# On the Possibility of Multiple Indisponible Grounds for a Global Bill of Human Rights[1]

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**Abstract:** In his Tanner Lecture, "Law and Morality," Jürgen Habermas makes a complex argument that law is necessarily related to morality on the basis of an indisponible moment—a moment of relative independence but one in which it is impossible to dissolve law's relation to religion and politics. Habermas' solution is to find a substitute for religion and politics by re-grounding this indisponibility in a formal procedure—discourse theory, a solution that presumes that other parties to international law will accept its modernist-secularist assumptions as a *fait accompli*. While accepting the value of discourse theory as a method, this paper contests Habermas' substitution of a formal procedure for a substantial ground and suggests that the idea of the *ius gentium* provides a more realistic basis for multiple indisponible grounds of international law, grounds that preserve its connections to religion and natural law.

**Keywords:** Habermas, Suárez, indisponibility of law, *ius gentium*, international law, human rights, theory of communicative action

## ARGUMENT SUMMARY

The future possibility of a centrally-administered global system of law brings the status of human rights and their foundation to the fore. Historically, various philosophies of law have attempted different legitimations, so that the Habermasian theory of law, the positivist theory of law, the utilitarian theory of law, Kantian cosmopolitan theory of law, and classical natural law theory have all been proposed

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as competing grounds for human rights. In this essay, I propose the thesis that an extension of classical natural law theory is preferable to the Habermasian grounding of a global bill of rights because it allows two, exclusive legitimations of human rights according to both independent secularist and religious assumptions. In other words, I will argue that a legitimation on multiple grounds is a superior foundation for a global bill of rights because it allows both the religious and the secularists to "buy into" these rights, though for different reasons. Providing a few examples of how this religious legitimation might be accomplished, I will argue that grounding human rights on natural law is a preferable approach because it supports a transnational system of laws, while preserving the particularity of both the secularist and religious interpretations of the origin of this system. Throughout this essay, my purpose is not to discuss what form this global bill of rights will take but how it might best be grounded.

## WHAT IS A GLOBAL BILL OF RIGHTS?

The idea of a global bill of rights or a global declaration of human rights constitutes a thought experiment whose conditions for realization have not yet been met. It presupposes a system of world government, law, and enforcement whose establishment distant. But that does not mean that how it might be realized is unworthy of consideration. Specifically, in connection with the sustained vigor of religion—especially in its conservative revivalist and fundamentalist forms—it is something that religionists and philosophers must begin to ponder. Especially in light of the sustained vigor of religious worldviews, a vigor that shows no sign of abating, such a document will need to find a complementarity in indigenous religious conceptions, if it is ever to have effect. Habermas' highlighting of what he calls the indisponible moment of law and morality, in his recent writings on the philosophy of law and ethics, has contributed to this cause in a peculiar way.

## HABERMAS AND THE INDISPONIBILITY OF LAW

Jürgen Habermas's 1986 Tanner Lecture "Law and Morality" provides an argument for the inseparability of law and morality which lies at the basis of the discussion, here. Before sketching Habermas' argument, let me file a quick disclaimer. It is not *Habermas'* intention to restore natural law thinking as the theoretical justification of contemporary

legal systems, that intention is all my own. Instead, *his* justification lies along neo-Kantian lines, as we shall soon see.

The fulcrum of Habermas' argument about the relationship between religion and law is his notion of the *indisponible moment* of law. Here a brief etymological excursus is in order. The notion of indisponibility is generally unfamiliar to those unacquainted with the content of Habermas' lecture and, even in his Tanner Lecture, "Law and Morality," Habermas never defines it except by use. (In the English translation, the word 'indisponible' is used to translate the German '*unverfügbar'* which means something "unavailable, inaccessible, not disposable, exempt from human command or control, inviolable," or "sacrosanct.")

The English word 'indisponible' is derived from the Latin '*disponērē*' which means "to set in different places, place here and there, arrange dispose." In its English evolution, the verb 'dispone' has the general sense of the Latin *disponērē,* but it also means "to incline mentally or physically to something," "to dispose of something or to give it away," "to expend or lay out," or "to deal with." Most interesting are its specifically legal ramifications. In legal usage, it has the connotation of "to make over, assign, warrant, grant officially, or [grant] in legal form" (*OED* 760B/490).

From these connotations, by adding the negative prefix "*in-*," the *indisponible moment* refers to the moment when law is understood as having an existence in *relative* independence from religion and politics but one in which the connection is not completely broken. It is the moment in which law, realized as a distinct realm of human thought and action, is also realized as incapable of fully taking possession of itself, or as of reflexively grounding itself. It is the moment in which law is incapable of being fully defined and disposed of as its practitioners may want. It is also the moment of the realization that law—to remain law—cannot be reduced to an internally defined instrumentality. In fact, Habermas argues that "the differentiation of law *never* [my emphasis] dissolves its internal relation to politics and morality (Habermas, *LAM*, 260)."

The reason why this status of the law is not more clearly recognized is that the historical evolution of law in the West is complicated by an "entangled and multiform process" by which common law was "overlaid by Roman Law under the influence of academically trained jurists" (Ibid. 260). This over-layering was accomplished, especially in the Renaissance and Reformation periods, and later included

accommodation to "the conditions of a rising capitalist economy and to the bureaucracy of the emerging territorial states" at the very beginning of the colonial period (Habermas, *LAM*, 260). The complexity of the evolution of law in the West, and the tendency for this complexity to occlude its indisponibility, dictates that the indisponibility of law must be studied through key historical forms or milestones. On the basis of an argument in which he reviews the ways that the different constellations of law, religion, and politics have been philosophically explained, Habermas is able to show that law cannot be without this irreducible indisponible moment.

## THREE HISTORICAL STAGES IN THE ATTEMPT TO GROUND LAW

*The first historical milestone*— the form of law connected to Neolithic or archaic societies—is characterized by three mechanisms that regulate internal conflict: self-defense (conditioned by feuds and vendettas), the "ritual invocation of magical powers" (also conditioned by feuds and vendettas), and the peaceful mediation of recognized arbiters in these conflicts. Here, "enforceability" backed by "courts of justice and juridical procedures are … lacking," law being "so intimately connected with moral and religious notions that genuinely legal phenomena are difficult to distinguish" because the "concept of justice … is intermingled with mythical interpretations of the world (Ibid. 264)." In archaic societies, there is no clear awareness of the distinction between fact and legality; rather, "legal processes, normative judgments, the prudent weighing of interests, and statements of facts" are confused (Ibid. 265). There are yet no legal formulations of concepts of "accountability and guilt," intent and negligence, nor are civil and criminal law distinguished. "What counts is objectively produced harm …; all violations of the law are equally offenses that demand retribution" (Ibid.). In archaic societies, the person of the judge, his rhetoric, power, charisma, and so on, are the means for bringing resolution; there is no question of appealing to "the impersonal, obligating authority of the law and to the moral insight of the participants" (Habermas noting L. Pospicil, *Anthropologie des Rechts* (Munich, 1982), no page number) (Ibid.).

Only when distinctions between the political, religious, and legal sectors of society begin to emerge are "conventional" (or "context-independent") legal norms set above factions and to arbitrate as *a priori* values that ground and guide both morality and the legal process

(Ibid.). But it is important to realize that, when these conventional norms emerge prior to a clear-cut notion of political authority, they do so from "elaborated mythical worldviews" (Ibid.).

In archaic societies, where there are "intersubjectively recognized legal norms" there may not be the coercion of state-backed sanctions (Ibid. 266). Once norms emerge, the chieftain's influence and prestige change dramatically with three consequences. The first consequence is that the chief as "protector" of such norms shares "in the aura of the law he administers, … [s]o the normative authority of the law" is carried from his authority *qua* judge to the leader generally (Habermas, *LAM*, 266). "The *de facto* power of an influential person is thereby inconspicuously converted into normatively authorized power of a commander who can make collectively binding decisions rather than merely exercise influence" (Ibid.). The second consequence is that judicial decision changes as a result: the *de facto* power of the prominent person is no longer the consideration, "but the threat of sanctions from the authority of a legitimate ruler" (Ibid.). Here recognition and force are fused in compulsory law. The third consequence is that this recognition allows him to organize a bureaucracy as an arm of his power. In bureaucratic organization, law takes on an instrumental aspect in addition to "the indisponibility of traditional law" (Ibid.). But especially significant, here, is that "morality functions as a catalyst in the fusion of compulsory law and political power" (Ibid.).

Habermas next considers *the second milestone of western law*—the middle Ages— and shows that even with its syncretism of Roman law and ecclesiastical and primitive tribal law, a common structure was repeated. According to Habermas, medieval law—like ancient Roman law—preserved the branching of sacred and secular law, with the sacred law being "closely tied to the order of the cosmos and to sacred history" (Ibid. 261). Here, "[a]ll law derived its validity from its divine origin in Christian natural law"; the "divine, or natural, law was not at the disposal of the political ruler; in this sense it was *indisponible* (*unverfügbar*). Rather, the canopy of sacred law provided the legitimating context within which the ruler exercised his secular power through the functions of adjudication and bureaucratic legislation" (Ibid.).

This is tantamount to Max Weber's "'two-fold realm of traditional domination (Ibid.).'" This dual character was maintained throughout the western medieval period. "New law could only be created in the

name of reforming or restoring [what was] good [in the] old law" (Ibid.). But a tension lay in the two elements of royal law. The sovereign stood under sacred law, and his power was legitimated by it, insofar as he protected it in his piety and reverence, but he could also use law as the medium for giving his commands force. But even here, bureaucratic legislation had to respect a non-instrumental, indisponible character. According to Habermas a tension was created between the indisponibility of courtroom law and the instrumentality of law for political domination (Ibid. 262). Sacred and customary law checked this inherent tensility by providing a critical grounding for bureaucratic law. As long as this ground went unquestioned, all was well.

It is curious that in tracing the indisponible moment, Habermas does not mention Thomas Aquinas' theoretical radicalization of the relationship between divine and human law or its prior bureaucratic implementation in the documents of Pope Innocent the 3rd. This is a further feature of the development of medieval law that, had Habermas recognized it, would have made his case stronger, for in arguing that all human law was subject to the ecclesiastical representatives of divine law, Thomas and Innocent route the indisponible grounding through the mediating structure of an ecclesiastical bureaucracy that could hardly be said to have been consistently faithful to either divine or natural law.

The expediency connected with this bureaucracy's organizational ends meant that the hypocrisy of the clerisy's claim to be the disinterested interpreters of the sacred law was obvious. The attendant corruption (along with the nominalist revolution in philosophy) influenced, on one hand, the Reformation view that the Church had experienced a Babylonian captivity and, on the other, the nominalist denial of the existence of ethical universals that had been assumed in medieval theories of natural law. Theologically, the effect is to substitute a notion of law not ultimately grounded in God's goodness but in his inscrutable will. Carl Joachim Friedrich describes the result as follows:

> [P]ractical reason becomes, in such a context, an expression of pure will, and the connection between pure reason and acts of the will is destroyed. The will of God is the last and final ground of all law and all laws. Even a great sin cannot be understood by means of pure reason. Such a doctrine frees God of all rationalizing objections; the matters of faith are mysterious. Furthermore, what applies to God and his unfathomable will is believed to be true by analogy for human society.

> The legal order and its laws are here valid because those who are in authority have willed it so. In this perspective, the authority of the emperor cannot be contested as long as he is emperor by right and legitimacy (Friedrich, *POL*, 48).

In the wake of early theoreticians, such as Marsilius of Padua, later Renaissance and Counter-Reformation philosophers of law—like Francisco Suárez—foreshadowed law's later positivization by preserving a voluntarist interpretation of the form/matter distinction, one that made the formal component of law "essentially coercive command," whatever its material content and whatever its origin, whether in the will of the sovereign or in the will of the people (Friedrich, *POL*, 49). Renaissance theoreticians also stressed the connection between sovereignty and legislation, with procedure as the grounding rationality (a theme absent in Aristotle and Medieval philosophies of law). They also stressed the historicity of law in such a way that emphasized the purely human construction of positive law (Friedrich, *POL*, 49-50). Furthermore, the Renaissance theoreticians preserved natural law theory but divested it of an essentially religious grounding by making it secular and philosophical.

*Habermas' third milestone* is reached when law becomes progressively postivized, when it is re-thought as self-contained in its disponibility. According to Habermas, this positivization was the result of changes that prevented the grounding of law in the sacred and politics. "To the extent that religious worldviews gave way to a plurality of privatized gods and demons, the common-law traditions were more and more penetrated, via the *usus modernus*, by scholarly law, the tripartite structure of the legal system had to collapse" (262).[2] Law shrank to bureaucratic royal law, and the ruler's power "was emancipated from its tie to sacred law and became independent. It was,

[2] The '*usus modernus*' in this citation refers to a movement in German and Dutch—and to a lesser extent Spanish and Latin American—legal practice, beginning in the 16th but especially during the 17th and 18th centuries. The phrase literally refers to the "the prolonged [modern] application of a rule or a continuous custom" producing further customary law is its product. This school of legal practitioners critically took up Roman law and combined it with the canons of Roman Catholic Church law, customary law, and natural law adapting them to modern conditions by deciding which were best applied in concrete cases. In character, it tended to be pragmatic, case-driven, and materially heterogeneous. Recovered at JuraForum: EKLÄRUNG ZUM BEGRIFF USUS MODERNUS PANDECTARUM https://www.juraforum.de/lexikon/usus-modernus-pandectarum.

accordingly, burdened with the task of filling the gap … [of] theologically administered natural law … and of achieving this on its own, through political legislation" (Habermas, *LAM*, 262). Thus, this conception of law was seen as flowing from the legislator's sovereign will. The creation, execution, and application of laws are three aspects of a "single, politically controlled feedback process," even after the differentiation into the checks and balances of state powers (Ibid.).

In this phase, the question of the indisponibility of law—the question of how law can retain its obligatory force when it is clearly dependent on programs "prior to the administration of justice" and as equivalent to "arbitrarily changeable political law"—is answered in three ways by legal theoreticians (Ibid. 263). One version of *legal positivism* sees law as non-normative and unrelated to morality. The *de facto* legal norms are nothing more than instrumental commands of the sovereign. Here, "the moment of indisponibility is pushed aside as a metaphysical relic (Ibid.)." It is to the instrumentalist legal positivism that the Kantian theory of law most directly responds.

The other positivist alternative is that of a radical formalism that goes beyond the intent and violates the consistency of Kantian theory. Positivist formalism allows that the legal code is somehow non-instrumental and attempts a new strategy for resolving conflict between the law's instrumentality and its absolute claims. In positivist formalism, the indisponible moment is now attached to the "form of the positive law" not the contents of natural law. Here, the legal system and courts survive as separate from politics and morality preserving their own unique form and autonomy, but this is accomplished by taking law to be a formal science whose purpose is to prescribe the possible conditions for all legislation. Kant's original understanding of law is, thus, undermined and the pure theory of law is constructed on parallel with a theory of pure reason.

We can express this false extension of Kantian thought in the following analogy: the forms of possible law stand to the material of actual laws as the categories of pure reason stand to the material of sensation. "In both cases the consequence is that the metasocial guarantee of the validity of law on the basis of sacred law can be dropped without any functional equivalent replacing it" (Habermas, *LAM*, 263). As Friedrich has observed, the Kantian theory of law was taken up by the creators of the pure theory of law in an attempt to bridge the difference between ethics and politics but in a way that constructs a formal theory of law on an analogy with Kantian pure

reason instead of identifying it with practical reason (Friedrich, *POL*, 171-172). This meant that concrete laws and their legislation did not presuppose human freedom as their precondition but were construed on an analogy with natural phenomena which are determined in necessity by the categories of pure reason (here reinterpreted as pure forms of law) (Ibid. 172).

But Habermas does not think that positivism succeeds in eliminating the indisponible moment in either of its versions. *Neither* positivist approach is honest about the genetic origins of law. As historical explanations (or descriptions), both are mistaken. Both positivist approaches see norms as coercive and created by the state, but the attempt to ground them in some absolute means that the demand that one must obey a parliament, monarch, *et al*., is taken as a free-hanging but ultimate norm. This absolute command of obedience tacitly implies that peace "has greater value than justice" because that obedience—correlative to the will of the sovereign—is a duty superseding obedience to a righteous conscience (Friedrich, *POL*, 172).

The form of positivism that equates law with the instrumental command of the sovereign means the dissolution (or reduction) of law into politics. The danger, here, is that this tends to undermines politics because politics can no longer seek to legitimate itself in law. If the legitimation of law is "the exclusive achievement of politics," this means that "concepts of law and politics" must be abandoned as separate systems (Habermas, *LAM*, 267). This would entail the grounding of the law on politics alone and would remove politics from the critique of law. It means that the rule of law can be changed at will by the arbitrary choice of the sovereign (Habermas, *BFN*, 448).

On the other hand, if we follow the second positivist course, if we maintain the completely distinct formalism of law in which the judiciary is maintained in pristine formal autonomy apart from morality and politics but with the "contingent decisions of the political legislator" being its material content, then the "identity of the law" is fragmented and lacking the "legitimating criteria … under which the legal system could be tied to the preservation of a specific internal structure of the law (Habermas, *LAM*, 267)."

What we have, here, is a duplication and fragmentation of grounds. One ground is the axiomatic formality of a pure theory of law; the other ground is the compelling, though contingent, dictate of the sovereign. It is difficult to know how to put these levels together

except as an accidental relation between factual reality (real legislation) and its axiomatic description (pure theory of law). Thus, the formalist-positivist theory of law is Janus-faced (Habermas, *BFN*, 448).

## BACK TO THE INDISPONIBILITY OF LAW

Habermas believes that positivist theories of law do not evade the need for a moment of indisponibility—or its equivalent. Against this crisis, new natural law theories have been proposed to again ground law, theories that articulated "a new, post-traditional level of moral consciousness … dependent upon principles and standards of procedural rationality" (Habermas, *LAM*, 268). Because they were designed to remedy "the disintegration of traditional, religiously, and metaphysically grounded natural law and to a demoralization of politics … conceived in naturalistic terms as a mode of sheer self-maintenance," these new natural law theories under the influence of positivism shifted the problem of the grounding of law to a "narrower basis of a post-traditional, secular ethic, decoupled from metaphysical and religious worldviews" (Ibid. 268). Among the most important representatives of these theories—contrary to his formalist interpreters—was Immanuel Kant. It is Kant who gives final shape to the modern formalist interpretation of natural law.

## HABERMAS' THEORY OF A NEW GROUND FOR THE INDISPONIBILITY OF LAW

In proposing a new theoretical formulation of the indisponibility of law, Habermas is decidedly focused on western Europe in late modernity, a cultural and political context which he describes as a set of "pluralistic societies in which comprehensive worldviews and collectively binding ethics have disintegrated, societies in which the surviving post-traditional morality of conscience no longer supplies a substitute for the natural law that was once grounded in religion or metaphysics" (Ibid.).

Accepting that western civilization has entered a post-metaphysical phase, Habermas rejects both the classical natural law and positivist theories, though he retains some of the formal features of the Kantian theory. His solution is to seek the indisponible moment of law in democratic procedure interpreted according to discourse theory.

How, then, does discourse theory restore the indisponible moment to democratic procedure?

Habermas summarizes his discovery as follows:

> Discourse theory answers this question with a simple, and at first glance unlikely, answer: democratic procedure makes it possible for issues and contributions, information and reasons to float freely; it secures a discursive character for political will formation; and it thereby grounds the fallibilist assumption that results issuing from proper procedure are more or less reasonable (Habermas, *BFN*, 448).

Habermas thinks he charts a course that avoids the Scylla of a Platonism that grounds positive law in a higher metaphysical reality and the Charybdis of an instrumentalism of contingent legal decisions (Ibid. 450). In thus setting his direction, he rejects the natural law and Kantian theoretical assumptions that conscience grounds law or that people of conscience make an original contract, though he admits that "discourse theory provides an interpretation of this … deontological understanding of morality … on the basis of a discursively [or deliberatively] achieved agreement" (Ibid. 449). In other words, democratic agreement becomes the conscience of the people. *Vox populi, vox Dei*. For Habermas, the indisponible moment is preserved by discourse theory inasmuch as the "democratic process [can bear] … the entire burden of legitimation" (Ibid. 450). It bears this burden by securing the "private and public autonomy of legal subjects," a process which can neither begin nor be implemented unless "those affected have not first engaged in public discussions" about issues relevant to new needs (Ibid.).

One must not think that Habermas has now put morality completely out of play; morality may not function as the ground for the indisponible moment—which, as we have seen, Habermas shifts to procedure—but it still enters into the legal process as participants wrangle to make laws that conform to individual or collective notions of conscionability (Ibid. 453).

If, as I have said, Habermas preserves an aspect of Kantian formalism in the relation between morality and the law, what exactly is this formal aspect? The answer is that it lies in the discovery of a procedure which is neutral with respect to a plurality of worldviews and which substitutes the "intrinsic [form of the] constitution of the practice of deliberation" for the notion of a transcendent good. This is to say that it is a method—a formal process or procedure—that must take the place of the notion of the Good as the highest material (or better: substantial) grounding of the law (Habermas, *ITO*, 41). This

process is an impartial "*form of communication* in which joint practical deliberation" is such that "it makes possible a justification of moral norms convincing to all the participants" (Ibid.). The formality of this process consists of two features: (1) an imperative and (2) a principle specifying its universal validity (Ibid. 41-42).

Habermas describes the grounding imperative (I) as:

"Only those *norms* can claim *validity* that could meet with the acceptance of all concerned in practical discourse (Ibid. 41)."

Habermas describes the (abductive) principle of universalization (U) of this imperative as:

"A *norm* is valid when the foreseeable consequences and side effects of its general *observance* for the interests and value-orientations of each individual could be jointly accepted by all concerned without coercion (Ibid. 42)."

On an analogy with these formalizations of the grounds of moral discourse—and warranted by Habermas' himself—it is possible to recast them to derive the principles of discursively grounded human rights. These principles now become:

"Only those *rights* can claim *inalienability* that could meet with the acceptance of all concerned in practical discourse."

And:

"A *right* is *inalienable* when the foreseeable consequences and side effects of its general *protection* of the interests and value-orientations of each individual could be jointly accepted by all concerned without coercion."

The rootedness of both formulations of imperative (and their universalizations) in the Kantian categorical imperative is clear. Setting aside questions of the sufficiency of these formulations and the practicalities involved in their implementation—for example, how are those not party to the conversation (i.e., the unborn) given voice—I should now move to a critique of Habermas' attempt to make the disponible moment of law and human rights a process of discursive practice.

## NATURAL LAW AS ONE BASIS OF INDISPONIBILITY FOR A GLOBAL BILL OF RIGHTS

It seems to me that Habermas' proposal to ground law and human rights in discursive rationality entails significant difficulties. Some of these difficulties have to do with assumptions he has made about the ease with which societies that still ground law in religion (or in natural law) will buy into his revision of indisponibility and some of these difficulties have to do deficiencies of natural law and its rival grounding of law and human rights. Let's begin with the first set of difficulties.

### *A. Will religious parties to the discursive context accept Habermas' re-invention of the indisponible moment?*

Habermas' framing of the solution to the grounding of law presumes that this proposal will be equally acceptable to western European nations that have weathered modernism and have been transformed in their thinking of law so that it is post-metaphysical, instrumentalist and positivist and to those that are effectively pre-modernist, religiously oriented and either deontologically or aretalogically oriented. His assumption, here, would seem to be that the modernist-secularist transformation of culture is a *fait accompli*, an irresistible mutagen, that all societies will eventually succumb to, or that, at very least, the terms for the inter-societal negotiation of law, human rights and morality will be dictated by the powers that have experienced this transformation. But either alternative is far from certain.

Behind Habermas' confidence in the acceptability of his proposal is a modernist assumption about the direction of history. And although it would be to go too far to suggest that Habermas succumbs to an evolutionary bias with respect to the positive direction of western society—his view is more nuanced and complex than that—he does seem to think that the disenchantment of the religious view of the grounding of law, human rights, and morality is inevitable.

It is this assumption that resurgent religious conservatism rejects inasmuch as it is in a struggle with the very forces that have already transformed western Europe. But the strict separation between the non-religious and the religious in modern secular society is one conceivable model for a global civilization, but not the only one. Where religious worldviews still dominate law, human rights and morality are indisponible because they *are* metaphysically grounded. How will such societies, then, view the very justification given for the rules which

make them party to the discursive situation? My view is that even if they see merit in the fairness of Habermasian rules, they will *not* see these purely formal rules as a substitute for their own ideas about a material or substantive religious grounding. They may choose to participate in the discursive situation as defined by Habermas, but they will do so with the reservation that what warrants their own ideas is something quite different. From the start, then, there will be an inevitable difference in the grounding assumptions of the moderns, pre-moderns and post-moderns. Some will accept his formulation of the new indisponible moment but the others will find that their understanding of that moment makes it one directly grounded in religious ideas or mediately grounded in some notion of natural law.

*B. What does a more adequate understanding of the claims of natural law add to the picture?*

The second difficulty with Habermas' critique of any indisponible moment founded on natural law is that he accepts those constructions of natural law that make it essentialist and *a priori* in specific content. But although this may be the case with less sophisticated natural law theories, contemporary theorists such as Finnis, Rohnheimer, and May (and to a lesser extent, Rowland and McIntyre) deny that this interpretation of the classical tradition and contemporary revision of it necessarily entail, either.[3] In place of this inadequate conception, these theorists have argued for an understanding of natural law that makes it teleological and, thus, relatively revisable.

To make this point plausible, it is necessary to postulate three strata of principles within natural law: the first, the so-called primary precepts of natural law are viewed as common to all people, metaphorically "written in natural reason," and are "self-evidently known (*per se nota*)" (May, *IMT*, 49). But they are self-evidently known only in a reflective moment of reasoning. Before reflectively recognized, they are present in the form of dynamic natural inclinations directed toward human well-being (May, *IMT*, 47-48). Among such invariants are: good is to be pursued and done, evil is to be avoided and not done; evil is to be done to no one; the Golden Rule or equivalent translations of it; that life, truth, education in truth, fellowship and amity among humans are goods and that love of truth

[3] See, for example: John Finnis, *Natural Law and Natural Rights*; Martin Rhonheimer, *Natural Law and Practical Reason*; William May, *An Introduction to Moral Theology*; and Tracey Rowland, *Culture and the Thomist Tradition*.

and neighbor is equivalent to willing that these goods "flourish in him [/her]" (*ST*, 1a2ae, q. 94, a. 2; May, *IMT*, 49).

Contained but distinguishable in this first level are the goods, principles or orientations *versus* the *way* of pursuing these goods. The general principles of the first level ground the second set of precepts that are "proximate conclusions" [or applications], which though determinate can *be understood with virtual immediacy*. Here, presumably, fall the common concrete commands of religious traditions. The third stratum consists of those precepts that are only discoverable prudentially and after involved deliberation.

Because of the concern to delineate a tripartite structure, one might get the impression that the contents of each level are rigidly specified, but that is not the case. At all three levels, the specification of values and actions is a historical, teleological process dependent upon a developing human nature and rationality. Another way of putting this is that in its new, revisionist form, natural law is entelechial and heuristic. Values are never exhaustively known *a priori*, in all of their richness. Rather, (relative to the expandability of human reason and nature), they are potentialities that develop historically and practically.

What, then, is the purchase of this new conception of natural law? Although there are constant features to human nature and rationality, this theory allows plasticity to both that undercuts Habermas's critique of natural law theories as essentialist. According to the revisionist theory, human nature and reason are best construed as vectoral and dynamic: they point toward fulfillment and expansion within a virtually unlimited horizon. This theory has the further consequence of turning laws *written into the tablet of the soul* into Kantian ideal limit concepts. Human goods and their associated pursuit—of which human rights are a species—become expandable both in quantity and quality as notions of human nature and rationality change. This squares nicely with E.B.F. Midgely's description of the common good as a limit concept pitched toward the future.[4] It also has the advantage of

[4] Midgely's treatment of *ius gentium* (in *The Natural Law Tradition and the Theory of International Relations*. London: Elek, 1975) contains a criticism of Suárezian theological voluntarism that makes God's will the basis of law. It is made clear below that I reject this grounding. Rather, it is my contention that this ground for the establishment of sovereignty can be side-stepped, in more Thomistic fashion, in favor of a view of law that restores its foundation in theological ontology (as the goodness of God). See also: Amanda Russell Beattie. *Justice and Morality: Human*

fleshing in Kant's third formulation of the categorical imperative—that is, the command to act in every circumstance as though one were realizing the Kingdom of Ends—by suggesting that the non-instrumentality of ethics is a directive under construction. Finally, it explicitly restores an anthropological horizon to law and ethics. It recognizes that all attempts to warrant law or ethics on the basis of a pure formalism or a pure proceduralism surreptitiously smuggle human nature in through the back door. Instead of attempting to disguise the role of human nature in ethical and legal deliberation, it recognizes that *datum* from the start, though it interprets it as more plastic than classical natural law theories.

*C. What might the Habermasian communication situation then look like, if rights were multiply grounded?*

To prescribe the specific procedures and institutional structures by which a multiply legitimated global bill of rights will come about is beyond the scope of my intention of this paper. Still, I can't resist providing a few crude speculations.

Initially, a dialogue must be opened among all parties, one that identifies an extensive but common set of concrete legal precepts and applications shared by the religious and non-religious alike. In effect, this would be equivalent to identifying the first and second strata of precepts of the natural law mentioned above. It seems to me that Hans Küng has already taken some first steps toward this identification, but despite the grandiose ring of his book's title, this process is only at its most elementary stages.[5] The greatest merit of his project of a global ethic is in beginning dialogue about the possibility of such an ethics by momentarily sidestepping the theoretical for the concrete. But, at some point, the theoretical must be re-introduced, because it is there that reasons for religious action are given. That the adoption of a western approach by all partners—as a *fait accompli*—is not presumed. It is not expected that other global partners will either discover the wisdom of this western model of natural law and adopt it or that they will discover a parallel theory to natural law in their own cultural or religious heritage. My suggestion runs in a different direction.

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*Suffering, Natural Law and International Politics*. London: Routledge, 2010, pp. 66-68.

[5] See: Hans Küng, *A Global Ethic for a Global Politics and Economics*. Oxford: Oxford University Press, 1997, especially chapters 4 &5, pp. 91 to 156.

Recently, Chantal Delsol has suggested that the *ius gentium* (law of nations), as classically conceived, provides a better model for international cooperation than natural law because of the barriers to the latter's being seen as little more than a uniquely western construct (Delsol, *UJ*, 45-58; 90-95). Rather than expecting that all partners to a dialogue will discover natural law as a common ground, it is more realistic to begin with the commonly shared practical commands at levels two and three. But this sharing of practical commands does not mean that other partners to law will derive them from the same premises or even derive any of them from natural law. *Ius gentium* has the advantage of looking for commonalities across legal systems—and thus preserving some of the inferences of natural law—while allowing each system to ground itself differently. It thus forces neither the pretensions of a universal natural law nor the pretensions of a universal positive law (Delsol, *UJ*, 54-55).

Over four centuries ago, Francisco Suárez recognized that the law of nations might work as a mediating form for international law because it occupied a middle ground between natural law and positive civil law. According to Suárez, *ius gentium* and natural law both share commonalities but are also different. As similar, they both (1) as types of law are "in a sense common to all mankind," (2) have humankind as their subject of application, (3) "include precepts, prohibitions, and concessions" (Suárez, *TOL*, 19:1, p. 393).

They differ in that (1) *ius gentium* does not derive affirmative precepts applying to the nature of a case *solely* from "a manifest inference drawn from natural principles" (Ibid.). Natural law does this, but *ius gentium* makes use of other principles outside of natural law. (2) *Ius gentium*, unlike natural law, does not prohibit evil acts on ontological grounds—by their intrinsic evil—but—like civic law—it *renders* [specific] *acts evil* by prohibiting them" (My italics, Ibid., 19:1, p. 394). (3) *Ius gentium* "cannot be immutable to the same degree as natural law"; from "immutability springs necessity." Therefore, because *ius gentium* is mutable it cannot—unlike natural law—be necessary (Ibid. 19:1, 395). (4) Natural law and its precepts are common to all people (as least *in potentia*) as reason is common, but *ius gentium*, though everywhere present, varies in its content among different peoples.

These features allow Suárez to draw the conclusion that *ius gentium* is more properly positive civil law than natural law. But—as Suárez indicates elsewhere—this does not preclude the fact that precepts and

applications that are found *in* natural law may *also* be found *in ius gentium*. In fact, the *ius gentium* would seem to be a mixed bag of the following kinds of precepts and applications: (1) precepts of natural law (though not necessarily recognized as such), (2) commonly shared precepts of custom discovered "through probable inferences and the common [human] judgment," (3) well-formed inferences/ applications wholly from type 1, (4) well-formed inferences/applications wholly from type 2, (5) well-formed inferences/applications as mixed syllogisms from types 1 and 2. In its logical structure, *ius gentium* thus would seem to stand to the natural law as speculative theology stands to *sacra doctrina* in Thomas's theological system.[6]

Unlike natural law, however, the *ius gentium* does not claim "objective universality" or claim to be inalterable, but only "general subjective agreement" that evolves historically (Delsol, *UJ*, 90). It thus preserves both particularities and differences in their historical

[6] Though parties to *ius gentium* may not recognize the origin of some of its precepts *in* natural law—and in this they are unlike the practitioners of speculative theology, who recognize their certain precepts as correctly understood propositions drawn from scripture and certain natural truths—they do make formal arguments in the same way as speculative theologians. Though the doctors of sacred doctrine may draw indubitable conclusions as long as they stick to propositions drawn from scripture, and philosophers of natural law may draw indubitable conclusions as long as they stick to propositions drawn from certainties about conscience, speculative theologians make use of mixed syllogisms in a way similar to those who reason about the *ius gentium*. In the case of speculative theologians, their syllogisms are formed using indubitable propositions from sacred doctrine (*sacra doctrina*) in combination with only probable propositions drawn from philosophers and doctors of the Church. In the same way, theoreticians of *the ius gentium* argue in syllogisms drawn from universally recognized precepts (implicitly based on natural law) in combination with the other propositions whose authority rests on custom. In both cases, the syllogisms they employ are mixed, though each group treats different kinds of truths (theological vs. legal). The conclusions thus drawn are only as certain as the syllogistically constituent propositions with the lowest probability. I other words, arguments in speculative theology and in *ius gentium* are only as strong as their weakest links. See: Thomas Aquinas, *Summa Theologiae* 1[a] Q.1, A.8, ad. 2. Compare this to Suárez's discussion of the similarities and differences of the *ius gentium* and natural law. Though essentially different, the *ius gentium* and the natural law may agree in content, though the former is grounded in custom. But this means the reasoning about it—even when it does not recognize it *as* natural law—may still have the same rigor within the scope of the custom that characterizes it. In other words, it may unknowingly use propositions of natural law as precepts and reason with these, in combination, with propositions drawn purely from custom. See Suárez's rather recondite discussion in *Treatise on Laws and God the Lawgiver* beginning at 19:1 through 19:9.

development. Parties to a common *ius gentium* will obviously share an intersection set of precepts and applications that is smaller than the complete sets of laws of each respective party to the dialogue, and they will ground them differently. Though agreeing upon the shared laws, indisponible moments will be different for different groups. Some groups will stipulate their grounding in natural law, some in religious revelation, some in metaphysical assumptions, some in tradition, and so on.

But in the open dialogue between nations about common laws, natural law will be put on display to show the force of its arguments. The best that can be hoped for is that through its successful persuasion natural law would drive the direction of legal evolution. Nevertheless, international justice must flow as "a free convergence of all people to the same law," a process of conscience that will likely take centuries (Delsol, *UJ*, 55).

Though the intersection set between laws derived from the precepts of natural law, and others derived from religious or traditional law, would be the same, their grounding would not. From the side of the theoreticians of natural law, those other groundings will be an occasions to reflect on how those groundings stand in relation to their own views on the nature of conscience, the universalizability of precepts, and the persuasiveness of the reasoning that derives practical precepts from them.

Once a set of common precepts and applications has been identified, the dialogue should be continued, but at this stage with the religious traditions showing how these ethical precepts are grounded in respective views of what it means to be human. Since most religiously conceived notions of human nature are teleological in nature, this part of the dialogue will describe the potentialities and dignity of human nature as defined within the respective traditions but especially in relation to the already identified ethical precepts. This stage is the procedural equivalent to the western historical stage when the indisponibility of law and morality was grounded in religious metaphysics.

The parties should next explicate *how* from their respective intra-traditional theories the common ethical features identified in the first step can be explained intra-traditionally. What I know about Christianity, Judaism, Buddhism, and Confucianism suggests that many traditions have already developed theoretical explanations for the moral behavior of others outside the tradition. (The idea that

conscience is a universal and that it produces some universal precepts would be an example of such a theory.) This step would involve a discussion about how the moral behavior of the religious *other* is explicated, especially when that moral behavior directly parallels that of one's own tradition. At this stage, comparisons would be made in the way these theoretical explanations work in the respective traditions. And it is at this stage that respective theories that parallel western formulations of natural law would be explicated and sharpened, as would western natural law.

In Habermasian terms, this stage would be the procedural equivalent of grounding the indisponible moment of law and morality in these natural law traditions; it would be the procedural equivalent of an event that has already occurred at a specific point in western history. Traditions that had theories of something like natural law could retain them, and traditions that possessed no such theories would be faced—perhaps for the first time—with the challenge of explicating commonalities in religious ethics across traditions. Those that rejected the notion of natural law—*tout court*, under any formulation—would still retain the religious legitimation.

Finally, the parties should attempt to arrive at an acceptable common description of what it means to be human, in dialogue, and then on the basis of the previous steps, specify which rights issue from the commonly agreed-upon moral precepts and a commonly agreed upon (but not exhaustively arrived at) definition of human nature.

The goal of this process—which would be governed by the rules of Habermas' ideal of communicative practice—is not to force the respective religious traditions either to submit their religious anthropologies as grounding of law and ethics to a modernist procedural formality or to force an uneasy homogeneity on religious traditions that will not bear it, but to reach an agreement about religious and secular common ground, to discover a justification for human rights that would be acceptable within each tradition and between traditions.

From the post-metaphysical secularist-modernist side, the Habermasian formalism of process may be a convincing grounding for the indisponible moment of ethics and law. But without significant theoretical modifications it won't be seen as such from the side of the religious dialogue partners. Therefore, it would be presumptuous to demand of religious participants either that they "modernize" sufficiently to accept it or that it should be forced on them.

A possible solution, therefore, would be to allow the religious participants to retain their respective pre-modern religious (or pre-modern religiously theoretized) justifications as parallel legitimations for commonly arrived at rights. The result would be an (appropriately modified) Habermasian communicative process in which the modernists and the religious each take the other's warranting of the indisponible moment as a legal fiction, a legal fiction nevertheless unavoidable in reaching consensus about the common good. Each side to the process would then see the others' groundings of law as alien—and possibly questionable—but would also see them as productive of a body of laws that could be commonly shared. All this requires is that such deliberations be done in good faith, according to Habermasian canons of communication.

Nevertheless, it may be that, in the end, the greatest barrier to the creation of a global bill of rights will not be procedural, or structural, or religious, or philosophical. It may be that the greatest barrier of all will be a lack of openness to persuasion.

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