

Deliberating about Cosmopolitan Ideas: Does a Democratic Conception of Human Rights Make Sense?

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Introduction

Human rights is *the* cosmopolitan idea. Whilst constitutional rights can be justified by reference to the fact of co-membership in a bounded political community, borders are irrelevant in the recognition of human rights, which give expression to the equal moral worth of all individuals.¹ The problem for human rights is that they lack a coherent or agreed ontological foundation. The contemporary literature divides between naturalistic accounts, which conclude that, for some reason or other, we have human rights simply 'by virtue of being human'; political accounts grounded in the practice of global and domestic politics; and an emergent literature on the moral justification for positivizing human rights in international law. One thing is clear. Where human rights is formulated in terms of *A has a human right to X against B by virtue of Y*, it is difficult to accept that the justificatory element ('by virtue of Y') might lie in the imposition of one particular philosophical argument, expressed in terms of agency, personhood, capacities, etc., or in the experiences of only one part of the human population. In the words of Upendra Baxi: human rights should be universal, not global, that is, agreed by the subjects of human rights regimes, and not imposed by others.² To the extent we agree with the abbé Sieyès, that persons should not be the passive beneficiaries of rights, but active citizens, who decide on the content of rights, then *mutatis mutandis*, a 'citizen of the world' (Diogenes) should not be the passive beneficiary of human rights, but should understand themselves as also being the authors of the global human rights regimes.

¹ David Held, *Cosmopolitanism: Ideals and Realities* (Cambridge: Polity, 2010), p. 54.

² Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002), pp. 95-6.

The objective of this chapter is to consider whether it is possible to justify global human rights by reference to an application of Jürgen Habermas' deliberative democracy to world society, given that the relevant community of fate of human rights is the unbounded human species. The argument from deliberative democracy is straightforward: those who are to be subject to regulatory norms should understand themselves to be the authors of those norms – albeit indirectly. Legitimate authority is established where the subjects of regulations consent to norms of conduct, with agreement reflecting a reasoned consensus achieved by deliberative equals. The work first outlines the argument for deliberative democracy, before considering the possibility of applying the model to systems of global governance and of developing a deliberative account of human rights. Three approaches can be seen in the literature: human rights as globalized constitutional rights (the position advanced by Habermas); human rights as global constitutional rights; and human rights as a global ethic arrived at through reasoned deliberations. After the 'death of God' (Friedrich Nietzsche), the idea that, in the counterfactual ideal, a reasoned consensus represents 'the right thing to do' has proved highly influential in the literature. This *consensus* literature can, though, be contrasted with work that understands human rights as the politics of *dissensus*, focused on disagreement: human rights as the product of outrage and emotion, not reason. The chapter examines the implications of this dissensus literature for the possibilities of a deliberative account of global human rights, concluding that human rights becomes meaningful primarily as an argument *against* politics.

The deliberative model

Democracy has established itself as the only legitimate form of government at the level of the State, but it is not, contrary to popular misconception, defined by the practice of majoritarianism, i.e. the holding of periodic elections or attempts to achieve a majority in support of a policy proposal, although majoritarianism is certainly one aspect of the practice of democracy. Democracy is properly understood as an ongoing process of debate, deliberation, and decision. In a democratic system, citizens expect that regulatory directives will reflect their individual interests and perspectives on an ongoing basis; that the authorities will introduce mechanisms to establish those interests and preferences; and they will attempt to accommodate those interests and perspectives within the regulatory framework – or

explain why this is not possible. Jürgen Habermas' model of deliberative democracy provides the intellectual and theoretical justification to support this way of thinking about democracy, establishing that, in the counterfactual ideal, political law norms should be agreed *all* subjects. This consensus is achieved via a process of reasoned deliberation in which positions are accepted as legitimate only where agreed by those affected by the outcomes in discussions in which the only force used is the force of the better argument.³

The conduct of politics in a deliberative democracy differs from that in aggregative models. It is not sufficient to put together a majority of self-interested positions in order to establish political legitimacy for a policy proposal. Legitimate laws result from effective democratic deliberations. In political debate, participants must rely on reasoned arguments if they are to convince others of the rightness of their positions. Consequently, the language of politics must be orientated towards mutual understanding, as participants vindicate claims by reference to reasons that others might accept, and arguments expressed in terms of what is equally good for all. When an argument is not accepted, there is a shift from justification to discourse, with claims and arguments tested through reasoned deliberation. Where consensus is not possible, the relationship shifts again from discourse to bargaining – a process in which each participant engages in strategic argumentation. Bargaining is permissible to the extent that the process is deliberative and compromises acceptable, in principle, to all participants, who may agree for different reasons – in contrast to a discursive consensus.

Whilst deliberative democracy provides the counterfactual ideal at the level of the State (against which the practice of real-world democracy can be evaluated), Habermas concludes that a global deliberative democracy is not possible, as the global public does not have the capacity to imagine itself as a voluntary association of free and equal citizens engaged in a process of collective will-formation – a variant of the no *demos*: no democracy thesis.⁴ The focus, then, should be on limited reform of the already existing governance institutions, in

³ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Oxford: Polity, 1996).

⁴ Jürgen Habermas, 'Does the constitutionalization of international law still have a chance?', in *The Divided West* (Cambridge: Polity, 2006), p. 115.

particular the United Nations. Given the lack of (democratic) legitimacy for any global institution, the governance functions of this world organization should be limited to international peace and security, technical questions of cooperation, and *human rights*.⁵

Elsewhere, I have argued, *pace* Habermas, that the model of deliberative democracy can be applied to governance systems beyond the State – albeit imperfectly.⁶ The analysis divides global regulation in two: the inter-State regimes of public international law and the regulatory regimes of international organizations and institutions. In relation to the first, the democratic legitimacy of inter-State agreements (treaties, conventions, etc.) can be located in the practice of deliberative diplomacy, as participants engage in reasoned discussions leading to a consensus on the adoption of a formal instrument (consent is *the* central idea of the international law system). The practice of adopting important treaties at international conferences or by international assemblies (in particular the General Assembly of the United Nations) enhances the democratic legitimacy of global agreements as those States that will be subjected to regulatory norms are directly involved in discussions leading to their agreement. In relation to global governance by international organizations and institutions, whilst these are normally established by inter-State agreements, they invariably more beyond the literal scope of their delegated powers to operate autonomously. There is, then, a requirement for global regulators to establish their own legitimate political authority, beyond that accorded to the relevant constitutive treaty. The argument from deliberative democracy suggests the following in relation to the exercise of authority by global regulators. First, the exercise of normative power must be justified by reference to the interests and perspectives of the subjects of the relevant regime. Second, in order to ascertain the interests and perspectives of subjects, a global regulator must engage with subjects through ‘democratic’ procedures, such as ‘notice and comment’ and other consultation mechanisms. Third, global regulatory norms must be established through a process of inclusive, public reasoning, requiring the

⁵ Jürgen Habermas, ‘A political constitution for the pluralist world society?’ (2007) 34 *Journal of Chinese Philosophy* 331. At the regional level, Habermas concludes that greater legislative activity would be permitted on co-ordination and collective action problems given the possibilities of the collective imagination of the region as a political community (drawing on the experiences of the European Union).

⁶ See Steven Wheatley, *The Democratic Legitimacy of International Law* (Oxford: Hart, 2010); Steven Wheatley, ‘A democratic rule of international law’ (2011) 22 *European Journal of International Law*, 525; and Steven Wheatley, ‘A democratic account of the right to rule in global governance’ (2012) 18 *Swiss Political Science Review* 158.

establishment of representative, deliberative bodies. Fourth, regulatory norms must represent a fair bargain in terms of the interests of the various subjects of the regime. Finally, the likely absence of a consensus on the adoption of a regulatory norm highlights the importance of mechanisms of review and challenge, and the need to allow issues to be brought back on the agenda where new evidence or arguments are adduced. Once these procedural mechanisms are in place, it becomes possible for a global regulatory regime to develop a legitimization narrative for its exercise of normative power that allows subjects to regard themselves as the authors of the regime – albeit indirectly.

Human rights and constitutional rights regimes

One of the major contributions of the theory of deliberative democracy is that it moves us away from the sterile debates that position democracy and rights in an antagonistic relationship. For Habermas, there can be no democracy without rights, and no rights without democracy – his ‘co-originality’ thesis. Constitutional rights in a deliberative democracy take one of two forms: constitutional rights inherent in the idea of deliberative democracy and those that result from democratic deliberations. In the former category (rights inherent in deliberative democracy) are the rights to equality, membership, and political participation; to an effective legal remedy; and to the enjoyment of the minimum living conditions necessary for citizens to exercise their legal and democratic rights.⁷ Beyond these basic rights, constitutional rights are established through democratic deliberations in a collective act of political self-determination that aims to promote the public and private autonomy of citizens: private autonomy is the right to be left alone to live a life of one’s own choosing, public autonomy the right of public participation in the process of law-making.⁸ With the exception of the basic rights necessary for the functioning of a deliberative democracy, constitutional rights (like all political norms) are legitimate only where they are agreed by subjects following a period of reasoned debate. They are not the product of some higher authority or natural law reasoning; constitutional rights are not discovered, or given –

⁷ Habermas, above note 3, pp. 122-123.

⁸ Ibid., p. 419.

they are agreed by the members of a political community via a process of democratic law-making.⁹

Whilst, at least to my mind, the model of deliberative democracy can be applied beyond the State to global regulatory norms (albeit imperfectly), it seems less clear that the deliberative ideal can be applied to human rights in world society – unless we conclude that there is nothing special about human rights, which can then be understood in the same way as any other global regulatory norms. Where Habermas has written about the possibilities of democracy beyond the State, the question of human rights is left unproblematized.¹⁰ Habermas concludes, for example, that the United Nations should retain its function as guarantor of human rights, without examining the justification for human rights. Habermas abandons his co-originality thesis at the global level, removing the necessary link between democracy and rights: international human rights are guaranteed by global institutions, but not in any meaningful way subject to democratic opinion- and will-formation. The ontological foundation of human rights, according to Habermas, lies in the experiences of those democratic Nations that developed constitutional rights regimes for the protection of the individual:¹¹ human rights as the globalization of constitutional rights.¹² Understood in this way, the focus would be on domestic constitutional rights regimes, with international

⁹ Rawls develops a similar argument: John Rawls, *Political liberalism* (New York; Chichester: Columbia University Press, 2005).

¹⁰ See, for example, Jürgen Habermas, ‘The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society’ (2008) 15 *Constellations* 444. Habermas concludes that a politically constituted world society would be composed of citizens and States. There would be two paths of legitimation: the first would lead from cosmopolitan citizens, via an international community of States, to the peace and human rights policy of the world organization; the second from national citizens, via the State, to a transnational negotiation system. Both paths would meet in the General Assembly of the world organization, which would be composed of representatives of cosmopolitan citizens and delegates from the democratically elected parliaments of member States. The legislative function of this ‘World Parliament’ would, however, be confined to the interpretation and elaboration of the Charter.

¹¹ Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge, Mass: MIT Press, 1998), p. 190. There is some evidence to support this reading, with the Universal Declaration on Human Rights being drafted with the actual experiences of democratic States in the protection of constitutional rights in mind. See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House New York, 2001).

¹² The idea of human rights as globalized constitutional rights is also seen in Louis Henkin, *The Rights of Man Today* (Boulder, Col.: Westview Press, 1978).

human rights providing a second-level backstop for the protection of rights.¹³ The most important global human right would be, in Hannah Arendt's terms, the 'right to have [constitutional] rights', i.e. the right to belong to an organized political community and to be recognized as a full member of that community.¹⁴ In this context, Jean Cohen argues that the most serious violations of human rights (mass extermination, ethnic cleansing, massive crimes against humanity, including the exclusion or enslavement of one part of the population) can be understood in terms of radical violations of membership that indicate 'absolute nonbelonging'.¹⁵

There is no doubt that human rights are related in some way to constitutional rights. This is seen in those narratives on the evolution of human rights that begin with Thomas Hobbes, John Locke, Jean-Jacques Rousseau, the French Declaration of the Rights of Man and the Citizen and American Declaration of Independence and Bill of Rights.¹⁶ Constitutional rights regimes concern, however, the rights of individuals *here*, and necessarily distinguishes between insiders and outsiders, i.e. they are not cosmopolitan in outlook. Constitutional rights are established within a given political community, for the political community, by the community – they are associative rights.¹⁷ By way of contradistinction, the claims of human rights are grounded in the argument that human rights apply to individuals *here* and *there*: to count as a possible violation of human rights, the impugned action or inaction must constitute a violation of human rights irrespective of whether it is committed *here* or *there*.

Deliberating about human rights

¹³ See, also, the influential argument developed by Charles Beitz, which develops a two-level model of human rights, with States as the bearers of the primary responsibilities to respect and promote human rights and the international community as the guarantor of these responsibilities: Charles R. Beitz, *The idea of Human Rights* (OUP, 2009), p. 108.

¹⁴ Hannah Arendt, *The Origins of Totalitarianism* (Orlando: Harcourt, 1968), pp. 296-7.

¹⁵ Jean L. Cohen, 'Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization' (2008) 36 *Political Theory* 578, 586.

¹⁶ For an introduction to the contested narratives of human rights, see Philip Alston, 'Does the past matter? On the origins of human rights' (2013) 126 *Harvard Law Review* 2043.

¹⁷ Cf. Thomas Nagel, 'The problem of global justice' (2005) 33 *Philosophy and Public Affairs* 113, 121.

The requirement, then, is to establish a justification for recognizing that all individuals enjoy globally recognized human rights without reference to membership in a political community. Whilst Habermas rejects the possibility of a genuinely democratic account of human rights, his influence can be seen in the literature that locates the ontological foundations of human rights in a political or moral consensus. An argument for the deliberative legitimacy of human rights can, for example, be made by reference to the processes of human rights law-making. Human rights treaties are, after all, adopted following a process of deliberation, argumentation, bargaining, compromise and ultimately consensus. The same point can be made about the treaties and the other human rights instruments adopted by the General Assembly of the United Nations, in which all States participate on a basis of equality. Jack Donnelly, for example, argues that the Universal Declaration on Human Rights (adopted by the UN General Assembly) should be understood as an overlapping political consensus on human rights, which can then be explained by reference to a number of moral and political theories.¹⁸

The idea that human rights somehow represents a consensus of political and moral thought has been developed by a number of writers. Charles Beitz observes that these ‘agreement theories’ conceptualise human rights variously in terms of the identification of rights common to different cultures, religions and other world views; possible agreement between world views on human rights; the identification of rights that it would be reasonable for adherents of different world views to accept; and positions that could be accepted by the various cultures, religions and world views, if they evolved in the direction of human rights.¹⁹ What these agreement theories have in common is that the ontological foundation of global human rights is located in an actual or potential agreement (or consensus) between individuals on the basis of their already existing cultural, religious and other beliefs systems.

Other agreement theories focus on the conditions necessary for achieving a political consensus on human rights, without reference to any ethical or religious outlook. The objective, as Joshua Cohen observes, is to establish the conditions and procedures by which

¹⁸ Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca, N.Y.: Cornell University Press, 2003), p. 41.

¹⁹ Beitz, above note 13, chapter 4.

human rights norms can be agreed, with those rights then establishing the standards by which all political societies can be held accountable.²⁰ This political conception of human rights is increasingly establishing itself as the dominant paradigm in the literature. Human rights are understood to be political in the sense that the justification given for them is determined by their political role in world society, i.e. in evaluating the practices of domestic political societies, and justifying intervention.²¹ Human rights are also political in the sense that their foundations lie in political agreement and not some metaphysical or religious conception of ‘right’ and ‘wrong’. Where political legitimacy is understood in deliberative terms, the legitimacy of human rights rests on the establishment of human rights norms through democratic procedures.

Consensus, or agreement, is of course central to the deliberative model of political legitimacy – the idea being that it is not possible, *ceteris paribus*, for an individual to suffer an injustice where they have consented to the relevant act or conduct. Writers argue variously that the legitimate authority of human rights can be established in the agreement of political communities to uphold human rights or, more radically, in the consent of each individual to the global human rights system that gives meaning to the contingent and contested idea of ‘being human’ (this later variant is clearly focused on hypothetical consent). Other writers have sought to locate the basis for human rights in different aspects of the deliberative ideal. A particular focus has been public justification.²² Rainer Forst, for example, refers to a basic human right to justification, which is framed in terms that an individual cannot be treated in a manner ‘for which adequate reasons cannot be provided.’²³ The premise is that no one can

²⁰ Joshua Cohen, ‘Minimalism about human rights: The most we can hope for?’ (2004) 12 *Journal of Political Philosophy* 190, 195-7.

²¹ Kenneth Baynes, ‘Discourse Ethics and the Political Conception of Human Rights’ (2009) 2 (1) *Ethics & Global Politics* 1, 7. See also Laura Valentini, ‘In What Sense are Human Rights Political? A Preliminary Exploration’ (2012) 60 *Political Studies* 180.

²² Amartya Sen, for example, argues that the ethical idea of human rights includes an implicit presumption that any justifiable conception can sustain open and informed scrutiny as to which rights should be included and which rights should not be included in any list of human rights: Amartya Sen, *The idea of Justice* (London: Allen Lane, 2009), p. 359. In similar vein, Robert Alexy concludes that human rights ‘are valid if and only if they are justifiable’: Robert Alexy, ‘Law, Morality, and the Existence of Human Rights’ (2012) 25 *Ratio Juris* 2, 10.

²³ Rainer Forst, ‘The Basic Right to Justification: Towards a Constructivist Conception of Human Rights’ (1999) 6 *Constellations* 35, 40.

speak for, or decide on behalf of, another. Consequently, it is not possible to construct a body of human rights law, unless that law can be justified to each individual to which it is applied.²⁴ Likewise, Seyla Benhabib argues that the project of human rights, as a project of juridical universalism, ‘presupposes recourse to *justificatory universalism*.’²⁵ Given that human rights does not have an objective, taken-for-granted, content or meaning, it must be developed through public debate and deliberation, as rights claims are ‘contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions.’²⁶ The contention is that each individual is entitled to equal moral respect – and as having the ability to make and understand arguments around human rights, and to accept or reject the arguments of others.

Dissensus accounts of human rights

Underlying the arguments of the various deliberative or agreement scholars – all influenced in some way by Habermas,²⁷ is the idea that, in the absence of an agreed religious, metaphysical or philosophical basis, the ontological foundation of human rights should be located in an actual or hypothetical consensus on global human rights system. Where new rights or new interpretations are proposed, the requirement then is to engage in a process of reasoned deliberations in order to achieved a revised consensus. The problem for deliberative accounts is that the objective of human rights is often not to establish agreement on the basis of reasoned argument, but to frame a politics of *dissensus* around which human rights campaigns can organize themselves.²⁸ Consider, for example, the ways in which the social movements on slavery, racism, gender discrimination, discrimination on the grounds

²⁴ Rainer Forst, ‘The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach’ (2010) 120 *Ethics* 711, 740.

²⁵ Seyla Benhabib, ‘Another Universalism: On the Unity and Diversity of Human Rights’ (2007) 81 (2) *Proceedings and Addresses of the American Philosophical Association* 7, 13 (emphasis in original).

²⁶ *Ibid.*, 21.

²⁷ Marie-Bénédicte Dembour identifies deliberative or agreement scholars (who understand human rights as ‘agreed’) as one of four Schools of human rights: Marie-Bénédicte Dembour, *Who believes in human rights? Reflections on the European Convention* (Cambridge: Cambridge University Press, 2006), chapter 8. Along with the deliberative scholars, Dembour identifies natural human rights scholars (human rights as ‘given’); protest scholars (human rights as ‘fought for’); and discourse scholars (human rights as ‘talked about’).

²⁸ Simon Critchley, *Infinitely Demanding: Ethics of Commitment, Politics of Resistance* (London: Verso, 2007), p. 94.

of sexuality, State-sponsored torture and killing were framed *against* political power and often sought to *breakdown* a political consensus, and in doing so to increase political instability – in contradistinction to the arguments from deliberative democracy.

In their everyday use, human rights are not propositions about philosophical truths. Those campaigning in support of this-or-that human right do not often consider themselves to be engaged in a process of moral reasoning. The language and rhetoric of human rights normally arises in response to a perceived injustice – a particular act of police brutality, for example, when campaigners seek to name the impugned act or omission a human rights injustice by reference to a globally recognized norm. This is explained by Alison Brysk in terms of ‘speaking rights to power.’²⁹ Brysk argues that a human rights politics of persuasion operates through narrating the concrete suffering of individuals. By caring about the fate others, we learn what it means to be human: ‘[b]y telling me who is human, the social imaginary of human rights reflects back my own humanity’.³⁰ Of course, as Jean-François Lyotard observes, the paradox of human rights is that rights follow situations of *not* being treated like a fellow human, i.e. to be treated *other* than a human – only then does an individual have rights, and only then are they treated by others as a human being.³¹

Human rights against the system

The paradigmatic infraction of human rights involves a violation of the physical integrity of a member of an Opposition political party by agents of the State. Thomas Pogge highlights the connection between human rights and the actions of officials, giving the example of the theft of a car: if the car is stolen by an ordinary thief, this is not normally considered a violation of human rights; whereas, if the car is arbitrarily confiscated by a government official, this is often understood as a violation of the right to property.³² We know this is a

²⁹ Alison Brysk, *Speaking Rights to Power: Constructing Political Will* (New York: Oxford University Press, 2013), p. 16.

³⁰ Ibid., p. 25.

³¹ Jean-François Lyotard, ‘The Other’s Rights’, in Stephen Shute and Susan Hurley (eds.), *On Human Rights* (The Oxford Amnesty Lectures, 1993) 135, 136.

³² Thomas Pogge, *World Poverty and Human Rights : Cosmopolitan Responsibilities and Reforms*, 2nd ed. (Cambridge: Polity 2008), p. 63. Following this line of thought, James Nickel develops a prudential argument for individuals to support human rights on

human rights violation because it concerns the abuse of power by a government institution. How, though, do we explain this? Gunther Teubner argues that, since Niccolò Machiavelli, politics has become detached from morality and religion. Understood as the use of coercive power within a territory to carry out collectively binding decisions, politics has developed its own specialised language and rationality. The politics system has a tendency, however, to totalise its rationality in one of two ways. First, it seeks to regulate all aspects of social life, including the law, the economy, religion and science, etc. Secondly, the politics system seeks to control the minds and bodies of individuals, interfering in what we might call private autonomy. Teubner observes that, through its functioning, the politics system creates its own understanding of the world that includes its conception of the value (or otherwise) of those individuals subject to the system, and it can easily ‘turn against [those individuals, or some sub-set, thereof] and threaten their integrity, or even terminate their existence.’³³

Whilst the idea that the function of human rights is to protect the individual from the government is common in the literature, it is an error to understand human rights only in terms of limiting political power. Consider, for example, the human right prohibiting slavery. Slavery results from the functioning of the economic system, where it develops a rationale that categorizes certain individuals as possessions to be bought and sold for money in an open market, with the objective being to make a profit. It makes no difference to the economic system whether slavery is regarded as morally *right* or *wrong* by others, whose opinions are not part of the system’s thinking. The argument against slavery must be made against both the economic system – demanding that it change its way of thinking about certain individuals – and against the politics system – calling on the latter to intervene in the economic system and utilize political power through the medium of law to protect individuals.

The example of slavery makes clear that human rights cannot be understood exclusively in terms of rights against the politics system, but against the ways in which social systems

the basis that rights protect fundamental interests against the threats presented by governments: James W. Nickel, *Making sense of human rights*, 2nd ed. (Malden, Mass.: Blackwell Pub. 2007), p. 55.

³³ Gunther Teubner, ‘The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors’ (2006) 69 *The Modern Law Review* 327, 335.

function – the politics systems, the economy, the media, religion, etc. The analysis draws on the systems theory of Niklas Luhmann, which understands world society in terms of communication systems that have their own irreconcilable rationalities: the rationalities of law, politics, economics and sciences, etc. Systems of communication are distinguished from the background *noise* of world society by virtue of the fact that each system has its own functional specialism and its own binary coding, through which the system creates its own understanding of the world according to the rationalities of the particular system-type.³⁴ Each system generates its own understanding of the world from a point-of-view that is internal to the system. The only relevant perspective is that of the system, and the only relevant observer is the system. Luhmann's autopoietic systems are closed systems. The theory excludes the possibility of information entering a social system directly from the environment, or from another system. A closed, autopoietic system can only understand the information it receives from the external environment in terms of 'irritations, surprises, and disturbances'.³⁵ It then makes sense of these *irritations* to restructure the system, consistent with its previous operations. Where there are repeated irritations from the environment that the system comes to rely upon, the system is said to be *coupled structurally* with an aspect of the environment, including the possibility of structural coupling with another system. The idea of structural coupling was developed by Luhmann in his later writings to explain how a system can maintain its autonomy, whilst evolving with developments in the external environment, including developments in other systems.

Law and politics are, according to Luhmann, autopoietic systems of communication. The functional specialism of law is to maintain expectations in the face of disappointment. The binary coding is lawful/unlawful, or law/non-law. The function of the politics system is to provide society with a means of making (collectively) binding decisions on political questions. The binary coding is governing/governed, or authority/subject. The politics system is comprised of communications on those issues identified as requiring the adoption of collectively binding decisions that will be coercively enforced. The politics system exercises coercive power through the legal system: politics establishes the scope of effective

³⁴ See, generally, Niklas Luhmann, *Theory of Society*, Vols. 1 & 2, translated by Rhodes Barrett (Stanford: Stanford University Press, 2012 & 2013).

³⁵ Niklas Luhmann, *Law as a Social System*, trans. Klaus Ziegert (Oxford: Oxford University Press, 2004), p. 383.

law norms through executive enforcement; law translates power into legitimate political action. Luhmann understands the systems of law and politics to be coupled structurally under a Constitution, which is constructed by each system separately, but which assists each system to make sense of its relationship with the other.³⁶ The idea of constitutional rights in closed systems theory is explained by reference to this structural coupling. Constitutional rights emerge through the interactions of the coupled systems of law and politics in the form of a Bill of Rights, which is one part of the State Constitution.³⁷ Fundamental (constitutional) rights operate in the following ways: to resist the totalizing claims of the politics system (the dystopia of the totalitarian State); to demand action from the politics system to protect the interests of subjects (the dystopia of the failed State); to protect individuals from the totalizing claims of other systems (media, religion, economy, etc.); and to ensure the recognition and inclusion of all individuals within the political system and the other communication systems of society (the economic system, etc.).

Self-constraint: the most we can hope for?

Luhmann understands world society as a system of *autopoietic* systems of communication that build themselves from their own communications and which then constitutes the possibilities of future communications. There is no reason to exclude the possibility of global constitutional rights emerging as the result of the structural coupling of global law and global politics – indeed, Luhmann sees the emergence of human rights, as the result of scandalization following State-sponsored disappearances, killings and torture, as an important indicator of the existence of a global law system.³⁸ These global constitutional

³⁶ Niklas Luhmann, 'Operational Closure And Structural Coupling: The Differentiation Of The Legal System' (1991-2) 13 *Cardozo L. Rev.* 1419, 1436. Whilst the legal and political systems are coevolved and coexistent, they can only make sense of the world in their own terms, even when they are communicating about the same subject: for the legal system, legislation adopted by the national Parliament is to be interpreted and applied in accordance with the principles concerning statutory interpretation; for the political system, legislation is an expression of a collective binding decision that should be given effect.

³⁷ Luhmann, above note 35, p. 417. See further Gert Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory' (2002) 29 *Journal of Law and Society* 258.

³⁸ Ibid., p. 482. For a critique of Luhmann's approach, see Gunther Teubner, 'Transnational Fundamental Rights: Horizontal Effect?' (2011) 40 *Rechtsphilosophie & Rechtstheorie* 191, 194-5.

rights would not, however, impose an external constraint on other social systems – including the systems of domestic law and politics.³⁹ In the closed systems theory of autopoiesis, human rights can only operate as a form of internal critique: they cannot establish ‘external’ limits on system functioning. In Luhmann’s words, there is no ‘moral super-code’ in closed systems theory.⁴⁰ The immorality of system function can only be understood by reference to the non-functioning of the system, i.e. when a system fails to operate in accordance with its own programme and code – corruption in politics is ‘wrong’, doping in sport is ‘wrong’, etc. From the perspective of autopoiesis, the justice claims of human rights can only be aimed at removing unjust situations, not creating justice, as the system responds to the *irritations* felt by the system at the point of contact with individuals complaining about violations of their physical and psychological integrity. The argument is one of self-limitation: it is for the system to decide how to respond to the *irritations* it feels following ‘injustices’ committed against flesh and blood individuals. Consider, for example, the way in which Gunther Teubner explains the emergence of global human rights in the aftermath of the World War II as a moment at which ‘political power throughout the world *was prepared to constrain itself*.’⁴¹

But why would political power constrain itself, and how could political power constrain itself *within the existing rationale* of the system? The question applies equally to other systems, including the (global) economic system.⁴² It is not sufficient only to develop a conception of human rights as an internal critique of system rationale, i.e. to leave it to each system to decide whether – and to what extent – it develops its own conception of ‘human rights’. It must also be possible for those outside of a system, including those put outside of the system, to directly challenge the way in which a system is functioning, whether that be the politics system, law system, or economics system, etc. In a significant divergence from earlier work, Luhmann’s later publications identify a meta-code of inclusion/exclusion. This meta-

³⁹ At one point Luhmann asserts, without explication, that ‘international public law... binds domestic law’: *ibid.*, p. 369. If this were the case, then it would be difficult to regard State-law as an autopoietic, autonomous, closed system of communication (as Luhmann does).

⁴⁰ Niklas Luhmann, *Theory of Society*, Vol. 2, translated by Rhodes Barrett (Stanford: Stanford University Press, 2013), p. 281.

⁴¹ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, translated by Gareth Norbury (Oxford: Oxford University Press, 2012), p. 83 (emphasis added).

⁴² See Emiliios Christodoulidis, ‘On the Politics of Societal Constitutionalism’ (2013) 20 *Indiana Journal of Global Legal Studies* 629.

code, he explains, is inherent in the idea of closed systems theory, as each system presumes to create a world of meaning for all individuals in relation to its own function, but only its function – the law system, for example, establishes the way in which individuals experience ‘the law’, but only the law. The very operation of the system results, however, in some individuals being excluded from full participation in the system – as a direct consequence of the way the system functions: individuals are either included within the system (as citizens within the politics system, for example) or excluded (slaves within the economic system). Inclusion from one system is likely to lead to exclusion from another. The exclusion from the politics system (and status of citizen) is likely, for example, to lead to exclusion from full participation on the economic system (as in the case of undocumented migrants). The meta-coding inclusion/exclusion reflects the fact that some human beings will be, in Luhmann terms, ‘persons and others only individuals [or bodies]; that some are included into function systems... and others are excluded from these systems’.⁴³

It is clear from Luhmann’s analysis, that he regards it as morally ‘wrong’ for certain individuals to be excluded from participation in social systems (the economy, politics, education etc.) that – in his opinion – they should be included in. Luhmann is not personally content to accept that the rationale of the particular system (politics, the economy, the media, etc.) legitimates itself through system functioning – and that the legitimation narrative should be accepted by all subjects (and non-subjects) and all observers of the system. Whilst Luhmann does not, in this context, refer to the idea of human rights, his concerns reflect one of the foundational meta-principles of human rights – that each individual counts equally simply ‘by virtue of being human’, irrespective of system rationale.

Whilst the closed systems theory of autopoiesis excludes the possibility of human rights directly influencing the law and politics systems (other variants of systems theory allow for a more nuanced account), it is evident that human rights constitutes a *massive irritant* to the law and politics systems when it highlights the exclusion of individuals who should have been included in a social system and observes violations of their physical and psychological

⁴³ Niklas Luhmann, ‘Globalization or World society: How to conceive of modern society?’ (1997) 7 *International Review of Sociology* 67, 76.

integrity as a consequence of the operations of a system. Where systems understand themselves to be closed, self producing, systems, they can only understand human suffering by constructing a *mask* that represents the pain of the individual.⁴⁴ Behind that mask, however, is the *face* of a flesh and blood individual that demands inclusion in the system and complains of violations of her physical and psychological integrity. The idea of humanity is represented in that face and in its suffering: in the face of the unknown man stood in front of a tank in Tiananmen Square or that of the emaciated individual behind the fence of a concentration camp.⁴⁵ Those *faces* serve as a reminder of the value of the human individual against the self-serving expansionist tendencies of system rationale – especially that of the politics system.

Conclusion

When we talk about human rights, we might mean one of three things: moral human rights – an ethical argument that we have rights, for this or that reason, simply by virtue of being human; political human rights, represented *inter alia* by the standard setting and interventionist practices of the political bodies of the United Nations; and legal human rights, reflected, for example, in the UN human rights treaties. The global human rights system can be modelled as the system of these (human rights) systems. The global human rights system frames our understanding of what it means to be human – or at least what it means *not* to be human – when it observes that it is ‘wrong’ (morally, legally, politically, or in some other way) to treat an individual in a particular way. Parts of the system are amenable to an application of the deliberative methodology: the texts of human rights treaties are agreed following deliberation and negotiation, and adopted by consensus; the political dimensions of human rights – discussions on the need for new rights or justifications for intervention – are often the subject of reasoned debate at the United Nations; and it is possible to identify a consensus on the meaning of human rights within and between many of the world’s cultures, or to develop a thought experiment in which human rights can be

⁴⁴ See, for example, Teubner, above note 41, p. 142.

⁴⁵ Cf. Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart, 2000), p. 245.

justified to all individuals by all individuals. It would though be an error to seek to locate the ontological foundations of human rights in the deliberative ideal.

Habermas' model of democracy establishes a compelling argument for the way in which governmental and governance regimes within and beyond the State should understand their claim to legitimate political authority. It also provides a coherent account of constitutional rights – rights inherent in the practice of democracy and those that result from political deliberations. Deliberative democracy is, though, a counterfactual ideal, observing the possibilities of a never to be realized utopia of justice yet to come. This must be contrasted with the language of human rights, which reflects the dark and depressing reality of a lived dystopia for many individuals.⁴⁶ The language of human rights is the language of dissent to the realities that functional systems (politics, the economy, etc.) can, and do, exclude individuals from full participation (slaves, women, minorities, etc.) and that they can, and do, turn against individuals, violating their bodily integrity or rendering them non-persons through significant restrictions on those aspects of human social life that make us human. Human rights is primarily the language of emotion, upset, anger and disagreement – and those using the language of human rights are not always predisposed to engage in a reasonable way with the rationales of the functional systems of politics, economics, etc. to explain why torture is wrong, slavery is wrong, etc. For this reason alone, deliberative ideas cannot establish the ontological foundations of human rights, even if they can provide a methodology by which we can agree on their positivization in law. The global human rights system must allow for the articulation of moral outrage and the breaking open of political consensus.

Susan Sontag observes that framing something as a human right, shifts our understanding of suffering beyond a mistake, or an accident, or crime: instead it becomes 'something to be

⁴⁶ Gordin observes that, whilst utopias takes us into the future, dystopia bears the hallmark of lived experience, placing us 'directly in a dark and depressing reality': Michael D. Gordin, et al., 'Utopia and Dystopia beyond Space and Time', in Michael D. Gordin, et al. (eds.) *Utopia/Dystopia: Conditions Of Historical Possibility* (Princeton, N.J.; Oxford: Princeton University Press 2010) 1, 2.

fixed'.⁴⁷ Human rights is concerned with universal conceptions of avoidable human suffering. It is the language in which communication systems (law, politics, economics, the media, etc.) and outsiders are reminded that individuals count against the rationale of system functioning – and that they count simply 'by virtue of being human' (nothing more is required). This idea of 'being human' is, though, both contingent and contestable. It starts with an emotional response to a concrete situation of perceived injustice observed in the *face* of each and every individual that suffers as the result of their exclusion from a social system or through the violation of their physical or physiological integrity as a result of the way in which the system functions. When a claim is recognized as a human rights violation, it contributes to our understanding of human rights – and what it means to be human. It is in that constructed and contested value of the individual, which emerges in the face of the victims of avoidable suffering, that we establish the ontological foundations of human rights.

The foundations of human rights are not, then, reason and logic. When we deliberate about what it means to be human in rational and reasonable terms, we are reflecting on the importance of each and every individual. The language of human rights is primarily an intuitive, emotional response (including empathy, upset and anger) to avoidable human suffering. It can be expressed in Anglo-Saxon terms of "That's just fucking wrong!" In order to count as a human right, the observation of 'wrongness' must either resonate with a globally recognized human right or shape the emergence of a new right or new understanding of an existing right. Conversations around human rights contain an express or implied reference to the meaning of 'being human' (or, more accurately, *not* being human): an impugned act or omission constitutes a violation of human rights only if it would amount to a violation when committed against any individual in the same circumstances. The contingent and contested device of the human *face* allows for a global (cosmopolitan) conversation about this idea of 'being human', providing a conceptual space in which discussions on the moral value of the human person can be developed, but there is no requirement that it develops in accordance with a deliberative methodology. Dissensus, i.e. widespread dissent and disagreement, as to the way in which a social system is functioning,

⁴⁷ Susan Sontag, *Regarding the Pain of Others* (New York, Farrar, Straus and Giroux 2003), p. 99, quoted Brysk, above note 29, p. 26.

not consensus, provides the starting point for identifying the ontological foundations of the cosmopolitan idea of 'human rights'.