

**HABERMAS ON JUSTICE**  
**JG Moore**  
**JD Student**  
**University of New South Wales**

INTRODUCTION

In his discourse theory of law and democracy, Habermas seeks to reconcile law and morals as well as human rights and popular sovereignty.<sup>1</sup> In doing so, he attempts to situate justice within law and the deliberative democracy that produces, enforces and applies the law. His success relies upon his conception of *justice*, which he takes to depend on the discursively rational, and, therefore, intersubjective, *justification* of legal norms.

The purpose of this paper will be to argue that although *justification* may depend on rational discourse, *justice* is independent of such discourse. In attempting to achieve this purpose, the body of this essay will consist in three parts. First, Habermas's theory of law and democracy will be summarised. Second, Habermas's conception of justice will be discussed. Third, Habermas's discourse principle will be analysed in connection with moral realism.

II ARGUMENT

*A Habermas's Discourse Theory of Law and Democracy*

1 *Law and Morals*

In this connection, Habermas attempts to place himself between legal positivism and natural law.<sup>2</sup> Legal positivism, which has its origins in Bentham and Austin,

---

<sup>1</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, MIT Press, Cambridge, 1998) 84, 104.

<sup>2</sup> Ibid 104.

maintains a distinction between law as it is, and law as it ought to be.<sup>3</sup> In other words, for positivists, a law can be valid even if it is immoral. Natural law, on the other hand, which has implicit origins in Plato and the Stoics, and an explicit origin in Aquinas, is the view that there is a necessary connection between law and morals.<sup>4</sup>

Habermas begins with the ‘post-metaphysical’ ‘assumption’ that law and morals ‘appear *side by side* as two different but mutually complementary kinds of action norms’.<sup>5</sup> As the term suggests, action norms are supposed to move one to action. More precisely, they are ‘generalized behavioural expectations’ of a temporal, social and substantive nature.<sup>6</sup>

One reason for this assumption, is that Habermas is trying to avoid reducing law to social facts, as the positivists do.<sup>7</sup> He refers to such reductionism as the ‘sociological disenchantment of law’.<sup>8</sup> His idea is that law is not a mere assemblage of social facts, but rather something the validity of which can be the subject of rational discourse. Indeed, for Habermas, one can act on a desire to respect the law, just as one can act on a desire to respect morality.<sup>9</sup>

Another reason for the assumption, is that Habermas is trying to avoid subsuming law to morals, as the natural lawyers do, since this would be ‘sociologically implausible’ and ‘normatively awkward’.<sup>10</sup> For example, unlike morals, the law is backed by the coercive power of the state; and moral norms

---

<sup>3</sup> Simon Blackburn, *Oxford Dictionary of Philosophy* (Oxford University Press, Oxford, 1994) 213.

<sup>4</sup> *Ibid* 256.

<sup>5</sup> Habermas, above n 1, 105.

<sup>6</sup> *Ibid* 107.

<sup>7</sup> *Ibid* Ch 2.

<sup>8</sup> *Ibid* 43.

<sup>9</sup> *Ibid* 104–18.

<sup>10</sup> *Ibid* 107.

are universal, whereas legal norms are specific to a particular legal system.<sup>11</sup> In addition, the law is ‘the only medium through which a “solidarity with strangers” can be secured in complex societies’.<sup>12</sup>

Thus, for Habermas, law and morals are distinct. However, he brings them together in his discourse principle. According to him, this principle ‘lies at a level of abstraction that is still *neutral* with respect to morality and law, for it refers to action norms in general’.<sup>13</sup> He defines the discourse principle in the following way:

D: Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.<sup>14</sup>

When applied to moral norms, the discourse principle becomes the universalisation principle.<sup>15</sup> This principle ‘results when one specifies the general discourse principle for those norms that can be justified *if and only if* equal consideration is given to the interests of all those who are possibly involved’.<sup>16</sup> When applied to legal norms, the discourse principle becomes the democratic principle, according to which, ‘a law may claim legitimacy only if all those possibly affected could consent to it after participating in rational discourses’.<sup>17</sup> Thus, if the discourse principle is the genus, then the universalisation and democratic principles are its species.

---

<sup>11</sup> Ibid 104–18.

<sup>12</sup> Jürgen Habermas, ‘Reply to Symposium Participants’ in Michel Rosenfeld and Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, Berkeley, 1998) 381, 441.

<sup>13</sup> Habermas, above n 1, 107.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid 109.

<sup>16</sup> Ibid 107.

<sup>17</sup> Jürgen Habermas, ‘Remarks on Legitimation through Human Rights’ (1998) (24) *Philosophy and Social Criticism* 157, 160.

Be that as it may, at the level of legal norms, one applies the democratic principle, according to which it can be decided whether laws are legitimate or justified. For Habermas, legal norms can be justified through rational discourse, in which moral, ethical-political or pragmatic reasons may be given.<sup>18</sup> That is to say, the justification of such norms is not given by moral reasons alone.<sup>19</sup> However, moral *reasons* can be given for taking a legal *norm* to be justified, and in this respect ‘law has a reference to morality inscribed within it’.<sup>20</sup> In this way, Habermas attempts to situate himself between legal positivism and natural law.

## *2 Human Rights and Popular Sovereignty*

In this connection, Habermas attempts to position himself between liberalism and republicanism.<sup>21</sup> Liberalism, which has its origins in Locke,<sup>22</sup> postulates the priority of the rights of individuals (private autonomy) over the rights of the majority (public autonomy).<sup>23</sup> Republicanism, which finds expression in Rousseau,<sup>24</sup> on the other hand, prioritises public autonomy over the private autonomy of liberalism.<sup>25</sup> For republicans, human rights owe their ‘legitimacy to the ethical self-understanding and sovereign self-determination achieved by a political community’.<sup>26</sup> For liberals, however, human rights provide ‘legitimate barriers’ to prevent the ‘sovereign will of the people’ from impinging on the freedom of individuals.<sup>27</sup>

---

<sup>18</sup> Habermas, above n 1, 108.

<sup>19</sup> Ibid 110.

<sup>20</sup> Ibid 106.

<sup>21</sup> Habermas, above n 17, 159.

<sup>22</sup> Habermas, above n 1, 44.

<sup>23</sup> Habermas, above n 17, 159.

<sup>24</sup> Habermas, above n 1, 100–103.

<sup>25</sup> Habermas, above n 17, 100–103, 159.

<sup>26</sup> Ibid 159.

<sup>27</sup> Ibid.

Habermas's alternative to liberalism and republicanism begins with communication. In this connection, he refers to his democratic principle, which, as has been seen, is the principle that 'a law may claim legitimacy only if all those possibly affected could consent to it after participating in rational discourses'.<sup>28</sup> As has also been seen, the democratic principle is a species of the discourse principle.

According to Habermas, the democratic principle justifies 'the presumption of legitimate outcomes', but 'the forms of communication necessary for a reasonable will-formation of the political lawgiver, the conditions that ensure legitimacy, must be legally institutionalized'.<sup>29</sup> For Habermas, any such institutionalisation must recognise the internal relation between human rights and popular sovereignty. That is to say, the notion that private and public autonomy presuppose each other.<sup>30</sup>

For Habermas, private autonomy presupposes institutional arrangements that secure the human rights of individuals, but such rights are expressions of liberty only if individuals can understand themselves to be both the authors and the addressees of the laws that institutionalise such rights.<sup>31</sup> That is to say, only if the laws that guarantee private autonomy derive from the people's public autonomy as citizens.<sup>32</sup> Thus, the rights that define the liberty of individuals presuppose the rights to participate politically, and *vice versa*.<sup>33</sup> According to Habermas, the

---

<sup>28</sup> Ibid 160.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid 160–161.

<sup>31</sup> James Bohman and William Rehg, 'Jürgen Habermas' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (26 October 2011) <<http://plato.stanford.edu/archives/win2011/entries/habermas>>.

<sup>32</sup> Ibid.

<sup>33</sup> Habermas, above n 17, 161.

relation between private and public autonomy is co-original.<sup>34</sup> In this way, Habermas attempts to position himself between liberalism and republicanism.<sup>35</sup>

### 3 *Justice and Justification*

For Habermas, ‘justice’ designates ‘the validity of universal normative sentences that express general moral norms’.<sup>36</sup> Thus, ‘justice is not one value among others’, but rather it poses an ‘absolute validity claim’.<sup>37</sup> Whereas, “‘legitimacy’” designates the specific kind of prescriptive validity (*Sollgeltung*) that distinguishes law from “‘morality’”.<sup>38</sup> For Habermas, therefore, valid moral norms are just, while valid legal norms are legitimate.<sup>39</sup>

Of course, Habermas considers that legitimate law has ‘a reference to morality inscribed within it’, and thus a legitimate law is a just law.<sup>40</sup> However, it is hard to see how morality, which is universal, could be inscribed within law, which is not. Of course, the universal ‘red’, for example, can be inscribed, or instantiated, in a red particular.<sup>41</sup> In the case of justice, however, to say that such and such is just is to make a universal claim, and it is hard to see how such a claim can remain universal within a non-universal system of law. That is to say, if there is only a reference to morality within the law, then there is only a reference to justice, since justice designates the validity of universal moral norms.<sup>42</sup>

Habermas recognises this problem. For him, certain legal norms (i.e., human rights) are ‘Janus-faced’. That is to say, they look ‘simultaneously toward morality

---

<sup>34</sup> Ibid.

<sup>35</sup> Bohman and Rehg, above n 31.

<sup>36</sup> Habermas, above n 1, 153.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid 156.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid 106.

<sup>41</sup> D. M. Armstrong, *Universals and Scientific Realism* (Cambridge University Press, Cambridge, 1978) Vol 2, 58.

<sup>42</sup> Habermas, above n 17, 161.

and the law'.<sup>43</sup> However, although they have moral content, which is universal, as legal norms they protect only those who belong to a particular community of legally constituted individuals.<sup>44</sup> This reply may be philosophically unsatisfying; nevertheless, Habermas takes justice to enter the law via the democratic principle in three ways. First, it allows moral reasons to be given for the validity of legal norms.<sup>45</sup> Second, it allows the addressees of the law to be the authors of the law.<sup>46</sup> Third, it provides for the discursively rational, and therefore, intersubjective, *justification* of legal norms. That is to say, a just law is a discursively justified law. A question arises, however, as to whether justice is really dependent on discourse.

### B *Habermas and Moral Realism*

Moral realism is the view that morality is grounded in the nature of things, rather than in intersubjective agreement.<sup>47</sup> In this connection, it is the view that justice is independent of discourse. Habermas explicitly opposes this view.<sup>48</sup> However that may be, in what follows, it will be argued that while intersubjective agreement may be necessary for *justification*, in the sense that one must have good reasons for supposing one's conclusions to be just, such agreement is not necessary for justice itself. That is to say, justice is independent of intersubjective agreement, including that given in rational discourse. For this reason, Habermas's discourse theory of law and democracy does not situate justice within law and the deliberative democracy that produces, enforces and applies the law.

---

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Habermas, above n 1, 106.

<sup>46</sup> Bohman and Rehg, above n 31.

<sup>47</sup> Blackburn, above n 3, 251.

<sup>48</sup> Habermas, above n 1, 256.

Habermas opposes moral realism on the grounds that it is contrary to post-metaphysical thinking.<sup>49</sup> As a neo-Kantian, Habermas distinguishes between morals, which have to do with what is universally right, and ethics, which have to do with what is good relative to a particular community.<sup>50</sup> In this way, he distinguishes between neo-Kantian morals and neo-Aristotelian ethics.<sup>51</sup> According to Habermas, moral realists ‘reify goods and values into entities as existing in themselves’ and ‘claim universal validity for the highest values or goods’.<sup>52</sup> Thus, he equates moral realism with neo-Aristotelianism.<sup>53</sup> However, in distinguishing between rights-based theories and moral realism, Habermas ignores the possibility of a neo-Kantian moral realist, such as Nagel, the well-known philosopher and jurist.<sup>54</sup>

It has been suggested that Habermas’s anti-realism motivates his intersubjective thesis.<sup>55</sup> But it may be the other way round. For example, according to Habermas, realism presupposes that one can justify norms and non-norms independently of the intersubjectively acquired concepts that are the building blocks of language and discourse.<sup>56</sup> For Habermas, this would require that one could have access to a transcendent reality that is independent of intersubjectively acquired concepts.<sup>57</sup> However, according to Habermas, such

---

<sup>49</sup> Ibid.

<sup>50</sup> Ibid 256–260.

<sup>51</sup> Ibid 256.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid 256–257.

<sup>54</sup> See, for example, Thomas Nagel, *The Possibility of Altruism* (Clarendon Press, Oxford, 1970), Thomas Nagel, ‘What Is It Like to Be a Bat?’ (1974) 83(4) *Philosophical Review* 435, and Thomas Nagel, *The View from Nowhere* (Oxford University Press, New York, 1986).

<sup>55</sup> Cristina Lafont, ‘Moral Objectivity and Reasonable Agreement: Can Realism Be Reconciled with Kantian Constructivism?’ (2004) 17(1) *Ratio Juris* 27, 27.

<sup>56</sup> Jürgen Habermas, *Ergänzungen zur Theorie des Kommunikativen Handelns* (Suhrkamp, Frankfurt, 1986) 171 cited in Felmon John Davis, ‘Discourse Ethics and Ethical Realism: A Realist Realignment of Discourse Ethics’ (1994) 2(2) *European Journal of Philosophy* 125, 133.

<sup>57</sup> Ibid.

access is impossible, since all experience of the world is dependent on such concepts.<sup>58</sup>

Of course, there is nothing controversial in the idea that the justification of norms and non-norms depends on intersubjective agreement. However, intersubjective notions of justification are consistent with both normative and non-normative realism. For example, according to Sellars, the justification of sensory experiences as veridical representations of the non-normative world is dependent on intersubjectively acquired concepts.<sup>59</sup> If this is so, then the intersubjective nature of normative concepts, such as justice, will entail anti-realism only if the intersubjective nature of non-normative concepts entails idealism. That is to say, the view that there is no reality independent of concepts.<sup>60</sup>

At this point, it may be useful to consider what Sellars has to say in this connection. Sellars questions what Descartes takes for granted. That is to say, Descartes never questions whether one can justify one's sensory experiences, *qua* sensory experiences.<sup>61</sup> Rather, he questions whether sensory experiences are veridical representations of a mind-independent reality. Sellars, on the other hand, goes one step further. For him, one cannot even be sure whether sensory experiences are veridical representations of pre-conceptual sensory states. For Sellars, all experience is dependent on intersubjectively acquired concepts. That is to say, one's pre-conceptual sensory states are conceptually mediated to form an experience. Thus, one cannot experience 'a red ball over there' until one has acquired the necessary intersubjective concepts that allow one to experience the

---

<sup>58</sup> Ibid.

<sup>59</sup> Wilfrid Sellars, *Science, Perception and Reality* (Routledge, New York, 1963).

<sup>60</sup> Blackburn, above n 3, 184.

<sup>61</sup> Rene Descartes, *Meditations and Other Metaphysical Writings* (Desmond Clarke trans, Penguin, London, 1998).

various particulars, properties and relations involved. Such concepts are necessary in order that one may interpret or construct an experience from pre-conceptual sensory states. According to Sellars, the experience is not 'given', and nothing is 'given' in experience.<sup>62</sup>

Thus, for Sellars, experience of the world is dependent on intersubjectively acquired concepts. If this is so, then *a fortiori*, the justification of one's beliefs about the world is dependent on intersubjective agreement. Indeed, since intersubjectively acquired concepts presuppose discourse, there is no reason to deny that the justification of non-normative beliefs is discourse-dependent. In any event, Sellars gives good reasons to doubt the verity of conceptually mediated sensory experience. Further, if one may doubt the truth of sensory experience, then, *a fortiori*, one may doubt the existence of a reality that is independent of concepts and discourse. Despite such arguments, however, few would doubt the existence of a discourse-independent world that contains such things as aardvarks and protons. Similarly, the realist may contend that the discourse-dependence of normative justification does not imply the discourse-dependence of justice.

Of course, to say that justice is independent of discourse, is to say that justice resides in the nature of things. Perhaps, for example, there is something about humans that makes torturing them morally wrong. Indeed, to paraphrase Russell, it is hard to believe that the only thing wrong with wanton cruelty is that rational people disagree with it.<sup>63</sup> However that may be, it is clear that realists are committed to the notion that one can move from premises about the natural

---

<sup>62</sup> Wilfrid Sellars, *Empiricism and the Philosophy of Mind* (Harvard University Press, Cambridge, MA, 1997) 33.

<sup>63</sup> Bertrand Russell, *Last Philosophical Testament: 1943–68* (Routledge, London, 1960) 310–311. His actual words were, 'I find myself incapable of believing that all that is wrong with wanton cruelty is that I do not like it'.

world to conclusions about justice, and surely this is a violation of Hume's law. That is to say, the view that it is impossible to derive an 'ought' from an 'is'; or, in other words, the view that propositions about the natural world cannot logically entail propositions about justice.<sup>64</sup>

In reply, it could be said that there are propositions that one takes to be true, despite the fact that nothing logically entails their truth. For example, not even a corroborated experience of what one takes to be an aardvark logically entails the existence of the aardvark, since one's experience may not be a veridical representation of an external reality. Yet most philosophers are happy to accept that aardvarks exist. That is to say, most philosophers do not let a lack of logical entailment lead to the sort of idealism that rejects the existence of a concept-independent reality. Thus, there is no reason for the moral realist to be perturbed by Hume's law.

In any event, according to Lafont, there is tension between realism and anti-realism in Habermas's theory.<sup>65</sup> On the one hand, Habermas agrees with the anti-realists that normative judgements do not describe a moral order that is grounded in the nature of things, and which is 'heteronomously' imposed on humanity independently of practical reason.<sup>66</sup> On the other hand, he wants to assert the objectivity of normative judgements, which he grounds in the shared interests and needs of human beings.<sup>67</sup>

The claim to moral objectivity characteristic of Habermas's theory makes the validity of norms depend on assumptions about the existence of common interests and needs amongst rational humanity.<sup>68</sup> It is this assumption that gives

---

<sup>64</sup> Blackburn, above n 3, 180.

<sup>65</sup> Lafont, above n 53, 27.

<sup>66</sup> Ibid 28.

<sup>67</sup> Ibid 28.

<sup>68</sup> Ibid 27.

credence to the claim that justice can be given by a procedure that will produce objectively right answers.<sup>69</sup> However, in grounding discourse in the universal interests of humanity, there are vestiges of the Platonism that Habermas finds in Kant's legal theory.<sup>70</sup> That is to say, that the validity of law is measured against norms given by an ideal moral realm.<sup>71</sup> Thus, when Habermas stipulates what rational discourse requires, he may commit himself to a weak form of moral realism.<sup>72</sup>

Moreover, Habermas is a moral cognitivist.<sup>73</sup> That is to say, he believes that moral knowledge is possible, insofar as one can know which norms are just by applying the relevant principle of discourse. Thus, Habermas makes epistemic commitments that moral realists eschew. Of course, moral realists make ontological commitments about a moral reality, but they balk at the suggestion that one can have moral knowledge.<sup>74</sup> In this way, moral realism is consistent with moral scepticism in a way that Habermas's theory is not.<sup>75</sup> Thus, he is wrong to say that realism could lead the judiciary to disregard the views of the majority and 'to concretize norms in a manner equivalent to implicit lawmaking, which gives constitutional adjudication the status of a competing legislation'.<sup>76</sup> Further, anti-realists, from Ayer onwards,<sup>77</sup> typically adhere to some version of expressivism.<sup>78</sup> That is to say, to the view that sentences that express moral propositions cannot be objectively true or false, but rather simply express non-

---

<sup>69</sup> Ibid 31.

<sup>70</sup> William Rehg, 'Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jürgen Habermas' in Michel Rosenfeld and Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, Berkeley, 1998) 257, 259.

<sup>71</sup> Ibid.

<sup>72</sup> Davis, above n 58, 125.

<sup>73</sup> Lafont, above n 53, 28.

<sup>74</sup> Thomas Nagel, *The View from Nowhere* (Oxford University Press, New York, 1986) 67–70.

<sup>75</sup> Ibid 142, 154. See here, for the connection between moral realism and moral scepticism.

<sup>76</sup> Habermas, above n 1, 258.

<sup>77</sup> A. J. Ayer, *Language, Truth and Logic* (Gollancz, London, 1946).

<sup>78</sup> Lafont, above n 53, 28.

cognitive attitudes.<sup>79</sup> Thus, according to Lafont, if Habermas is an anti-realist, then he is an ‘anomalous’ one.<sup>80</sup>

Be that as it may, according to moral realists, justice does not depend on discourse. Of course, discourse may provide epistemic support for the conclusion that justification has been achieved.<sup>81</sup> To this extent, the realist can be both a cognitivist and a discourse-theorist. However, for the realist, justice and justification are conceptually distinct. That is to say, ‘justice’ has uniquely moral connotations, whereas ‘justification’ may relate to almost any type of reasoning, including that which is purely pragmatic. Even in its moral sense, justification is a process that simply aims at justice. Indeed, Habermas implicitly recognises this in his discussion of justice and justification.<sup>82</sup>

Further, realism allows for the possibility that participants in rational discourse could be justified in taking a norm to be just, and yet the norm be unjust. It seems for Habermas, however, that if a norm is rationally and discursively justifiable on one occasion, then it is just on that occasion, and if it is rationally and discursively unjustifiable on another occasion, then it is unjust on that other occasion. However, the concept of justice, as it is commonly understood, is such that if a norm turns out to be unjust, it has always been unjust.<sup>83</sup> In this connection, it will be remembered that intersubjectively acquired normative concepts do not entail anti-realism, anymore than intersubjectively acquired non-normative concepts entail idealism.

### III RECAPITULATION

---

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid 46.

<sup>82</sup> Habermas, above n 1, 108–109, 154.

<sup>83</sup> Lafont, above n 53, 47.

In his discourse theory of law and democracy, Habermas seeks to reconcile law and morals as well as human rights and popular sovereignty.<sup>84</sup> In doing so, he attempts to situate justice within law and the deliberative democracy that produces, enforces and applies the law. His success relies upon his conception of justice, which he takes to depend on the discursively rational, and, therefore, intersubjective, justification of legal norms.

The purpose of this paper was to argue that although justification may depend on rational discourse, justice is independent of such discourse. In attempting to achieve this purpose, the body of this essay consisted in three parts. First, Habermas's theory of law and democracy was summarised. Second, Habermas's conception of justice was discussed. Third, Habermas's discourse principle was analysed in connection with moral realism.

#### IV CONCLUSION

It has been suggested that Habermas's discourse theory of law and democracy is as important as Weber's sociology of law or Hegel's philosophy of law.<sup>85</sup> This can scarcely be doubted. However, Habermas's theory is not without its problems. For example, his claim to cognitive anti-realism seems anomalous.<sup>86</sup> Indeed, in grounding discourse in the universal interests of humanity, he may commit himself to a weak form of moral realism.<sup>87</sup> Be that as it may, it is hard to believe that the only thing wrong with wanton cruelty—towards animals and

---

<sup>84</sup> Habermas, above n 1, 84, 104.

<sup>85</sup> Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich eds, Bedminster Press, New York, 1968) and Georg H. W. Hegel, *Hegel's Philosophy of Right* (T. M. Knox trans, Oxford University Press, London, 1967), cited in Michel Rosenfeld and Andrew Arato, 'Introduction: Habermas's Discourse Theory of Law and Democracy' in Michel Rosenfeld and Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, Berkeley, 1998) 1.

<sup>86</sup> Lafont, above n 53, 28.

<sup>87</sup> Davis, above n 58, 125.

infants, for example—is that rational people disagree with it. Thus, in taking justice to depend on discourse, Habermas conflates *justice* with *justification*.

In support of moral realism, it was argued that justice does not depend on discourse. Of course, discourse may provide epistemic support for the conclusion that justification has been achieved. To this extent, the realist can be both a cognitivist and a discourse-theorist. Nevertheless, since justice is independent of intersubjective agreement, including that given in rational discourse, Habermas's discourse theory of law and democracy does not situate justice within law and the deliberative democracy that produces, enforces and applies the law.

## V BIBLIOGRAPHY

Armstrong, David Malet, *Universals and Scientific Realism* (Cambridge University Press, Cambridge, 1978)

Ayer, Alfred Jules, *Language, Truth and Logic* (Gollancz, London, 1946)

Blackburn, Simon, *Oxford Dictionary of Philosophy* (Oxford University Press, Oxford, 1994)

Bohman, James and William Rehg, 'Jürgen Habermas' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (26 October 2011) <<http://plato.stanford.edu/archives/win2011/entries/habermas>>.

Davis, Felmon John, 'Discourse Ethics and Ethical Realism: A Realist Realignment of Discourse Ethics' (1994) 2(2) *European Journal of Philosophy* 125

Descartes, Rene, *Meditations and Other Metaphysical Writings* (Desmond Clarke trans, Penguin, London, 1998)

- Habermas, Jürgen, *Ergänzungen zur Theorie des Kommunikativen Handelns* (Suhrkamp, Frankfurt, 1986)
- Habermas, Jürgen, 'Reply to Symposium Participants' in Michel Rosenfeld and Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, Berkeley, 1998) 381
- Habermas, Jürgen, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, MIT Press, Cambridge, 1998)
- Habermas, Jürgen, 'Remarks on Legitimation through Human Rights' (1998) (24) *Philosophy and Social Criticism* 157
- Hegel, Georg H. W., *Hegel's Philosophy of Right* (T. M. Knox trans, Oxford University Press, London, 1967)
- Lafont, Cristina, 'Moral Objectivity and Reasonable Agreement: Can Realism Be Reconciled with Kantian Constructivism?' (2004) 17(1) *Ratio Juris* 27
- Nagel, Thomas, *The Possibility of Altruism* (Clarendon Press, Oxford, 1970)
- Nagel, Thomas, 'What Is It Like to Be a Bat?' (1974) 83(4) *Philosophical Review* 435
- Nagel, Thomas, *The View from Nowhere* (Oxford University Press, New York, 1986)
- Rehg, William, 'Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jürgen Habermas' in Michel Rosenfeld and Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, Berkeley, 1998) 257
- Rosenfeld, Michel, and Andrew Arato, 'Introduction: Habermas's Discourse Theory of Law and Democracy' in Michel Rosenfeld and Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, Berkeley, 1998) 1
- Russell, Bertrand, *Last Philosophical Testament: 1943–68* (Routledge, London, 1960)
- Sellars, Wilfrid, *Science, Perception and Reality* (Routledge, New York, 1963)
- Sellars, Wilfrid, *Empiricism and the Philosophy of Mind* (Harvard University Press, Cambridge, MA, 1997)
- Weber, Max, *Economy and Society* (Guenther Roth and Claus Wittich eds, Bedminster Press, New York, 1968)