How to Recapture Human Rights within the Political: Validating the Discourse Theory Approach

By Magdalena Zolkos

Human Rights and Democracy: Discourse Theory and Global Rights Institutions by Eva Erman. Aldershot: Ashgate, 2005. 243 pp.

The problematic accommodation of human rights as a research object within the discipline of political science has, in the last decade, attracted a good deal of intellectual attention. While some researchers have highlighted human rights' conceptual connection to the metaphysics of the natural law notion[1], others have pointed out their post-war juridical genesis and their appropriation by the domain of law[2], and still others have discussed their universalistic implications that seem to locate human rights *beyond* the sphere of politics[3]. One of the often repeated conclusions has been that if political science is to succeed in forging a deliberative and investigative forum for human rights research, it needs to reflect more critically on its own disciplinary limitations and capacities vis-à-vis the topic of human rights.[4] More specifically, there has been a recognized need for constructing a closer link between, on the one hand, the study of human rights within comparative politics and international relations and, on the other, the research on human rights done by normative political theory and political philosophy. This is because, as Susan Mendus has suggested, there has been "a considerable… conundrum inherent in any attempt to discuss the status of human rights in political theory, [which] is that… as political commitment to human rights has grown, philosophical commitment has waned" (1995: 10).

Eva Erman's recent book on studying global human rights institutions through a (modified) Habermasian version of discourse theory constitutes an innovative and thoughtful attempt to bridge the gap between the theoretical-normative and the empirical research on human rights in the discipline of political science. While writing from the position of a critical social theorist and hence making explicit her normative interests in human rights, Erman has managed to create a convincing theoretical-analytical narrative of the processes of communication and conciliation in the U.N. human rights system, namely the Commission on Human Rights.

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[1] See Ingram (1998: 12-17).
[2] See Freeman (2002: 76-79); Sen (2004: 317); and Evans (2005: 1046-1068).
[3] See Bellamy (2000: 155), Langlois (2005: 369-387), and Sarat and Kearns (2001: 9).
[4] See, for example, Mendus (1995).

The idea of overcoming the problematic positioning of human rights within political science through the theory and methodology of discourse analysis is discussed in three stages. First, the content and main argument of Erman's book is outlined. The purpose is to bring in focus Erman's modification and operationalization of the Habermasian discourse theory for the study of human rights actions and human rights institutions. Second, a broader evaluation of Erman's argument is conducted from a political-theoretical perspective with a particular focus on her understanding of political power. Third, Erman's book is positioned in the context of three (relatively) novel debates within human rights research, which are treated here as an expression of the more reflective approach of political science towards human rights. The first debate has evolved around the questions about the functioning and practice of political rights, and about the connection between human rights and democracy. The second debate has been methodological (but implicitly also epistemological) in character and it has evolved around attempts to address human rights from the position of the so-called "linguistic turn" in political science. The third debate has focused on the widespread post-Cold War acceptance of human rights as, paradoxically, a potentially detrimental development for the critical and emancipatory functions of human rights, which have been integrated *within* the power structures, rather than continuing to act *against* power. The argument pursued here is that seen as a contribution to those three debates, Erman's book constitutes an attempt to re-capture human rights within the area of the political.

Human Rights as a Communicative Action: the Habermasian Perspective

Human Rights and Democracy is a discourse-theoretical inquiry into the problematic of the claimed interdependence of human rights and democracy. This book originates in three concerns: first, the author ponders on the paradoxical connection between human rights and democracy. While in the contemporary normative thinking these two tend to be put together as inseparable components of good governance, Erman notes that as research fields, democracy and human rights "pull in different directions" (7). One of the consequences of the democracy-and-rights discrepancy has been a rather limited conceptualization of political rights, which have been conventionally understood as negative entities that right-beneficiaries "possess," rather than act upon. Second, the author is concerned about the deep-rooted tendency in the field of political science research to understand democracy in dual terms of democratic means (mechanisms) and democratic ends (contents) (8). In Erman's opinion, it is not so much this distinction that is most problematic, but the *inclinations to presume it* in political science research. This means that the means/contents dualism remains under-elaborated and oversimplified. Third, Erman finds problematic the sub-disciplinary lack of connection between, on the one hand, democratic theory and political philosophy, and, on the other hand, the study of political institutions. After having articulated these three concerns about the study of human rights within the area of political science, the author suggests that a way out can be found in Habermasian discourse theory, in particular in the operationalization of Habermas' notions of the discourse-principle and the universalization-principle (Habermas 1996). The Habermasian discourse theory refers to Habermas' ideas of communicative action and discourse ethics. In short, the former designates social communication as a rational achievement of an interpersonal agreement and mutual understanding. The focus of Habermas' discourse theory is the notion of communicative action/rationality, as distinct from instrumental or strategic action/rationality (Erman: 55-56). The primary difference is that while the former aims at achieving

communication and mutual understanding, the latter is results-oriented. This relates to the idea of discourse ethics, which in the Habermasian version originates in a reinterpretation of the Kantian principle of categorical imperative. Habermas' discourse ethics has been linked to (i) *formalism*, because it is based on procedural moral forms; (ii) *cognitivism*, meaning that normative statements can be considered true because of their validation in rational discourses; and (iii) *deontology*, as a general assumption about the obligatory nature of morality in social life.[5]

Erman demonstrates extensive knowledge of contemporary human rights debates. For instance, she maps two important distinctions made within the category of human rights by political scientists: (i) the distinction between the negative and positive rights, and (ii) the distinction between the individual and collective rights. Erman's argument is that both these distinctions have problematic connotations for the inquiry into the interdependent relationship of democracy and human rights in that they tend to under-theorize political rights. For Erman these contemporary human rights debates show "how political rights are conspicuous by their absence" (19). In this context the inference from Habermas' discourse theory is that political rights can be re-articulated as rights empowering people to political activity, rather than just negative "rights-as-permissions" (Ferry and Renaut 1992: 17). Through this Habermasian discourse-theoretical perspective, the meaning of political rights is constituted through reference to people's political participation, collective autonomy and popular sovereignty. Importantly, for Erman, the reason why "Habermas puts political rights to the forefront is that both civil and social rights could be realized within a community without democratic means—a state governed by law and a welfare state are possible without democracy" (52).

Erman's rationale for employing Habermas' discourse theory for the study of global human rights institutions hinges upon the assumption that communicative action brings about certain emancipatory effects. This means that communicative action brings into light the structures of domination and control embedded in late-modern social life, and has the potential to suspend existing power relations. Two other central notions in Habermas' critical social theory are "systems" and "lifeworld" (63). The notion of "lifeworld," as Erman eloquently explains, denotes "the background knowledge that we as social beings always carry with us, as the totality of sociocultural facts whose boundaries cannot be exceeded but which at the same time constitute an inexhaustible context" (63). Habermasian systems are best understood as independent chains of understandings that have developed in the process of modern rationalization of the sphere of the lifeworld, and which differentiate between sub-areas of social life, such as law, science, aesthetics, etc. The lifeworld is based on social interaction "through symbolical reproduction and reproduction of members dependent on socialization processes and cultural traditions," whereas the directive principle of the systems is "functional integration" (64). While the coexistence of the lifeworld and systems is one of the unavoidable consequences of modernity, it is the continuous spreading of the systems into the area of the lifeworld, and hence a disturbed balance between these two, that constitutes a disturbing mark of late-modernity (Fairclough 2003: 44-45). In addition, an important connection between the lifeworld and the systems on the one hand, and different modes of communication on the other, is that "communicative action is the coordinating principle of the lifeworld [and] strategic action is the coordinating principle of the system" (64).

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[5] See Mauss (2002).

Erman's suggestion is that the discourse-theoretical approach has the potential to offer a way out of the dichotomies of negative/positive and individual/collective, which have been dominant in the contemporary political science research on human rights, and which have contributed to the minimalist conceptualization of political rights (67). The discourse-theoretical approach creates the possibility to view normative claims of human rights through "a universal pragmatics based on the epistemology of language" (67). It therefore directs attention toward the way human rights language functions in practice and toward its contextual performativeness. However, in order to operationalize that theoretical suggestion, Erman conducts a critique of the Habermasian approach on the basis of (i) its assumed ethnocentrism and (ii) its insufficient denunciation of the paradigmatic "Cartesian dualism between the subjective categories and objective data" (116). In this respect, Erman's book could be usefully located within the feminist, post-colonial and post-modern critique of the Habermasian theory of language and late-modernity[6]. The first point is that Habermas' categories reflect an unhelpful ethnocentric bias in his conceptualizations of the institutions of the deliberative process and public sphere. These conceptualizations are developed with an explicit background of the Western state-centric processes of modernization. This complicates application of the Habermasian discourse-theoretical approach to the study of human rights from a global (as well as local) perspective. The second point is that the "neo-positivist dualism between form and content and […] a modified version of the subject-object world" (116), which are present in the Habermasian discourse-theoretical approach, imply that this approach is unable to capture and account for those human rights aspects that escape that dualist perspective, such as human rights. More specifically, the unmodified version of Habermas' theory of communicative action "cannot capture [the] type of proposition, which is not empirically verifiable since we presuppose it when interacting, yet has exhaustive epistemic contents" (117).

Erman proposes modification of Habermasian discourse theory so as to make it more apposite for the study of global human rights actions and institutions. First, Erman avoids the Habermasian distinction between subjective, social, and objective validity claims, and instead presupposes an inclusive discursive-social reality as a shared analytical-interpretative moment. On this basis, she develops her ideas about the universal pragmatics that are constitutive of the "necessary conditions" and the "imperative conditions" for communicative action taking place within any given social order. In this way, the social practices of human rights (including both human rights actions and human rights institutions) are designated as "moral," based on substantial-epistemic and normative-universal foundations (17). The author then applies this discourse-theoretical model to a study of the United Nations Commission on Human Rights in an informative, thorough and convincing manner (43-51 and 161-207). The point of choosing that particular institution is that it combines a parliamentary-like forum and a public sphere-like forum. Also, it seems to be less influenced by state interests than many other U.N. organizations, and hence it potentially creates great opportunities for deliberative and discursive activities. In Erman's view, the U.N. Commission on Human Rights provides an interesting environment for the application of the discourse theory of human rights actions and human rights institutions, as well as for the analysis of how the emancipatory potential of communicative action is realized.

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[6] See Benhabib (1986); Rasmussen (1990); Fraser (1991); and Wright (2004).

One could argue that Erman's assumptions, which underpin her empirical analysis, are problematic in at least two respects. First, these assumptions imply that one can distinguish between those global human rights institutions that are more suitable for the application of the discourse theoretical approach to human rights, and those that are less suitable for such an analysis. Moreover, this degree of suitability seems to depend on the extent of realization of state power within those institutions, and the formation of the networks of control and domination resultant of state power. Taking into consideration the number and impact of those global human rights institutions that are based on inter-governmental forms of cooperation, and hence remain open for the manifestation of state interests, Erman's assumptions leave the impression of an implicit admittance of the limited applicability of her modified discourse-theoretical model.

The second, and possibly more serious, problem is that even though Erman's rationale for her analytical choices seems to hinge upon a critical conceptualization of power and on the equation of "power" with "state power", Erman makes no attempt to legitimize that point of view. The idea that the very act of engagement in communicative action brings about certain dissolution of the existing structures of dominance and control is controversial, and Erman does not adequately defend that claim. Consequently, Erman's identification of the discursive mechanisms at play in the fora of the U.N. Commission on Human Rights as emancipatory must be regarded as interpretative, rather than demonstrative. This also raises doubts about the author's rejection of alternative views on power— either constructive or descriptive—as well as power conceptualized as an unavoidable, enduring and constitutive component of all societal interactions and societal integration, which is not reducible to state activities. While this book seems to speak from the position of critical social theory, it remains unclear what dominating and harmful mechanisms of power it seeks to uncover.

Finally, Erman's designation of the deliberative and discursive situations in the U.N. Commission on Human Rights as (relatively) free from power mechanisms, as a result of the institution's independence of state interests, contrasts somewhat with the initial description of that institution and its deliberative mechanisms (43-51). Even if one agrees that the degree of state influence is minor within the Commission in comparison to other U.N. institutions, this very description demonstrates the existence of a dense network of power relations within the Commission. This network is being continuously re-produced and re-affirmed through a chain of collective decisions, which involve the mechanisms of exclusion and inclusion and legitimization and de-legitimization, and which center, for example, on what matters are being debated within the Commission, what are the procedures of deliberations, what actors are being recognized as legitimate participants of the debates, and what are the results.[7]

The Context of Three Debates

Human Rights & Democracy is a contribution to the growing body of literature on human rights within the area of political science that has been particularly concerned about the relationship

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[7] The recent reform project of the UN human rights protecting bodies have addressed directly the problem of participation in and the functioning of the Commission (I thank one of the anonymous reviewers of this essay for pointing it out). See e.g., Rodley (2003).

between human rights and democracy. Most of those studies, however, hinge upon an idea of a rather simple dialectic between the theoretical-normative assumption of consistency and interdependence of human rights and democracy, and the empirical observations of their discrepancies in the process of political transformations and legal developments. For Erman, however, this research tendency is detrimental and evocative of the neo-positivist tendency to regard norms and facts as separate research objects that have different epistemic statuses. Instead, she supports a holistic approach to human rights, which would be able to make sense of the actual inseparability of rights-as-norms and rights-as-facts. It is the suggestion of this essay that reading Erman's book could benefit from Ferry and Renaut's (1992) conceptual mapping of the relationship between human rights and democracy in liberal, socialist and civic-republican normative democratic theories. This is because, while Erman distances herself from the Habermasian outline of the republican notion of rights, she also emphasizes the complex relation of mutuality and dialectic between rights and democracy. In addition, her endorsement of the holistic approach to rights-as-norms and rights-as-facts and her attempt to overcome the limited and negative modes of conceptualizing political rights in, for example, Rawlsian liberalism, has also been expressed by Ferry and Renaut in their definition of rights in terms of political participation (1992:10). In the civic-republican tradition, an important function of rights has been their *empowering effect*, which hinges on the idea of the holders of rights as rights-practitioners, rather than rights-owners. In consequence, the practice of human rights aims to traverse the distinction between the private sphere and the public sphere. It also brings about the effect of "non-domination," which results from citizens' fervent engagement in the democratic process of deliberation and contestation. This idea has been expressed by authors exploring the understanding of rights by the civic-republican tradition,[8] as well as those investigating more specific relationships between human rights, politics and the civicness as a "passion," in Hannah Arendt's political thinking (Canovan 1998; and Rostbøll 1998). The suggestion is therefore that there are interesting parallels to be explored between Erman's idea of human rights as the loci of communicative action and as the constituents of emancipatory change along the lines of the Habermasian critical theory, and the civic-republican conceptualizations of human rights as political practice that conditions civic activity and deliberative engagement. The argument is that those parallels hinge upon similar objectives of the civic-republican, Arendtian, and the Habermasian (as interpreted by Erman) traditions: that in order to explore the intricate nexus between rights and democracy, one needs to challenge the hegemony of the conventional location of human rights *beyond*—and consequently *above*—the political process.

In addition, Erman's book constitutes an attempt to conduct a systematic political science investigation of human rights in respect to theory, methodology and empirical analysis, which tries to accommodate those aspects of human rights that have been particularly problematic for political analysis. In this respect Erman's discourse-theoretical analysis explores the perspectives created by the so-called "linguistic turn" (or "cultural turn") in political science and international relations (Bonnell and Hunt 1999; Hacking 1999; Fasolt 2004). Erman's epistemological point of departure is namely the problematization of human rights language, as well as the question about the relationship between the discursive social reality of human rights and their non-discursive practice. This perspective has been explored from, for example, a pragmatic-linguistic view of Wittgensteinian

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[8] For instance, Oldfield (1990); Sandel (1996); Brugger (1999); Pettit (1999); and Honohan (2002).

philosophy (Janik 1989; Holt 1997; and Zolkos 2004), conceptual analysis along the lines of the Cambridge Contextualist School (Zolkos 2005); critical discourse analysis (Over 1999; and Souillac 2004) or post-structuralist/post-Marxian analysis (Brown 1995; Norvall 1996). In spite of diverse disparities and conflicts between these different approaches, their common point of reference is that the language of human rights is not simply reflective of social reality, but, in contrast, is both creative and (at least partly) constitutive of that reality. The implications are that the discursive approach to human rights allows the political science perspective to accommodate human rights in their entirety, and to account for rights' traditionally problematic attributes (universality, extra-territoriality, etc.) as elements of *human rights grammar*. The discursive approach to human rights hinges on the assumption that language is "a way to signify generalized, socially constructed categories of thought to which social meanings and values are attributed, [and which] lends structure to our experience and to the meanings we give to our experiences" (Evans 2005: 1049). The specific contribution of Erman's book is that it pushes that claim further by showing *how* human rights function as a form of global communication, and in this way how they constitute a performative act of the exposure, dissolution and suspension of state power interests and power relations. The particular value of Erman's book is therefore that it challenges the view of human rights discourse and social practices of human rights as consequential and yet separate and hierarchical social events. In this way, it paves the path for an authentically holistic approach to human rights that does away with, or *re-negotiates*, the conventional distinctions between norm and fact, between speech and action, and consequently between negative and positive, and the individual and the collective.

In this context, Erman's book seems also to be an attempt of making sense of human rights in the post-Cold World situation that has been marked by a re-conceptualization of human rights from explicitly critical and emancipatory tools employed for the purposes of opposing power to human rights becoming increasingly more integrative constituents of power. In this context, there are some interesting inter-textual connections between Erman's book and Guilhot's recent book titled The Democracy Makers: Human Rights and International Order (2005). Guilhot views human rights as the "organizing principles" of post-Cold War order, which implies also an important process of "professionalization" and "technical specialization" of human rights (2005: 3). This is indicative of an important transformation within the human rights discourse: once an exclusive language of "protesters, campaigners, dissidents and committed citizens…, of socially progressive repertoires of collective action and of social elements often opposing state institutions" (Guilhot 2005: 3), nowadays human rights has to a great extent become the language of state administrations and institutions. The consequence is that while the discourses of human rights and democracy used to act as "weapons for the critique of power, [they] have now become part of the arsenal of power itself" (Guilhot 2005: 8). In this context, the main question for Guilhot, as well as for Erman, is what hegemonic aspects of human rights language mean for the human rights themselves, and how to uphold their "critical intent" (Guilhot 2005: 12). In spite of the different argumentative lines and levels of analysis in those two books, it seems that both Guilhot and Erman give a similar suggestion: it is crucial to understand human rights as an unfixed, open and flexible discourse, which lends itself as a mode of articulation to a whole range of normative social practices. These are diverse and undefined practices, which are linked by only one Wittgensteinian "family resemblance:" the perception of injustice.

Conclusion

This essay has argued that there is a need for a more thoughtful and integrated approach to human rights within the area of political science and, in particular, political theory. There are different reasons for human rights being an uneasy subject for political science, such as the conceptual linkage between human rights and natural rights, the universalizing implications of rights, or their primary legal development. Taking a point of departure in Erman's remarkable analysis, this essay has concluded that the impasse between the human rights and political studies perspectives might be overcome through the application of language-oriented political methodology. This is because the focus on the discursive functioning of rights is potentially able to grasp the previously indiscernible aspects of the politics of human rights. The discourse analysis approach is therefore a valid instrument for the political study of human rights because it perceives the very act of including into or excluding from the category of human rights as empowering and highly consequential for its subjects.

In addition, the critical component in the discourse analysis approach problematizes human rights as *speaking against* or *speaking with* power. It is therefore particularly concerned with recent developments within the area of human rights that indicate the dangerous transformation of rights into perpetuating the existing societal order. The discourse analysis approach does away with the assumptions of the necessary objectivity of social science research (or, even more importantly, the possibility of objectivity) as it has obvious *political* and *normative* interests in human rights. Its aim is to re-claim human rights as instruments of progressive action driven by the desire for social change. The concluding suggestion of this essay is therefore that the value of the discourse analysis approach lies in its belief in the possibility of challenging injustice in the world—a belief it shares with human rights.

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Â This volume springs from a workshop on the discourse theory of law which was held on 11 and 12 June 2004 at Queen's University, Belfast under the auspices of the Forum for Law and Philosophy. The event constituted the second in a series of Workshops in Analytical Jurisprudence that regularly invite state of the art papers to address key issues in legal philosophy. 'Analysing Political Discourse is provocative and offers readers a unique international perspective. The author's in-depth linguistic analyses of various contemporary samples of political discourse bring to light different mental representations of political thought and behavior. Given its broad scope, Analysing Political Discourse would be a valuable resource for researchers in the fields of discourse analysis, English, linguistics, sociolinguistics, and communication studies.' - Linguist List.Â Paul Chilton provides exceptionally good insights into the cognitive effects of Political Discourse. I had been studying classic SFG and CDA and reading standard texts. Chilton brings in new angles and hybrids mixing psychology with CDA. Pragmatic analytical distinctions between politics and media politics may be unavoidable, and this volume is no exception in that respect. However, within the horizon of a discourse theoretical ontology, it is important to emphasize how representation is understood as constitutive, rather than merely reflective, of social practice. It is also crucial to underline how untenable it is to think of media "as a set of discrete objects" separate from "the individual" and "society" (Kember & Zylinska, 2010; also see Torfing, 1999), as typically presupposed in traditional mass communication mod- e