

# The Basic Right to Justification: Toward a Constructivist Conception of Human Rights\*

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In contemporary debates on the concept of human rights, one frequently encounters the critique that this is not only a specifically Western concept, but also a tool which Western, capitalist states use to politically and culturally dominate other societies. The first thesis concerns the historical genesis and normative validity of human rights, while the second touches on political issues of their interpretation and application. Concerning the second thesis, one needs to take a closer look at the critique, especially at who raises it and against which policy or institution it is directed. It may turn out that such accusations are justified and that, at times, the rhetoric of human rights does serve to veil the political or economic aims of states or international parties who wish to achieve or maintain influence and dominance.<sup>1</sup> But it is just as possible that this critique is unjustified and that the accusation of “neocolonialism” is employed ideologically, in order to conceal governments’ attempts to defend their own political power. Demands that particular values and traditions be observed and corresponding demands that cultural and political autonomy be respected may be pretexts for unimpededly dominating and oppressing segments of one’s own populace or neighboring states.<sup>2</sup>

In light of this situation, it is important to see that one walks into a trap if one believes that one must decide the matter generally and unequivocally in favor of one or the other position. For, in any given case, one or the other or even *both* critiques may be sound. And in the event that both critiques are appropriate, the dichotomous perception of reality characteristic of the postcolonial era threatens to deny the interests of those who raise the demand for human rights against those who hold power in their own state, without sharing the interests or political and economic ideas of Western states.

In any case, one makes the situation too easy if one regards *a priori* every single critique of human rights as a disguised attempt to claim freedom to oppress instead of freedom from oppression. And, regardless of whether it is justified in a given situation, the discussion of political strategies and rhetoric hardly affects the first, more fundamental thesis, which states that human rights are a culturally specific, Western invention and *ipso facto* cannot be globally valid. Now, it is clearly indisputable that the concept of individual rights human beings have as human beings arose in the context of the secularization and modernization of European culture.<sup>3</sup> Hence it is neither very difficult nor unjustified to draw attention to and emphasize

the specific genesis of this concept, considering how differently other traditions and cultures understand the meaning of the term “human being.”

Thus anyone who still wishes to develop a conception of human rights that preserves the basic substance of these rights – as individual rights no human being can have good reasons for withholding from others – and which does not fall prey to the accusation of being biased and therefore invalid and inapplicable in non-Western societies, must take this criticism seriously and enter into an intercultural discourse concerning the normative justification of human rights.<sup>4</sup> The goal of such a discourse should be to arrive at a conception of human rights that is as culturally sensitive as it is culturally neutral – a conception that proves to be interculturally non-rejectable, universally valid, and applicable in particular cases.

In this essay, I would like to propose a foundation and formulation of such a conception of human rights. I begin, in the first section, with an analysis of the logic of objections raised against the notion of human rights in order to discern their underlying normative core. My thesis is that this very core can serve as the basis for a foundation of the human rights whose possibility has been denied by these objections. This discussion shows that the condition for an *intercultural* discourse concerning human rights lies in the proper examination of the relevant *innercultural* discourses. In the second section, I offer a constructivist suggestion for establishing a conception of human rights on the normative basis developed in the first section. In this discussion, apart from the issue of cultural context-sensitivity and context-dependency, other problems with the theory of human rights are taken up, such as the relationship between moral and positive rights and the tension between human rights and democracy. In the third section, I discuss the question of the duties and institutions that correspond to these rights in an international context. I conclude with some comments about a critical theory of human rights.

Taken together, the various sections present an attempt to give a different picture of the normative genesis and validity of human rights from the picture one ordinarily encounters in discussions among philosophers, historians, political scientists, or legal theorists: the demand for human rights arises in social conflicts in which a justification of perceivedly unjust existing structures is being called for in a particular way. Preceding all demands for concrete human rights, there is one basic right being claimed: the *right to justification*. In my opinion, this type of dissent and conflict – internal to a society and culture – is the actual context in which the claim to human rights arises. Every conception of the foundation and validity of human rights must take this kind of dissent into account, and then ask how the basic right to justification is to be understood and which specific rights can be claimed on its basis. Only in this way does one do justice to the original, emancipatory meaning of human rights: namely, as concretely-demanded basic conditions for establishing a just, or more just, society in political contexts.

## **I. Cultural Integrity and the Right to Justification**

I would like to begin by uncovering the normative core of the primary objections leveled against the validity and applicability of human rights from the perspective of “non-Western” societies or cultures; at the same time, however, I abstract from the concrete distinctions between different possible perspectives – for example, the distinctions between the perspectives of a primarily Islamic culture and a primarily Confucian culture. A more differentiated discussion would have to expand upon and, should the occasion arise, modify the argumentation that I provide here. Moreover, I begin with a highly idealized concept of “culture,” by which I understand a complex and integrated totality of convictions and practices that constitute the self-understanding and the institutions of a political community, i.e., of a “monocultural” state. Membership in such a state implies belonging to the relevant culture, and the demands for respecting and preserving a culture, its values and traditions, are asserted as demands for respecting a specific social and political order. These assumptions do not imply that cultures can be neither smaller nor larger than states; they merely establish an argumentative starting point. Nor is it necessary to make any further mention of the fact that the idea of a monocultural state is hardly encountered in contemporary, multicultural political reality and that even where a culture is almost totally contained and dominant in a single state, many internal differences and conflicts will arise. I return to this point later; what matters here is that the arguments of one who champions the autonomy of such a political-cultural unity are not undermined from the outset by these considerations.

Let us assume that the advocates of such a “culture-state” present specific arguments against some of the human rights that one finds in the General Declaration of 1948, such as the right to freedom of religion, gender equality, or general democratic participation. What does the central objection to rights of this sort consist of – an objection that these advocates hold to be strong enough to trump individual rights? In short, it appears to lie in the imperative that the *cultural integrity* of such a society be maintained. The primary claim is not so much to political self-determination, though that too comes into play, but rather to respect for the inviolability of the core components of a well-established, long-standing, autonomously evolving cultural structure with its own self-understanding and special institutions. “Integrity” is an appropriate term in this context, since it implies that the culture in question is a self-standing and, in a certain sense, “complete” unity, as well as a sense-bearing, quasi-organic whole that meets certain standards of genuineness and respectability. The culture is, so to speak, a *fully integrated* unity *full of integrity*. On this basis, every single external encroachment can be regarded as a violation of this integrity that forces the culture to compromise its values and thereby its authenticity. The imposition of an “external” morality of human rights is thus considered to be such an encroachment.

One need not think that this defense of cultural integrity aims at maintaining the culture without acknowledging any possibility of change; its goal is simply to avoid externally coerced change. Internal developments can be met with mistrust, but they must not be made wholly impossible lest the culture be imagined as a more or less eternal being without any inner life or movement. Rather, the life of this collectivity is thought to be constituted by the life of its individual members and vice versa; in this innerworldly existence, change is inevitable. The reciprocity of this relationship consists in the fact that the integrity of the whole is the condition for the integrity of the individuals and the integrity of the members is a condition for the integrity of the community. The ethical meaning of the whole is that which individuals experience in their lives through belonging to the community. The “health” of the culture both produces and depends upon the “health” of its members. Therefore the integrity of the whole cannot be defined and claimed independently of the wellbeing of the individuals. What is more, *the claim to be a respectable, fully integrated unity full of integrity depends on the claim that otherwise the integrity of the members of this culture would suffer*. And this in turn means that no communal integrity may be bought at the cost of the integrity of the parts which form the whole. Consequently, if one presupposes the culture’s own self-understanding, such a culture (or state) demands respect on the basis of its acceptance by its own members as an ethical source of the experience of their own lives as meaningful and “sublated” (*aufgehoben*). A society or culture may therefore only demand that its “shared understandings” be accepted and respected as its internal morality if these understandings really are shared and are not forced upon any segment of the population.<sup>5</sup>

Thus, there is an *internal* criterion for the justified claim to cultural integrity: the uncoerced acceptance of the culture by its members. A culture is only entitled to be respected by outsiders as a fully integrated unity full of integrity if it is recognized as such by its own members. The argument for *external respect* presupposes *internal acceptance*. To be sure, the legitimacy and quality of the culture and its institutions are based essentially on substantial values and truths (e.g., religious truths) which the culture and institutions should embody in the eyes of its members; they are not based on “consensus” in an abstract sense. But these are values and truths for the people who live in this culture; they are not values and truths that others are free to decide. The legitimating acceptance of the socio-cultural structure presupposes that the members of the society understand the present communal practices (especially political practices) as an appropriate expression of their own convictions. And this is what the defender of the claim to cultural integrity must be able to show in an intercultural discourse, since an account of the social situation that is not generally shared – i.e., a paternalistic or even autocratic account – would not support this demand.<sup>6</sup> Such an account would have to defend the integrity of the culture *against* its own members (or at least a number of them). And if one were to accept this view, one would be taking a very limited view of this culture which fails to correspond to the actual situation. As a

participant in an intercultural dialogue, one would be blind to the society's inner-cultural dialogue, or rather, to its innercultural conflicts and struggles. Aside from this hermeneutical mistake, one would further, and more importantly, commit a moral error: by leaving the right of definition to those who are in power in the society, one would regard those who dissent as cultural outsiders and condemn them to silence. Adopting such a perspective is false in every case, whatever the individual positions may be, for, in so doing, a specific, particular interpretation of what is important is forced upon the culture, and differing opinions are (so to speak) expatriated and possibly branded as "foreign to the culture" or "hostile to the state" or even "Westernized." This clearly shows that the assumption of a monocultural society that I introduced above for heuristic purposes must be withdrawn in actual intercultural discourse, since it runs the risk of becoming an ideological instrument. Rather, the *closer* (not the farther) one stands to a culture, the more differences and conflicts one perceives in that culture and the more critically one is disposed toward the claim to cultural integrity in a monolithic sense. Such claims are often the expression of totalizing and idealizing constructions that correspond to specific interests of power and exclusion.

From this we may draw two insights. *First*, respecting a culture as a fully integrated unity full of integrity presupposes taking the concept of integrity seriously so as to prevent a one-sided and exclusive interpretation of a culture's "true character" from being forced upon it. The members of the culture as a whole must truly identify with and normatively accept the culture and its current institutions for its representatives to demand that the culture be generally recognized as an autonomous cultural, political, and moral unity in our present sense. We can express this point in a formula: the stronger the culture's internal cultural and moral coherence, the stronger its claim to external respect, assuming that this coherence is based on uncoerced support. This is not an externally imposed formula, but rather one that arises from the logic of the argument from integrity. In a situation in which this assumption of internal acceptance and uncoerced unity is called into question by the members of a culture themselves, the claim to integrity is problematized and brought into the discussion; we may then say that the culture breaks up internally, even though it may not split in two. Clearly this does not imply that the outsiders to the culture have good reasons and sufficient knowledge to intervene in the situation; at this point, it simply means that the strong claim to the full integration and integrity of the culture, whose equilibrium may not be disturbed by allegedly "external" demands for human rights, can no longer be maintained.

*Second*, and more importantly, it follows that the moral objections and demands raised when the claim to cultural integrity is called into question are not raised "from outside," nor can they be understood as the imposition of a foreign morality. Rather, they are raised *from within*, by the members of the culture and society themselves, for it is on their agreement that those who regard the culture as an integrated unity depend. The demands for another interpretation of cultural

values and practices and for a redistribution of social power are raised by “insiders” on the very basis of those particular values and traditions whose interpretation is in dispute. Here no values or norms are implied “from nowhere,” though a very *simple principle* is: if it is claimed that a certain socio-cultural structure is appropriate and morally legitimate for a certain community, then the members of this culture – indeed all of them – must be able to recognize this structure (and its institutions) as “their own,” as appropriate and legitimate. And as soon as this recognition is questioned and becomes problematic, these questions must be answered with reasons and not with force, lest the culture put its integrity at stake. The language of the social discourse which then develops is not a moral Esperanto, but rather the language in which the members of the culture express their self-understandings and connect it with their normative claims, which they believe should be heard and accepted. They demonstrate the extent to which their interpretation of the common cultural context is morally right and appropriate without thereby intending to leave this context altogether.

In such a situation of internal conflicts there arises – not necessarily, but under certain conditions, and in our day as a rule – the demand for *human rights*: it arises “from within” and is directed at something “internal.” The demand is directed at the establishment of a social structure in which the definition of the character of the culture and society, the determination of the appropriate treatment of its members, and the answer to the question of who deserves what, are not merely entrusted to a specific segment of the community. The demand springs up where people ask for *reasons*, for the *justification* of certain rules, laws, and institutions, and where the reasons that they receive no longer suffice; it arises where people believe that they are treated unjustly both as members of their culture and society and also simply *as human beings*. They may have no abstract or philosophical idea of what it means to be a “human being,” but in protesting they believe that there is at least *one* fundamental human-moral demand which no culture or society may reject: the unconditional claim to be respected as someone who deserves to be given justifying reasons for the actions, rules, or structures to which he or she is subject.

This is thus the most universal and basic claim of every human being, which other human beings or states cannot reject: *the right to justification*, the right to be respected as a moral person who is autonomous at least in the sense that he or she must not be treated in any manner for which adequate reasons cannot be provided. Moral persons themselves decide about the “adequacy” of these reasons in concrete dialogue with others; abstractly stated, (as I explain in the next section) these are reasons which can be reciprocally and generally justified – or better, which cannot be rejected – without violating the respect for others as beings with their own perspectives, needs, and interests. To speak of a *right* here – and indeed of that most basic of all rights of every human being – is to say that it expresses a fundamental, absolutely binding subjective claim that cannot be denied intersubjectively. As long as rights are understood as a certain sort of reciprocally and

generally indisputable and legitimate claim, it is appropriate to call the right to justification (a) a moral right and (b) the *basic* right; for by itself it is not a specific, intersubjectively established and recognized human right, but rather the basis of the justification of concrete rights itself.

When the demand for human rights arises in a culture that has previously been largely traditionally integrated, clearly one must not assume that the members of that culture understand themselves according to such a general conception of autonomy. They have completely other, “thick” notions of the person, of the respect belonging to the person, and of the person’s dignity or honor, and they connect their rights-claims with their particular cultural self-understandings and idioms. The members do not strive to found a republic of rational beings; they fight for a more just society that is worthy of being recognized as *their own* society. In this sense the demand for human rights and the demand for cultural integrity do not contradict one another; rather, the opposite is the case because the granting of demanded rights is regarded as a condition for re-establishing the integrity which has been called into question. Here it also becomes clear how artificial the opposition between “Western” human rights and “authentic,” integrated forms of life is – an opposition inherited from postcolonial discourse. Not only does the demand for human rights aim at the establishment of a social structure that is worthy of being generally recognized and not just accepted by a dominant group; but further, it arises out of everyday (and here it is unnecessary to add “authentic”) *experiences of injustice* in the culture itself, such as the confrontation of a daughter with the suffering of her mother in a patriarchal society – in the words of the Indian feminist Uma Narayan, “a pain that was earlier than school and ‘Westernization,’ a call to rebellion that has a different and more primary root, that was not conceptual or English, but in the mother-tongue.”<sup>7</sup> The claim to concrete human rights then stands opposed to certain interpretations of one’s own culture, such as the role of women in the culture, but it has the goal of making possible a more inclusive form of social integrity and therefore is not directed against “the culture” in general:

We arouse nervousness and resistance because we hold up to the culture the shame of what its traditions and cultural practices have so often done to its women, the deaths, the brutalities, and the more mundane and quotidian sufferings of women within ‘our’ culture, that ‘our’ culture is complicitous with. . . . We all need to recognize that critical postures do not necessarily render one an ‘outsider’ to what one criticizes, and that it is often precisely one’s status as one ‘inside’ the culture one criticizes, and deeply affected by it, that gives one’s criticisms their motivation and urgency. We need to move away from a picture of cultural contexts as sealed rooms, with a homogenous space ‘inside’ them, inhabited by ‘authentic insiders.’<sup>8</sup>

Thus neither the starting nor end points of the demand for human rights correspond to “Western” ideals of personal autonomy and of social and economic order. Nevertheless, in all these concrete conflicts and struggles a certain notion

of autonomy can be found which may at first be defined *negatively*: it is the autonomy of persons who are no longer ignored, no longer subordinated as the mere means to the preservation of certain institutions and power relations. Stated positively in Kantian terms, to be an “end” and not a “means” of others is to be able to demand justifications for social relations in concrete contexts. And to the extent that claimants link this demand with the language of rights, there exists at the core of their claim a conception of the person as a being who both gives and demands reasons and is, therefore, in this sense autonomous. This conception is not necessarily connected with the comprehensive idea of a person who determines him- or herself in an ethical or even “post-traditional” sense in all aspects of life; rather, it means that a person considers her- or himself as one who demands and gives reasons in morally relevant contexts.<sup>9</sup> This concept of the person and the “right to justification” indicate a normative deep grammar of social protests and struggles in which concrete demands for justification are associated with the language of rights. Thus there arises the possibility of a logic of development – in the sense of a “moral modernization”<sup>10</sup> – in which more and more reasons for social relations can be demanded on the basis of the right to justification and ever more constructive justifications of rights can be provided. This process is set in motion once this dynamic logic of asking for reasons develops in a culture, and those affected can stop it in one of two ways: legitimately, by providing sufficient justifications, or illegitimately, by means of power and force. Within such a process, the language of human rights is the language of social emancipation. Whoever speaks this language does not rely on an unjustifiable authority, but rather on an idea of mutuality that cannot simply be regarded – as some believe – as a hallmark of “Western” culture; instead, this idea of reciprocity appears wherever authorities and privileges are examined – which, I want to emphasize once again, does not imply that the “whole” culture or tradition is called into question.

Understanding the right to justification as the core of the demand for human rights and the basis for the construction of specific human rights should not be taken to mean that all further rights can be “derived” from the right to justification. Contrary to this view, which would rightly incur the reproach of an “external” standpoint, the basic right designates primarily the concrete standpoint of those who demand reasons and rights in particular social situations. The basic right does not determine from the outset which substantial reasons are adequate, which rights can be demanded, or which institutions or social relationships can be justified. As the universal core of every internal morality, the right to justification leaves this to the members’ specific cultural or social context. If one discursively develops its universalistic implications, the right to justification makes possible a kind of central morality which can in various ways become part of “thick” forms of the social order.

In a certain sense, this conception of the right to justification agrees with Michael Walzer’s universal “rights to reiteration” – “the right to act autonomously and the right to form attachments in accordance with a particular understanding



of the good life. Or, immorality is commonly expressed in a refusal to recognize in others the moral agency and the creative powers that we claim for ourselves.”<sup>11</sup> But it is important that this principle not only be applied to respect for communities and nations, as Walzer would have it, but also to the relationship between individuals or citizens within a state, in accordance with his conception of a “minimal morality.” Yet, contrary to Walzer’s hermeneutic suggestion, this core morality cannot be defined as a morality of generally shared values that we happen to find empirically and reconstructively to be the common denominator of all “thick” cultures, which have normative priority. This approach offers no basis for a procedural, constructivist starting-point for morality.<sup>12</sup> Rather, the “thin” but strong right to justification can be regarded both as the normative center of every integrated and legitimate political community and as the foundation for the creative construction of a “moral home,” as Walzer calls it.<sup>13</sup> This does not mean that the concrete, context-dependent constructions are all similar, but it does mean that they have their roots in a truly creative, normatively substantive process – a process that is initiated by those who are disadvantaged by or excluded from “naturally-grown” practices and traditions. In this sense, there is no priority of a pure and “minimal” morality, understood as a minimalist building no one wants to inhabit; rather, the minimal moral demand is that any particular “moral home” must be arranged in such a way that individual members can find a justifiable place in it. These moral “private homes” must be built or constructed on a common, human basis.<sup>14</sup> In the passage where Walzer himself advocates a constructivist theory of social meanings and practice, he also notes: “We might say . . . that the construction of social-construction-with-human-agents has certain moral entailments. Among these is the right of subjective nullification, the right of the agents to refuse any given object status – as commodities, ‘hands,’ slaves, or whatever.”<sup>15</sup> Thus, human rights have a *negative* and a *positive* meaning at one and the same time. On the one hand, they raise objections to specific unjustifiable social developments and injustices; on the other hand, they are constitutive and constructive components of the common project of establishing just social relations.

A constructivist conception of human rights must distinguish between two levels of “discursive construction”: on the level of *moral constructivism*, a general conception of rights is being justified that no individual or state can legitimately withhold from others; on the level of *political constructivism*, conceptions of legal, political, and social structures need to be developed in which these general rights are concretely justified, interpreted, institutionalized, and realized as basic rights in given historical and social contexts.

## II. Moral and Political Constructivism

Every conception of human rights – by which I understand fundamental rights every human being can claim as a human being – presupposes, as has already been mentioned, a conception of the moral person who is the author and

addressee of such claims. The basic underlying notion, abstracted from concrete ethical-cultural self-understandings, is of the person with the right to and the capacity for the reciprocal and general justification of morally relevant actions and norms. Whenever human beings act, they are obliged to recognize every morally affected person as someone to whom they owe reasons justifying their actions. To the extent that actions are justified with reference to specific norms, these norms and their interpretation must themselves be based on acceptable reasons. To be able to distinguish “acceptable” from “unacceptable” reasons, two criteria are required: *reciprocity* and *generality*. First, reasons that justify specific normative claims must be reciprocally non-rejectable, i.e., the author of these claims may not demand any rights or privileges that he or she denies his or her addressee. Moreover, the author may not project his or her own opinions, interests, or values onto others and thus decide for him- or herself, rather than reciprocally, how to fulfill the criterion of reciprocity. The same is the case for the addressee of the claims. Second, in moral contexts the community of justification may not be arbitrarily restricted, but rather must include all those affected by actions or norms in morally relevant ways. These two criteria taken together confer upon moral persons a basic, if qualified, *veto-right*: the basic right to justification. This veto-right is “qualified” in the sense that the moral appeal as “veto” itself must observe the criteria of reciprocity and generality. Consequently, on the basis of this fundamental right, human rights are established as rights which no one can reasonably – that is, with reciprocal and general arguments – reject and deny others. The advantage of this negative formulation<sup>16</sup> lies in the fact that it makes use of a qualified, instead of a simple, criterion of consensus which allows us to assess the justifiability of different positions in cases of dissent.

We need not resort to a metaphysical or anthropological foundation for these rights. Rather, they are to be regarded as constructions – though not as “mere” constructions, but as constructions that have an intersubjectively non-rejectable “reason.” They are justified constructs the respect of which moral persons, who see no good reason to deny them, owe to each other. Therefore, the basic right to justification reveals itself in a recursive<sup>17</sup> reflection combined with a discursive<sup>18</sup> explanation of what it means to justify individual actions and general norms in a moral context. Any moral norm that claims to be generally and reciprocally valid must be able to prove its validity to those to whom it is addressed according to these criteria. Consequently, it must be able to be the subject of a practical discourse in which, in principle, all arguments for and against the norm can be presented. Thus if one begins with an analysis of claims to moral validity and asks further for the conditions of their validity, one finds the “simple” principle of justification, which I mentioned above. According to this principle, a norm must be able to prove itself in a discourse whose participants are precisely those who are supposed to accept it and who are affected by it in morally relevant ways. For in this context validity means that no morally significant reasons count against the norm’s rightness.

Connected to the cognitive insight into the principle of justification (and the criteria of reciprocity and generality) is the normative insight that moral persons have a duty not to withhold the basic right to justification from anyone. These two dimensions of practical reason are linked insofar as the cognition of the correctness of the principle of justification must be a *practical* cognition: individuals must understand both themselves and others as subjects of this principle, as members of a moral universe of finite, vulnerable, reasonable, reason-giving beings – of a moral community in which one is inevitably the author and addressee of validity claims for actions or norms that concern others (or oneself) and therefore must be justified in specific ways. This does not mean that one has “always already” accepted moral duties insofar as one is a thinking, reasonable, or arguing human being in a general sense. It does mean, however, that the insight into the practical principle of justification – a principle that is understood here as valid in specific normative contexts (and is differentiated accordingly),<sup>19</sup> not as an all-embracing principle of reason – is not a purely cognitive one. The insight further implies that the principle of justification is relevant and binding for the actions of moral persons.<sup>20</sup> Morally autonomous persons are characterized by this capacity for the practical insight into the principle and the corresponding duty to justify and right to justification. They regard the right to justification as a claim that is put forth by human beings as members of an inclusive moral community and as a right that one cannot have reasons for rejecting.

The right to justification and the criteria of reciprocity and generality serve as the basis for the moral construction of a conception of human rights. As I have tried to show, this foundation is culture-neutral in the sense that it is both immanent to a culture and transcends it: no culture can deny this basis as a purely external “discovery,” since its own claim to cultural integrity and internal acceptance presupposes the affirmation of the right to justification. In which way this right is claimed by the members of a society as a demand for concrete rights can then no longer be determined by “unquestionable” values or decrees. Without such a starting point, which is both universal and yet relatively open in terms of its content, there can be no general conception of human rights.

A conception of human rights should be regarded as the result of “discursive constructivism” for the following reasons.<sup>21</sup> First, such a conception should be founded upon a secure, impartial basis and should be, so to speak, a building that is erected in principle by all moral persons in cooperation with one another. They should use only morally acceptable materials and proceed according to a plan of reason so that every human being may find a safe refuge in this house – or hotel, as Walzer would say.<sup>22</sup> In this sense, moral constructivism is an expression and result of the moral capabilities and experiences of autonomous, practically reasonable, finite human beings, who recognize the necessity of common norms of humanity and the rights and duties corresponding to these norms.

Second, following John Rawls, a constructivist view of human rights begins with a basic conception of the moral person which is appropriately represented in

a procedure for the construction of basic principles.<sup>23</sup> In Rawls' theory, the moral person (as a "model-conception") is characterized by two moral powers which correspond to the concepts of the "rational" and the "reasonable": the "rational" is represented in the description of the parties of the "original position," and the "reasonable" is represented in the limitations that would be placed upon them by the "veil of ignorance." The "mediating" model-conception of the original position serves as a medium for the procedure for constructing principles of justice for a "well-ordered society" (another model-conception). In his later work, Rawls emphasizes the "political character" of his theory and thus uses a procedure of "political" constructivism instead of a "comprehensive" moral constructivism. Rawls sets out from normative political assumptions so that his conception of the "moral person" corresponds to his conception of democratic citizenship, and he emphasizes that the goal of his theory is to justify a political conception of justice for the basic structure of society.<sup>24</sup> The procedure of construction, says Rawls, "embodies all the relevant requirements of practical reason and shows how the principles of justice follow from the principles of practical reason in union with conceptions of society and person, themselves ideas of practical reason."<sup>25</sup> Thus there are three steps in this constructivist theory: first, the reflective reconstruction of the principles (the rational and the reasonable) and the ideas (person and society) of practical reason; second, the "laying out" of the original position on that basis; and third, the construction of the principles of justice using the original position.<sup>26</sup>

There are several differences between Rawls' approach, in the earlier as well as the later version, and the approach suggested here. (a) My starting point is a related yet distinct conception of the moral person, which stems from neither a "comprehensive doctrine" nor a theory that restricts itself to the political. (b) The procedure of construction is not to be understood as a hypothetical thought-experiment like Rawls' original position, which also contains a number of particular assumptions (such as a list of "primary goods"). Rather, it is conceived of as a procedure of reciprocal and general argumentation within certain contexts. (c) I understand the distinction between moral and political constructivism differently from Rawls; as I explain below, moral constructivism is a part of, rather than a theoretical alternative to, political constructivism. (d) The resulting principles are either a list of human rights (as is the case in moral constructivism) or specific, context-related norms of a justified basic structure of society (as is the case in political constructivism). Moral constructivism in particular leads to a conception of human rights other than that which Rawls suggests in his extension of the theory of justice to the law of peoples.<sup>27</sup> In contrast to Rawls' attempt to establish a culture-transcending conception of human rights and international justice – an attempt which I cannot discuss more fully here – a differentiated constructivism that builds upon the right to justification and the criteria of reciprocity and generality leads to a more direct and stronger moral justification of human rights and norms of international justice.

The third reason for a constructivist approach to the theory of human rights lies in the advantages of “discursive constructivism.” Its basic idea is to start from a conception of reasonable justification and to place it in different contexts in which the members of different communities have to find and accept the principles that are to guide their collective life. The procedure for construction is contextualized, which is to say that moral norms have to be justified in the *moral community* of all human beings, whereas norms of political and social justice are to be justified in particular *political communities*. The essential characteristics of a constructivist position are thereby preserved – the conception of a moral person, principles of practical, reasonable justification, and a procedure for constructing norms – but the procedure is discursive, so that the reasons for specific norms must be found among and examined by those for whom validity of the norms is claimed. In this way, a constructivist position avoids paternalistically establishing a list of human rights or a specific interpretation of these rights in a particular political structure.

The idea of a universal context of humanity in which human rights must be justified and accepted requires that a constructivist theory make use of certain abstractions on this level. Against the background of presuppositions of a discursive justification of moral norms and rights, such a theory reconstructs those moral experiences and learning-processes that support arguments for human rights that cannot be rejected reciprocally or generally. Starting from the claims people have raised and do raise in social conflicts, a constructivist theory arrives at a list of human rights that cannot reasonably (i.e., with reasons) be withheld from a person, in any social context whatsoever, without violating his or her right to justification. Thus it is possible to construct a conception of human rights that, while lacking an “ultimate” foundation, both represents the result of normatively relevant historical developments and remains open to further argumentation, without at the same time lacking a strong moral content. For if one wants to dispute the status of these rights as human rights – as they are recorded in the 1948 General Declaration of Human Rights, for instance – one must be able to supply arguments that show the merely limited validity of those rights; and such arguments must be able to prove themselves reciprocally and generally to those who might suffer from any violations of those rights. Thus, a constructivist theory requires that no one’s right to justification, the basis of all rights of human beings, be ignored. Further, this holds true in the case of special rights. There are no Platonic truths to fall back on here, but there are criteria that must be met in a discourse about such rights. Every construction of a general list of human rights has a “provisional” character and can be questioned, but it is not created *ex nihilo*; rather, it is the result of historical experiences and learning-processes and is secured by the criteria of a legitimate calling into question of such rights – and, ultimately, by the basic right to justification. The normatively proven “inviolability” of these rights, as well as their function as instruments for securing non-rejectable individual claims, is expressed in their formulation as *positive-legal*,

binding rights that protect persons as legal persons. To this end, there must be legal and political structures that presuppose a procedure of political (and thus always also legal) constructivism.

The main reason why moral constructivism must be accompanied by and integrated with political constructivism is that, since moral construction can only lead to a very general list of rights for which we can assume that no normatively acceptable reasons count against their validity, these rights can only be *concretely* justified, interpreted, institutionalized, and *realized* in social contexts, that is to say, only within a legally constituted political order.<sup>28</sup> The very rights that moral persons can claim and justify as moral rights they must also be able to claim and justify as citizens of a particular political community – which depends on their social goals. The demand for human rights arises in concrete social constellations, and it is here where that demand must primarily be heard and justified and where the rights must be granted and guaranteed as legally binding. The idea that there are two separate procedures for construction is thus itself an abstraction: *moral justification is – in a normative-formal sense – the core of political justification.* The “public use of reason” which is required in contexts of fundamental political justification may not violate the basic right to justification or the criteria of reciprocity and generality. What is valid in the universal moral context must also be demonstrably valid in particular political contexts in which persons demand certain rights as both moral persons and citizens. This is the actual context in which human rights arise, are justified, and are applied; as I discussed above, human rights are demanded in certain political situations where social relations are examined for their legitimacy and where there is doubt that these social relations comply with standards to which human beings as human beings have a non-rejectable claim. At the same time, the goals of the protest remain special and bound to concrete experiences of injustice.

Political constructivism – the justification and establishment of a just basic structure for a particular political community – is thus not to be understood as a mere application and institutionalization of a list of moral rights fixed *a priori*. For, first, political contexts are those in which demands for human rights concretely arise and towards which those human rights are directed. And second, a legally binding interpretation, institutionalization, and realization of these rights can be supplied only in a law-governed state – a state in which the citizens confer upon themselves a right to justification and recognize the rights that are justifiable on the basis of this right (in the form accepted by them).<sup>29</sup> In political discourses citizens are participants in a cooperative, historically-situated enterprise of setting up a justified social structure; they are not beings who, having been born in a moral heaven, descend on the world in order to form it according to an ideal. Rather, they are engaged in a multiplicity of conflicts and struggles over the best order for their state – and it is in cases of especially grave conflict that they assume their role as moral persons and assert basic human rights which no one can reject, whether for the sake of legal fairness, political equality, or

social inclusion.<sup>30</sup> The political and legal structures that result within various social and cultural contexts will be quite different from one another, but none of them should contain components that can arbitrarily trump the basic right to justification. Thus, human rights constitute the *inner core* of any justified social structure without being concrete regulations that the legal system must simply mirror. The form that the rights take must be determined discursively by those affected.

Thus a political community is to be regarded as “sovereign” in the sense that its members regard it as a collective project of establishing just institutions founded on the citizens’ recognition of one another as persons with the right to justification. There can therefore be no absolute claim to sovereignty according to which imperatives of sovereignty trump human rights. Rights are not “granted” vertically by a state, but instead are accepted and conferred horizontally in processes of justification,<sup>31</sup> and thus are an expression of mutual recognition.<sup>32</sup> States do not possess a supply of rights they can distribute to their citizens according to their political discretion; rights do not come from an authoritative source such as a state, a divine power, or nature. These alternatives kept the debate between positivist and natural rights theories going for a long time – a debate that can be overcome when one understands rights as reciprocally and generally non-rejectable, subjective claims that must be secured in a law-governed state. As fundamental rights they have a universalist moral core that develops in distinct ways depending on the context; but it is essential that the rights that are non-rejectable among moral persons are also non-rejectable among citizens. Consequently it is essential that these rights find a place in the determination of any concrete image of the legal person which serves as a “protective cover” to preserve freedom of action for ethical persons pursuing individual ethical conceptions of the good.<sup>33</sup> There is no unbridgeable difference between moral and juridical rights; insofar as juridical rights are justified as *basic rights*, they contain the core of moral rights, though these take on particular forms. Thereby, juridical rights do not become merely morally binding rights; but it turns out that the claim to the validity of basic rights is a claim of a special nature. However the members of a state interpret and institutionalize them, these rights fundamentally provide legal persons with a *veto-right* tailored to specific, central normative questions and decisions, including issues of legal protection, personal freedoms, political participation, and equal social opportunity, to name but a few. When one considers how basic rights function to defend individuals and to ensure that their objections are heard, one can see the extent to which these rights rest upon a right to justification: through them subjects of rights are awarded the right to fight against being ignored in morally sensitive matters and the right to demand justification for decisions or norms that (allegedly) justify existing practices and institutions.<sup>34</sup>

My argument implies the “equiprimordiality” of human rights and popular sovereignty, but in a way different from Jürgen Habermas’s defense of this thesis. In his attempt to avoid an argument for moral or “natural” rights, Habermas shows

that human rights and popular sovereignty – and thus “private” and “public” autonomy – stand neither in tension with one another nor in a relation where one has normative priority over the other, since both are equally presupposed by the legal institutionalization of a democratic, political order in which citizens are simultaneously authors and addressees of the law.<sup>35</sup> My conception of political constructivism agrees with Habermas’s position insofar as the justified establishment of a basic social structure leads to a democratic state of law in which citizens are subjects of political justification as citizens and subjects of the law as legal persons. Political and legal autonomy are two sides of the same coin, and they are protected by basic rights, though this does not mean that no conflict can arise between these rights in practice. Still, the level of moral constructivism needs to be considered which shows that moral persons, both in a given context as well as beyond it, must grant certain rights to each other – rights that they *owe* one another, in a moral sense. Habermas’s argument for combining the “discourse principle” with the “form of law,” according to which human rights are implied by the legal institutionalization of democratic self-determination, does not do full justice to this normative dimension of human rights. Moreover, Habermas understands “private autonomy” primarily as the freedom to refuse to communicate and thus underestimates the intrinsic value of the rights that protect personal autonomy.<sup>36</sup> Even if the content of human rights requires interpretation and they must be legally enacted to achieve positive validity as legally binding rights, they retain their moral justification and are thus moral and juridical rights at one and the same time. In their concrete *form* and their positive-legal sense, human rights are of a juridical nature, but their *core content* is of a moral nature.<sup>37</sup> Where they arise, demands for human rights are moral demands, and they are primarily justified with moral reasons. Their core content is not – and here the integrated two-tieredness of moral and political constructivism is significant – prior to political justice in the sense of natural rights; rather, it is always concretely legitimated and recognized in specific discourses of justification. The moral construction is not a “transcendent” arrangement, although the rights construed correspond to context-transcending norms of humanity to which human beings make recourse in concrete situations. The alternative between a conception of human or basic rights based on natural right and one based on rights internal to legitimate law-making is too narrow in this respect. Rather, the right to justification lies at the heart of legitimate law as both an *internal* and a *transcendent* standard; rights justified on this basis “exist” only as positive rights in legal orders, but they also tell us in a fundamental sense why such orders should exist at all and what the conditions of their legitimacy are.

### III. Rights, Duties, and Institutions

So far my analysis has focused primarily on the connection between human rights and a justified political and social basic structure, and on the double role that citizens



play as moral persons and members of a particular political community. The demand for human rights has been interpreted as arising out of the conflicts of a political community and as aiming at changing that community; the internal structure of such a community has been regarded as the locus of contextualizing and institutionalizing basic rights. But obviously, the right to justification is not restricted to the members of a state. The decisions of a state also affect other individuals and political communities who can raise claims based on their right to justification as well. Human rights are not always claimed *within* a state but are claimed *from outside* as well – at its borders, so to speak. The citizens of a political community must adopt their role as moral persons and as “citizens of the world” not only with respect to their own rights but also where the rights of others who are not members of their political community are concerned. The right to justification imposes not only internal conditions on political sovereignty; it also places limits on external conduct, since a horizontal conception of justified rights does not end at a state’s borders. Victims of other states may lay claim to certain forms of respect they have been denied, as may victims of one’s own state’s present or past political or economic domination and oppression. Political decisions in one country may, for example, have ecological consequences for residents of another. Such cases provide grounds for strong claims and make it clear that (a) every political order must make provisions for dealing with such claims and (b) the international context itself is one in which demands for rights and justice are raised in a comprehensive way. This points to the necessity of an international basic structure and possibly even a “world state.”

To be sure, this last consequence must be qualified. Before one draws the conclusion that the universalistic character of human rights – especially considering increasing developments of globalization and interdependence – requires a global super-state, one must ask what precisely the concept of human rights contains, i.e., which *duties* correspond to these rights. It is important to note that justified rights-claims always presuppose an addressee to whom they are directed and who is both obligated to respect these claims and to guarantee that these rights be respected. It is no less important to consider that a complex picture of the addressees of rights and those who have certain duties arises in the context of human rights. The distinction between moral and political constructivism helps to explain this picture.

1) On a *moral* level, it follows from my argument that the authors and addressees of claims to human rights are moral persons as members of the inclusive community of all human beings. Each person, as a vulnerable as well as a reasonable human being, is morally obligated to respect everyone else’s right to justification and the rights that are justified on that basis. To speak of human rights here is an abstraction insofar as conflicts between persons or groups normally arise in specific situations in which persons appeal to certain “human,” moral standards of conduct. But setting out from the general principle that each human being should

be respected as a subject of reciprocal and general justification, we can construct a general conception of human rights that protect personal integrity.

2) As I argued above, the primary context in which human rights claims are explicitly raised is a political community with a certain social structure which is the object of the claims. Here the language of rights states that these demands are made by individuals who claim that they cannot be refused; these demands are directed at all other citizens as authors and addressees of rights and thus as a community of justification. In this context the aim is to establish a just (or more just) structure of rights, duties, and institutions that can be generally accepted – without excluding any citizens from legal, political, or social justice. Basic rights confer upon the individual a secured veto-right where certain questions of basic justice are at issue. This means that the primary *political* addressees of claims to rights – human rights and, further, specific rights – are the legally constituted institutions of a political community: the state. As a political collective that forms a state, citizens have the duty to interpret, institutionalize, guarantee, and realize justified human rights in concrete terms.<sup>38</sup>

There are a number of distinct (and disputed) empirical, functional, and normative considerations I cannot discuss here that support regarding states as the primary subjects for realizing human rights. Empirical considerations extend from reference to the present reality, in which states are still the main units of order despite political and economic interdependence, to reference to the factual desire of collectives to form states, to the argument that a democratic order presupposes a reasonably small territory. Normative positions extend from the communitarian thesis that political communities have a particular, historically-grown ethical identity that the structure of the state must represent to the libertarian and sometimes also social democratic position that the internal structure of states represents the achievements of generations and the preservation of national boundaries contributes to the security and continuity of these structures. The main argument for regarding individual states as the principal addressees of human rights claims, however, holds independently of these considerations, whatever their advantages or disadvantages. Normatively speaking, there is no reason to doubt states' legitimacy and efficacy as long as their basic structure respects claims raised on the basis of and conforming to the right to justification. This must be determined empirically. Insofar as a state is such a *historically situated, common project of establishing a just social order*, in which the citizens *themselves* define justice, *prima facie* it is to be regarded a sufficient context for the realization of human rights. In the political world, particularity is no problem by itself; rather, the problem is the injustice that accompanies particularity.

Nevertheless, there are two reasons why it is important to consider further levels to guarantee human rights. First, a state can fail to build a justified basic structure, and second, it is possible that it may fail to live up to its duties to individuals who

are not its members or to other states. This leads to several consequences which I merely outline below.

3a) Since human beings are both moral persons and citizens of a state, they have certain duties in an international context. As a moral person, a member of the community of all human beings, one is a “world citizen” insofar as one has not only the duty to respect the human rights of others, but also the duty to *help* them when their rights are violated, as when the basic rights of human beings are systematically disregarded in another state. This moral duty to help victims of flagrant injustice translates into a “mediated” positive duty to construct *institutions* that effectively guarantee that such violations of rights are recorded, fought against, and prevented.<sup>39</sup> Both as citizens of a state which can together with others establish institutions to oppose infringements of human rights, such as the United Nations and an International Court of Justice, and as moral comrades and members of a universal society, people have duties to help others who are in danger. States, international institutions, and global civil society and its various organizations are the subjects who fulfill these duties in order to secure human rights politically and legally.<sup>40</sup> The primary goal of these efforts is to enable the victims of injustice to establish a political structure in which their basic right to justification is no longer denied and violated; thus the goal is internal, though not in a paternalistic sense, since it primarily implies respecting every person’s basic right to justification. What follows once this basic right is secured is no longer the concern of their fellow world-citizens and their institutions. As with the next point, here one must note that helping to restore social *integrity* and domestic justice must not itself destroy the integrity of a political community, even when this community finds itself in conflict. Ultimately, the point of intervention is to prevent situations in which human rights are systematically and continually violated, and those very interventions stand under a strict obligation to justify themselves – especially to those whose interests one represents and to those who are, in one way or another, directly affected by the intervention. It goes without saying that the obligation is strictest in the case of interventions that employ force.

b) There is a further case in which help is called for: aggression of one state against another. Here the traditional law of peoples, along with its supreme imperative of peaceful relations between nations, as well as a conception of human rights demand actions by institutions that represent all citizens of global society. Nevertheless, it must be stressed that the aim of establishing peace is only a step along the way to re-establishing a situation in which citizens can exercise their right to justification in their own political community. The “international community” has other duties besides preserving peace between nations; these other duties include the guarantee of human rights and thus also the guarantee of a continual condition of peace (and here again the justification and means of intervention need to be examined closely).<sup>41</sup>

c) Related to these problems is yet another duty that citizens have as “world citizens”: the duty to provide legal possibilities for the victims of human rights’ violations so that they can find security in a state. The basic right to *asylum* is not a right that a state can choose to grant or not grant to persons at its discretion; it is a fundamental right that cannot be reciprocally rejected.

d) Other duties that citizens must accept concern the consequences of political decisions on others who are not members of their political community. If these decisions (on economic or ecological issues, for instance) lead to consequences that violate the rights of other persons or groups, these persons or groups must be involved in the political procedure of justification in appropriate ways – and when certain consequences have already occurred, the affected persons or groups must be compensated. Here again it is necessary to have institutions suitable for this task – which raises the question of the structures of a “global democracy,” or, to be more precise, the question of democratically controlled institutions to deal with global problems.<sup>42</sup>

e) Besides the duties I have already mentioned, an important dimension of human rights, namely, *social rights*, remains to be discussed. By “social rights” one generally means basic rights to an adequate standard of living. But the meanings of both “social” and “adequate” (in Article 25 of the General Declaration, for instance) are extremely indeterminate and, when one considers the distinct conceptions of “adequate” standards of living in very different cultural and social settings, raise the difficult question of what these rights really contain. Furthermore, one often hears the objection that these are positive rights to the distribution of social goods that can only be claimed on the basis of concrete relations and commitments within specific social contexts; thus they do not apply generally across societies and states.<sup>43</sup> Despite the relevance of these considerations for a differentiated concept of justice, I see no reason to reject the argument according to which every human being who suffers from hunger, disease, or poverty can demand, as a matter of principle, the resources for a basic standard of living – given the material conditions of human life on earth – from all others who possess sufficient means and, especially, from those who possess a surplus of means.<sup>44</sup> Theories such as that of Amartya Sen have shown that it is possible to define a general standard of living that takes cultural differences into account. On that basis, one can develop a conception of what constitutes a life “worthy of a human being” in different societies and what means would be necessary for such a life.<sup>45</sup> And even if insurmountable difficulties should arise in determining the meaning of “adequate,” basic criteria can be found for what is to be considered an “inadequate” standard of living. Citizens of states that have sufficient means have the duty to create *institutions* that secure the effective realization of legitimate claims to such means. Moreover, it would be contradictory to demand, on the one hand, that every person should have a right to justification in his or her own political community and, on the other hand, to neglect the material presuppositions that

make this right realizable. Thus, human rights to certain material goods are to be justified with reference to the necessary conditions of establishing a justified basic structure as well as – and this is crucial – with reference to the minimal standard of a life worthy of a human being, which may be justifiably withheld from no one given today's level of available resources. In this sense, human rights are not only rights to certain freedoms but also rights to goods, the demand of which can be justified both reciprocally and generally.<sup>46</sup>

4) Nevertheless, it is important to note the distinction between claims to human rights and claims to *justice* in a broader sense. Claims to justice within a political community include much more than a conception of human rights does since, in the former, substantial, normative self-understandings lead, for instance, to specific conceptions of a just distribution of goods. As well, human rights to a certain standard of living do not cover all the claims that can be raised in an international context of distributive justice.<sup>47</sup> Here the authors and addressees of such claims are primarily political collectives with specific historical, political, and economic relations which are the basis of demands for justice.

First, there are demands for *historical justice*, which can be justified with reference to prior (and sometimes still existing, albeit in different forms) relations of domination and exploitation. The demands of former colonies for compensation is a good example of such a demand. But we must also include cases in which trade relations short of direct colonization have clearly disadvantaged certain states.

Second, there are considerations of *general justice* between states. These concern the equalization of severe inequalities based on the possession of natural resources or especially disadvantageous climatic conditions, but also those based on different technological capabilities. These claims do not rest on a conception of human rights but rather on an understanding of justice that wants to exclude unfair relations of cooperation that result from radically unequal and morally arbitrary starting positions. The demand for just terms of trade is one example.

The global context is thus an important context of justice and responsibility in addition to the more particular political ones; and neither of these contexts may be reduced to the other. A historically informed but universalist conception of justice ignores neither particular, historically developed political communities and their internal structures of production and distribution, nor the way in which the current economic system of power and influence has developed and the arbitrariness with which advantages and disadvantages are distributed within this system. Which institutions follow from these considerations of global justice is a question I cannot go into here.<sup>48</sup>

#### **IV. Conclusion: Toward a Critical Theory of Human Rights**

In this essay I have tried to develop the idea that there is one basic human right which is not a specifically “Western” and thus culturally relative notion: the right

to justification. Setting out from a society's own claim to cultural integrity (and uncoerced integration) and its internal problematization in social conflicts, this right has been understood – in argumentation that is partly ideology-critique and partly abstract – as the immanent moral core that constitutes the foundation for a constructivist conception of human rights in their relations to concrete social and political contexts. The general conception of human rights, justified in a discursive theory of moral constructivism, was analyzed as the formal, normative center of a plurality of possible politically constructivist concrete interpretations which pursue the goal of establishing a basic social structure that is justified both “internally” as well as “externally.”

Thus it is possible for a conception of human rights to avoid the objection that it is an external invention or that it has an ethnocentric character without thereby losing its moral authority. Beyond contextualist particularism bias and context-indifferent globalism, this conception locates the primary goal and the meaning of human rights where they belong: in the heart of the political discussions and conflicts about a more just social order – one that actually justifies itself to those who are its subjects. These confrontations are those in which the emancipatory demand for human rights arises and in which their language is understood; thus, it is here that a theory of human rights must begin and to which such a theory must finally return. Only by thinking from the margins, so to speak, does the original political and moral sense of juridical human rights reveal itself – in struggles against tyranny, domination, and exploitation, in the many concrete claims for “human” justice and rights. Conscious of this bias in favor of those who raise such claims and who fight in these struggles, we can begin to develop an unbiased, critical theory of human rights.

(Translated from the German by Jonathan M. Caver)

#### NOTES

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1. Cf., for example, P. Kondylis, “Des Westens weiße Weste?,” *Frankfurter Rundschau*, 20 Aug. 1996, 10.

2. Cf. the examples discussed by S. Moller Okin in her essay, “Konflikte zwischen Grundrechten. Frauenrechte und die Probleme religiöser Unterschiede,” S. Gosepath and G. Lohmann, eds., *Philosophie der Menschenrechte* (Frankfurt, 1998). See also S. J. Al-Azm, “Das Wahrheitsregime der Verbrecher,” *Frankfurter Rundschau*, 26 Nov. 1996, 10.

3. On the relationship between the religious and the secular roots of the concept of human rights, see E-W. Böckenförde and R. Spaemann, eds., *Menschenrechte und Menschenwürde*

(Stuttgart, 1987) and O. Höffe, "Christentum und Menschenrechte," *Vernunft und Recht* (Frankfurt, 1996), 83–105.

4. For two different views of the starting point of such a kind of discourse, see O. Höffe, "Menschenrechte," *Vernunft und Recht*, 49–82, and J. Habermas, "Der interkulturelle Diskurs über Menschenrechte," *Frankfurter Rundschau*, 4. Feb 1997, 10.

5. Cf. M. Walzer's revised version of his maxim that in questions of morality the "shared understandings" of a culture are to be followed: "There is another constraint built into my 'relativist' maxim: the reference to social meanings requires some understanding of how such meanings are constituted and how they can be recognized. I suppose that they must meet certain criteria – non-substantive but not merely formal. They must actually be shared across a society, among a group of people with a common life; and the sharing cannot be the result of radical coercion." M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, 1994), 26ff. I respond below to Walzer's other constraint by means of a "moral minimalism." For a critique of Walzer's original conception and for the thesis that these changes are necessary, see R. Forst, *Kontexte der Gerechtigkeit* (Frankfurt, 1994), ch. IV.1 (English translation forthcoming, University of California Press).

6. This does not mean that there are not or that there cannot also be autocratic (particularly theocratic) defenses of the autonomy of a culture opposed to human rights claims; it means only that such defenses cannot employ a strong concept of cultural integrity, although they often try to do this in order to conceal the autocratic character of their argumentation.

7. U. Narayan, "Contesting Cultures: 'Westernization,' Respect for Cultures, and Third-World Feminists," in: Linda Nicholson, ed., *The Second Wave: A Reader in Feminist Theory* (New York, 1997), 399. I thank Linda Nicholson for drawing my attention to the points in common between Narayan's impressive essay and my position.

8. *Ibid.*, 410, 412.

9. See also the distinction between different conceptions of autonomy in R. Forst, "Politische Freiheit," *Deutsche Zeitschrift für Philosophie* 44 (1996) and my discussion with Will Kymlicka concerning the concept of autonomy appropriate for a theory of multicultural justice: R. Forst, "Foundations of a Theory of Multicultural Justice," *Constellations* 4 (1997) and Will Kymlicka, "Do We Need a Liberal Theory of Minority Rights? A Reply to Carens, Young, Parekh, and Forst," *ibid.*

10. How such "moral modernization" is connected with processes of social modernization is an empirical issue. Despite all its empirical value, however, a purely functionalistic explanation of the developmental logic of human rights cannot link up with the normative logic peculiar to demands for human rights as it presents itself from the perspective of those affected in different social and cultural contexts with possibly very different political goals. A "functional foundation" of human rights (like the one suggested by Habermas) thus requires a normative foundation, as one also finds in Habermas' constructivist theory. Cf., J. Habermas, "Zur Legitimation durch Menschenrechte," in: H. Brunkhorst, W. Köhler, M. Lutz-Bachmann, eds., *Recht auf Menschenrechte* (Frankfurt, 1999). The underlying conception of autonomy certainly must be bound to a social and moral process of learning and differentiation, but not in such a way that it is to be considered as the end result of a process of social modernization; rather, it is essentially claimed and developed in social conflicts in which the language of human rights is employed and justifying reasons are demanded.

11. M. Walzer, "Nation and Universe," *The Tanner Lectures on Human Values*, G. B. Peterson, ed. (Salt Lake City, 1990), 535.

12. Cf. M. Walzer, *Thick and Thin*, esp. 11ff.

13. Cf. M. Walzer, *Interpretation and Social Criticism* (Cambridge, 1987), ch. 1.

14. For a full discussion of this point, see R. Forst, *Kontexte der Gerechtigkeit*, ch. IV.1.

15. M. Walzer, "Objectivity and Social Meaning," in M.C. Nussbaum and A. Sen, eds., *The Quality of Life* (Oxford, 1993), 173.

16. I have borrowed the formulation from Thomas Scanlon's theory, though I have interpreted it differently. Cf. T. Scanlon, "Contractualism and utilitarianism," in: A. Sen and B. Williams, eds., *Utilitarianism and beyond* (Cambridge, 1982). Scanlon chooses the formulation "not reasonable to

reject" in order to allow for altruistic attitudes, which one can rationally refuse or accept. It appears more important to me, however, that it is necessary to clarify the term "reasonable" with the assistance of the criteria of reciprocity and generality and consequently to define this term more precisely than Scanlon does.

17. Cf. O. O'Neill, *Constructions of Reason* (Cambridge, 1989), esp. chs. 1 and 2.

18. Cf. especially J. Habermas, "Diskursethik – Notizen zu einem Begründungsprogramm," *Moralbewußtsein und kommunikatives Handeln* (Frankfurt, 1983) and "Eine genealogische Betrachtung zum kognitiven Gehalt der Moral," *Die Einbeziehung des Anderen* (Frankfurt, 1996).

19. Cf. the distinction between four "contexts of justification" in R. Forst, *Kontexte der Gerechtigkeit*, esp. 294ff. and 362ff.

20. In founding the right to justification, I make no recourse to a general concept of reason or argumentation and its transcendental-pragmatic presuppositions, as does Karl-Otto Apel, for example in his *Diskurs und Verantwortung* (Frankfurt, 1988). For a critique of Apel see A. Wellmer, *Ethik und Dialog* (Frankfurt, 1986), 102ff. Only by way of a recursive reflection the premises of the justification of practically reasonable *action* in normative contexts are reconstructed, and there is no claim to an "ultimate foundation" here. But in order to close the gap (between the cognitive insight in the principle of argumentation "U" on the one side and the obligation by discursively justified norms on the other) that arises because of the Habermasian distinction between "the 'must' of a weak transcendental necessity" of the presuppositions of argumentation and the "prescriptive 'must' of a rule of action" (J. Habermas, "Erläuterungen zur Diskursethik," *Erläuterungen zur Diskursethik* (Frankfurt, 1991), 191 and his "Eine genealogische Betrachtung zum kognitiven Gehalt der Moral," 63), one must emphasize the *practical* insight into the principle of justification and the duty and right to justification. This insight characterizes persons who understand themselves as beings who give moral reasons and act accordingly. Otherwise, the practical sense of the principle of justification for persons remains undetermined. It is important to note that the right to justification is not to be placed on the same level as discursively established rights; rather, it is the foundation of the establishment of rights. A similar idea, though it is different in some respects, is K. Günther's "right to free opinion" in his "Die Freiheit der Stellungnahme als politisches Grundrecht – Eine Skizze," in P. Koller, C. Varga, and O. Weinberger, eds., *Theoretische Grundlagen der Rechtspolitik*, a supplement to the *Archiv für Rechts- und Sozialphilosophie* 54 (Stuttgart, 1992). I have discussed some of the differences in R. Forst, "Die Rechtfertigung der Gerechtigkeit. Rawls' Politischer Liberalismus und Habermas' Diskurstheorie in der Diskussion," in H. Brunkhorst and P. Niesen, eds., *Das Recht der Republik. Festschrift für Ingeborg Maus* (Frankfurt, 1998).

21. Cf. the discussion of constructivism and practical reason in R. Forst, *Kontexte der Gerechtigkeit*, ch. IV.2. Here I cannot go into the complex question of the relationship of this conception of a context-related theory of justification to the original, and in some respects more inclusive, program of a rational foundation of practical orientations in the constructivism of the Erlangen and Konstanz schools; cf. especially P. Lorenzen and O. Schwemmer, *Konstruktive Logik, Ethik und Wissenschaftstheorie*, 2e (Mannheim, 1975); F. Kambartel, ed., *Praktische Philosophie und Wissenschaftstheorie* (Frankfurt/M., 1974), especially F. Kambartel, "Moralisches Argumentieren. Methodische Analysen zur Ethik."

22. Here I use an image taken from Onora O'Neill's discussion of a constructivist morality; see her *Towards justice and virtue* (Cambridge, 1996), ch. II.3. Cf. M. Walzer, *Interpretation and Social Criticism*, ch. 1 on the idea of a "Hilton Hotel" as the minimal standard of the morally demanded shelter for human beings to be guaranteed everywhere.

23. Cf. J. Rawls, "Kantian Constructivism in Moral Theory," *The Journal of Philosophy* 77 (1980):516ff.

24. Cf. R. Forst, *Kontexte der Gerechtigkeit*, ch. IV.2 and "Gerechtigkeit als Fairneß: ethisch, politisch oder moralisch?," in Philosophische Gesellschaft Bad Homburg and W. Hinsch, eds., *Zur Idee des politischen Liberalismus*, (Frankfurt/M., 1997).

25. J. Rawls, *Political Liberalism* (New York, 1993), 90.

26. Cf. *ibid.*, 103f.



27. Cf. J. Rawls, "The Law of Peoples," in: S. Shute and S. Hurley, eds., *On Human Rights* (New York, 1993). For illuminating critiques of this essay see T. Pogge, "An Egalitarian Law of Peoples," *Philosophy and Public Affairs* 23 (1994) and T. McCarthy, "Über die Idee eines vernünftigen Völkerrechts," in: M. Lutz-Bachmann and J. Bohman, eds., *Frieden durch Recht* (Frankfurt/M., 1996).

28. Cf. R. Forst, "Die Rechtfertigung der Gerechtigkeit", sec. 4.

29. The right to justification in this legal-political context does not fall prey to Frank Michelman's *reductio ad absurdum* according to which any interpretation of human rights would only be legitimate in a state if it could be accepted concurrently in a more or less "pure" procedure. Rather, it means that in procedures of political justification that exclude no one arbitrarily, no fundamental, reciprocally and generally irrefutable claims are ignored; this comes close to Michelman's emphasis on the criterion of the normative "validity" of interpretations of human rights and their democratic "examination." Cf. F. Michelman, "Bedürfen Menschenrechte demokratischer Legitimation?," in: H. Brunkhorst, W. Köhler, M. Lutz-Bachmann, eds., *Recht auf Menschenrechte*. It is important in this connection that the right to justification cannot be completely absorbed into the political procedure and remain a necessary corrective to political justification. Consequently, this right cannot be perfectly institutionalized, though it can be violated, or expressed better or worse, by institutions.

30. Cf. Claude Lefort's analysis of demands for human rights in the internal dynamics of democratic societies in "Politics and Human Rights," *The Political Forms of Modern Society* (Cambridge, 1986).

31. Cf. R. Forst, "Politische Freiheit."

32. Cf. A. Honneth, *Kampf um Anerkennung* (Frankfurt/M., 1992), ch. 5.

33. On the conception of the legal person as a "protective cover" see R. Forst, *Kontexte der Gerechtigkeit*, ch. II.

34. As Rawls emphasizes with his "difference principle," the veto-right can refer to the fundamental components of the socio-economic order and to the distribution of goods; nevertheless, it remains to be determined how this veto-right can be given the form of concrete rights. Cf. J. Rawls, *A Theory of Justice* (Cambridge, 1971), §26.

35. Cf. J. Habermas, *Faktizität und Geltung* (Frankfurt/M. 1992), ch. III.

36. For a more extensive discussion of Habermas's theory, which I have only outlined here, cf. R. Forst, "Die Rechtfertigung der Gerechtigkeit," sec. 4.

37. For Habermas's thesis that human rights are of a juridical nature – but also for the thesis that moral arguments suffice to justify these rights, see J. Habermas, "Kants Idee des ewigen Friedens – aus dem historischen Abstand von 200 Jahren," *Die Einbeziehung des Anderen*, esp. 221ff., and his "Zur Legitimation durch Menschenrechte."

38. Cf. T. Pogge, "How Should Human Rights be Conceived?," in J. Hruschka, ed., *Jahrbuch für Recht und Ethik* 3 (Berlin, 1995); P. Koller, "Frieden und Gerechtigkeit in einer geteilten Welt," in: R. Merkel and R. Wittmann, eds., "Zum ewigen Frieden." *Grundlagen, Aktualität und Aussichten einer Idee von Immanuel Kant* (Frankfurt/M., 1996).

39. Cf. H. Shue, "Mediating Duties," *Ethics* 98 (1988) and Shue's important discussion of rights and duties in his *Basic Rights* (Princeton, 1980).

40. Cf. J. Habermas, "Kants Idee des ewigen Friedens – aus dem historischen Abstand von 200 Jahren," *Die Einbeziehung des Anderen* and in: M. Lutz-Bachmann and J. Bohman, eds., *Frieden durch Recht*. In the latter book, cf. J. Bohman, "Die Öffentlichkeit des Weltbürgers. Über Kants 'negatives Surrogat'"; R. Falk, "Die Weltordnung innerhalb der Grenzen von zwischenstaatlichem Recht und dem Recht der Menschheit. Die Rolle der zivilgesellschaftlichen Institutionen"; A. Honneth, "Universalismus als moralische Falle? Bedingungen und Grenzen einer Politik der Menschenrechte." On the problem of "humanitarian intervention," cf. C. Greenwood, "Gibt es ein Recht auf humanitäre Intervention?," *Europa-Archiv* 4 (1993).

41. Cf. R. Marx, "Kein Frieden ohne Menschenrechte – keine Menschenrechte ohne Frieden," *Amnesty International: Menschenrechte vor der Jahrtausendwende*, ed. H. Bielefeldt, V. Deile, B. Thomsen (Frankfurt/M., 1993); D. and E. Senghaas, "Si vis pacem, para pacem," *Leviathan* 20 (1992).

42. Compare, for instance, the various suggestions of D. Held, "Kosmopolitische Demokratie und Weltordnung. Eine neue Tagesordnung," in: M. Lutz-Bachmann and J. Bohman, eds., *Frieden durch Recht*; J. Habermas, "Kants Idee des ewigen Friedens – aus dem historischen Abstand von 200 Jahren"; O. Höffe, "Eine Weltrepublik als Minimalstaat," *Vernunft und Recht*.

43. Cf. W. Kersting, "Weltfriedensordnung und globale Verteilungsgerechtigkeit. Kants Konzeption eines vollständigen Rechtsfriedens und die gegenwärtige politische Philosophie der internationalen Beziehungen," in R. Merkel and R. Wittmann, eds., *Zum Ewigen Frieden*; C. Chwaszca, "Politische Ethik II: Ethik der internationalen Beziehungen," in J. Nida-Rümelin, ed., *Angewandte Ethik* (Stuttgart, 1996).

44. Also, in the case, which Rawls refers to in "The Law of Peoples," 77, that mismanagement in a state has led to certain undesirable developments, there exist non-rejectable – mediated – positive duties to help those who suffer as a result, which also includes the duty to work towards the establishment of just internal structures.

45. Cf. A. Sen, *Inequality Reexamined* (Cambridge, 1992) and "Capability and Well-Being," in Nussbaum and Sen, *The Quality of Life*.

46. Thus, these rights are no weaker than other claims that allegedly imply only negative duties. This is also shown by the fact that the rights to life and personal integrity contain far-reaching duties positive to found institutions that help secure these rights. Cf. H. Shue, *Basic Rights*, ch. 2.

47. Here, I distinguish myself from S. Gosepath, "Zur Problematik sozialer Menschenrechte," in: S. Gosepath and G. Lohmann, eds., *Philosophie der Menschenrechte*, who argues for the identity of social human rights and distributive justice on the basis of a principle of the equal distribution of goods and resources. In my opinion Gosepath overlooks the particularity of specific contexts of justice – though they are in part reintroduced as qualifications of the principle of equality.

48. Cf. T. Pogge's innovative suggestion of a global resources dividend, "Eine globale Rohstoffdividende," *Analyse und Kritik* 17 (1995).