

DELIBERATING ABOUT COSMOPOLITAN IDEAS:
DOES A DEMOCRATIC CONCEPTION OF HUMAN RIGHTS
MAKE ANY SENSE?

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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*, the 'citizens 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.

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

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.

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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. This 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 mechanism 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 by *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