, properly recognize. Understood in this way, human rights must remain reflexive. By premising the legitimation of human rights on demands for deliberation under procedurally fair conditions and linking this demand to struggles that seek to address the political poverties that stand in the way of this goal, human rights must depend, as Habermas argues, on the "permanent risk of dissensus to spur on legally institutionalized public discourses."

Here we see the deliberative and contestatory groundwork laid within discourse-theoretic versions of the legitimation of rights. These are some of the issues that a deliberative approach to human rights might address with the aim, not just of evaluating the democratic deficits we currently face, but also of contributing to the conditions where human rights, public spheres and political institutions—local, national, regional and global—may be opened to the flows of a proceduralized and democratized popular sovereignty.

A discourse-theoretic approach to the deliberative legitimation of human rights may help us, then, begin to address one of the most pressing issues of our time which consists, as Santos puts it, in "transforming the conceptualization and practice of human rights from a globalized localism"

166 For a similar interpretation, see Patchen Markel who argues that Habermas conceives of democratic politics in public spheres as "an unending process of contestation, conducted with the critical awareness that no actually existing settlement can constitute a satisfactory embodiment of the regulative idea of agreement." Markell, supra note 68, at 378-379. For Habermas, then, "agonistic political action is among the very conditions of the possibility of democratic legitimacy." Id. at 379. Furthermore,

In a post-conventional society in which every settlement ought in principle to be open to further contestation and in which no issue, not even the rules of discussion themselves, can be excluded from the political agenda, it would be a mistake to interpret the ‘orientation toward agreement’ as a standard that can justify the exclusion of ‘spontaneity, initiation and difference’ from a regularized and normalized public sphere.

Id.

167 BETWEEN FACTS AND NORMS, supra note 22, at 462.
into a cosmopolitan project.”¹⁶⁸ A consistently deliberative commitment holds the promise of producing such a post-imperial legitimation of human rights required in the conjuncture of globalization, multiculturalism and postmetaphysical thinking. It begins to address the cultural imperialisms associated with globalization and some forms of cosmopolitanism. We must be clear that it is, however, a project that is both inadequate to the current scene that includes the politics of human rights imperialism and it is fraught with risks; it means living without guarantees. It is inadequate—necessary but not sufficient—because it does not, of itself, fully address the “imperial logic of power”¹⁶⁹ or the risks entailed by the emergence of “military human rights policy”¹⁷⁰ such as we see in late modernity. It does, however, offer one element of redress for the cultural aspect of imperialism. It is risky for, as Beck emphasizes, legitimate rights may entail their own dangers. But life without guarantees does not mean we must live life with no normative ideals. And the ideal of the just expansion of human rights based on cross- and intra-cultural deliberations capable of testing and producing discursively legitimated human rights imagines the replacement of a cultural imperialism with a post-imperialism. This is a political imaginary worth struggling over.

¹⁶⁸ Santos supra note 1, at 339.
¹⁶⁹ Beck, supra note 9, at 86.
¹⁷⁰ Id. at 87.