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## Human Rights, Institutional Duties and Cosmopolitan Responsibilities†

SAMANTHA BESSON\*

A remarkable feature of Thomas Pogge's writings over the last 10 years has been their capacity to engage the reader in an abstract and high-quality philosophical argument about justice in a global world, while at the same time forcing her to come to terms with some of the economic and political data on the poverty downsides of our global institutional order.

These data are our daily bread, but the problem is that we rarely bring them to bear on our moral judgements and even less on our moral actions. Pogge acknowledges, with Hume, that we tend to find it most fortunate that 'nature herself'<sup>1</sup> ensures that we do not linger in dark scepticism about human reasoning and belief and thus neither reflect too long on world poverty and our responsibilities for it, nor act upon our reflections. Notwithstanding this, he constantly denounces our natural myopia and reminds us that the global poor's best hope may be our moral reflection.<sup>2</sup> Pogge does this not only by gathering an impressive amount of factual information and by offering on its basis a series of rigorous normative arguments as to why responsibility for world poverty bears on the individuals who live in affluent countries.<sup>3</sup> He also engages with passion in a critique of our failure to help those in desperate need. Moreover, in contrast with other philosophical discussions of global justice, Pogge provides detailed proposals as to how we could live up to our responsibilities in supporting institutions that try to alleviate the grave injustices they have caused. It is this passionate cum normative kind of argument, as well as the balance of the normative and the descriptive which explain why Pogge has become a central figure in the global justice debate,<sup>4</sup> but also, more generally, the voice of the poor in the general

† A review of Thomas Pogge's *World Poverty and Human Rights, Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2002), hereafter referred to as *World Poverty*. I am grateful to Jeremy Horder, Christine Peters, Thomas Pogge and Adam Tomkins for very helpful comments on earlier drafts of this review.

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<sup>1</sup> D. Hume, *A Treatise on Human Nature*, Edited by L.A. Selby-Bigge (Oxford: Oxford University Press, 1973) Book I, Pt IV, § VII at 269.

<sup>2</sup> *World Poverty* at 26.

<sup>3</sup> Hence his remark in *World Poverty* at 24: 'Mine is not, then, a leftist critique'.

<sup>4</sup> T. Pogge recently edited a book called *Global Justice* (Oxford: Blackwell, 2001) in which an impressive range of political philosophers address different issues related to global justice.

'academic justice industry' that has, he contends, largely ignored the phenomenon of global responsibility for world poverty.<sup>5</sup>

*World Poverty and Human Rights* is a collection of some of Pogge's most important and best-known essays from the last 10 years. The book comprises eight chapters and a general introduction. Bar the introduction, which is new, the eight essays first appeared as articles in various publications, but they have been substantially rewritten for the purpose of the book. As a result, the book shows more unity and coherence than do many collections of essays.

The introduction states the author's normative position on global justice in a 'unified and non-technical way'.<sup>6</sup> Thus, it sets the background against which each of the other chapters may be read separately. The main theme of the book can be summarized as follows. The poorest 46% of humanity have 1.2% of global income, while the wealthiest 15% of humanity in the affluent economies have 80% of global income. Despite important economic and technological development and the extension of the scope of protection of moral norms, progress has remained mostly cosmetic and one-sided, as the 1990s have in fact brought a large shift towards greater global inequality.<sup>7</sup> As a result, transferring a small percentage of our share towards the poor is not only morally compelling, but would also constitute an almost imperceptible material loss for us.

The difficulty is, however, that most of the individuals in affluent societies believe that they have no such moral responsibility. This belief rests on two common prejudices: (i) the persistence of severe poverty abroad does not require our moral attention and (ii) there is nothing seriously wrong with our conduct, policies and the global economic institutions we forge in regard to world poverty.<sup>8</sup> Pogge shows that the 'four easy reasons' we usually give for the first prejudice cannot survive reflection. These reasons are, in short, overpopulation, the cost of eradicating poverty, the ineptness of financial aid and the natural decline of poverty.<sup>9</sup> As to the second prejudice, much of the book is an examination of the justifications we give ourselves for sustaining the corresponding belief. Pogge addresses arguments that oppose national to global justice, on the one hand, and so-called 'lofty nationalism' or 'justice-for-compatriots' priority, on the other. He shows that neither of them succeeds in justifying the application of double standards of justice to national and international situations, at least in the case of violation of our negative moral duty not to harm others since it has universal validity.<sup>10</sup> He then addresses the arguments made under the label of 'explanatory nationalism', according to which the responsibility for poverty lies exclusively within the countries that suffer from it. He shows that the global economic order does direct harm to the poor and that we share a responsibility

<sup>5</sup> *World Poverty* at 145. For further denunciations of academic blindness to our moral responsibility for world poverty, see 3, 25, 127.

<sup>6</sup> *Ibid* at 1.

<sup>7</sup> *Ibid* at 2–6.

<sup>8</sup> *Ibid* at 4.

<sup>9</sup> *Ibid* at 6–11.

<sup>10</sup> *Ibid* at 11–13, 129–39.

in this, not only in violating our positive duty to assist the poor if the existence of such a duty can be established, but additionally in violating our negative duty not to create or exacerbate life-threatening poverty.<sup>11</sup> Pogge acknowledges poor countries' own responsibilities in their economic state, but he explains how affluent countries' responsibilities in creating or contributing to world poverty are also engaged. In taking up the harm and benefit argument, he shows that neither the benefits for the poor, nor our benefits from the global economic order exceed and can justify the harm that is being done. Thus, what is at stake here is not a question of respecting our rather controversial positive duty to help the poor or to redistribute wealth, but merely of realizing our more widely accepted negative responsibility in directly causing poverty without compensating for the harm done.<sup>12</sup>

Pogge then makes various reform proposals. These go considerably further than remedial measures aimed merely at 'assisting' the poor. The reforms imply facing our responsibilities for the poor's present situation and our negative duty to amend the harm to which we have contributed, and even benefited from.<sup>13</sup> These include reforms that aim to undermine the borrowing and resource privileges that our global order confers upon those who manage to bring a country under their control, as well as institutional and constitutional reforms.<sup>14</sup> Last but not least, the author emphasizes the need to raise consciousness of our responsibilities in violating 'a central element of [Western] morality: that it is wrong severely to harm innocent people for minor gains'.<sup>15</sup>

The eight successive chapters vary in difficulty and in focus. They can be divided roughly into three main groups of ideas. The first two chapters discuss

<sup>11</sup> Ibid at 13–20. It is interesting to note here that Pogge produces very elaborate arguments on the causation of the harm that has been inflicted to the poor and on its relationship to moral responsibility for the harm thus caused (Ibid, Introduction III, Introduction IV, Introduction V, ch 4.9). He is not blind to domestic causes of world poverty, but he makes a case for affluent countries' causal responsibility in creating some of it and in perpetuating or even exacerbating most of it (for an extensive account and discussion of the data on the issue, see P. Singer, *One World. The Ethics of Globalization* (New Haven: Yale University Press, 2002) at 87–90).

<sup>12</sup> On this distinction and a critique of Rawls' positive duty of assistance, see T. Pogge, 'Assisting the Global Poor' in D. K. Chatterjee (ed.), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge: Cambridge University Press, 2003). See also *World Poverty* at 134 ff. It is to be noted that recent accounts of global justice and world poverty, like Singer's, above n. 11, tend to focus more on our positive and interactional duties of assisting the poor.

<sup>13</sup> According to Pogge, it is not thus just a matter of our positive moral duty as innocents to assist the poor, but a matter of not abiding by the responsibility we have for violating our negative moral duty not to harm them in the first place. One may contend, however, that the boundary between the *allegedly negative duty to compensate* for a breach of one's negative duties not to harm the poor by ensuring minimal resources to eradicate world poverty, on the one hand, and a *positive duty to maintain a minimal level of resources* in poor countries in the future or even to attain full equality, on the other, is not easy to establish. See, e.g. C. Fabre's critique of *World Poverty* in her interview on the American radio programme 'Ideas and Issues', <http://www.etsu.edu/philos/radio/fabre-wphr.htm> (visited on 02/07/03). In fact, later in the book (e.g. *World Poverty* at 67), Pogge insists on the negative nature of the duties *individuals* have not to support institutions who breach their duties, but the latter may be negative or positive and hence could go beyond attempting to alleviate world poverty at one point in time and hence encompass measures aiming at maintaining a minimal level of resources over time or even at creating full equality. Moreover, his other proposals for the reform of the global order seem to require positive duties and cannot merely rely on negative ones. I will come back to this contrast between individuals' negative duties and institutions' positive duties later in this review. There I will argue that the contrast is moot and cannot save Pogge's argument that relies on a negative duty not to harm the poor and to compensate for the harm done and that does not develop an alternative line of argument founded on individuals' positive duties to help the poor.

<sup>14</sup> *World Poverty* at 21–6.

<sup>15</sup> Ibid at 25.

classical philosophical themes such as universal justice and human rights in an abstract way; they set the *normative background of global justice* against which other common moral claims will be tested later in the book. Chapters three to five focus on how these moral convictions do not fit with the ways in which we usually assess the moral justification of the current global order. They address, in other words, the *lack of correspondence between common moral standards and standards of global justice*. More precisely, the chapters look at the importance of double standards and of national priority in our moral justifications. Finally, chapters six to eight examine different modes of *global institutional reform*. Mainly, they look at ways to achieve democracy through constitutional entrenchments in fledgling political orders, at ways of dividing sovereignty vertically and of levying a 'global resources dividend' on each transaction implying the transfer of national resources.

If the essay format aptly reflects the book's multi-faceted approach to the problem of world poverty and its complex normative position on global justice, it also makes it difficult for the reviewer to do justice to the extraordinarily rich range of issues addressed. As a choice has to be made, I shall concentrate on the legal and institutional dimensions of the various human rights issues raised in the book. In so doing, I will engage mainly with what I take to be Pogge's argument for an institutional conception of human rights, but will also assess his argument for the constitutional entrenchment of democracy in both poor and affluent countries, and his argument for dividing political sovereignty vertically.<sup>16</sup>

Such a focus is justified by virtue of the fact that these three issues are bound together by the recurrent theme of the book: *individual responsibility in a global institutional order*. In the sixth essay of the volume, called 'Achieving Democracy', Pogge explains why he has not chosen a narrower title such as 'Achieving Democracy in the Developing World'. His explanation is simple:

there is a serious democracy deficit also in the affluent countries, whose citizens have not approved, and for the most part do not even understand, very important foreign policies and international practices that are conducted and upheld in their name.<sup>17</sup>

What the author is hinting at here is that there is a moral responsibility of individuals for supporting national, but also global institutions when these act wrongly and cause direct harm in the domestic or in the global spheres, because these act in their name.<sup>18</sup> This cosmopolitan responsibility or complicity<sup>19</sup> corresponds, in Pogge's reconstruction of the Kantian negative duty to comply with

<sup>16</sup> The first argument is deployed in chs 1 and 2, but it also underlies some of the arguments in chs 5, 6 and 7 where the second and third arguments are set up. I prescind from discussing in detail the author's account of Loopholes in Moralities (ch 3), his arguments on Moral Universalism and Global Economic Justice where he discusses David Miller's and John Rawls' arguments on global justice (ch 4), as well as his arguments for a Global Resources Dividend (ch 8).

<sup>17</sup> *World Poverty* at 166.

<sup>18</sup> Curiously, the term 'cosmopolitanism' is only introduced and explained in detail in ch 7 and this in relation to individual responsibility, human rights, democracy and sovereignty.

<sup>19</sup> Note that the issue of individual *indirect* complicity or responsibility for supporting institutions which are *directly* responsible of harming others is a controversial one that I will have to leave aside in this review.

just institutions,<sup>20</sup> to a negative duty not to cooperate in upholding institutions which disrespect human rights. It is this line of thought that underlies most of the essays in the book under review, and gives this otherwise complex and multi-layered collection its unity.<sup>21</sup> The current deficits in human rights and democracy trigger individuals' responsibilities for supporting the current global institutional order, in affluent countries as much as in developing countries. Since cosmopolitan responsibility in the global order underlies Pogge's conception of human rights, his account of democracy and his approach to political sovereignty, these different aspects are best addressed together in respect of the institutional responsibilities they give rise to.

The present review breaks down Pogge's account of human rights into four steps and discusses each of them in turn: first, his conception of human rights qua core criterion of global justice; second, his institutional account of human rights; third, his conception of the relationship between human rights and legal rights; and, finally, his approach to human rights qua basis for cosmopolitan sovereignty. Before we get to the main institutional argument, it is necessary first to assess Pogge's background argument for human rights as a measure of global justice.

### 1. *Human Rights Qua Core Criterion of Global Justice*

Pogge's conception of human rights is first presented in the book in relation to justice in a global world. It is linked to his attempt, in the first chapter, to determine an internationally acceptable core criterion of basic justice, which is 'a measure of low specificity'<sup>22</sup> and 'which all persons and peoples can accept as the basis for moral judgements about the global order and about other social institutions with substantial international causal effects'.<sup>23</sup>

Human rights is precisely the language in which this criterion may be best expressed, according to the author.<sup>24</sup> But this only applies on condition that the concept of human rights can in itself be conceived or understood in a single way.<sup>25</sup> And this can only be done, according to Pogge, if one distinguishes the *understanding* of the concept of human rights from the *content* of its conceptions, since the latter is bound to be even more controversial in the global order than in national ones.<sup>26</sup> In other words, one should distinguish the question 'what are human rights?' from the question 'what human rights are there?'.<sup>27</sup>

<sup>20</sup> *World Poverty* at 135.

<sup>21</sup> One finds this leitmotiv in chs 1, 2, 5, 6 and 7 and more precisely on pp 67, 135, 172; it is reinforced in each of those chapters by being associated to different issues and different contexts.

<sup>22</sup> *World Poverty* at 50.

<sup>23</sup> *Ibid* at 33.

<sup>24</sup> *Ibid* at 44.

<sup>25</sup> *Ibid* at 70.

<sup>26</sup> *Ibid* at 53. For a more detailed defence of this point, see T. Pogge, 'Human Rights and Human Responsibilities' in P. De Greiff and C. Cronin (eds), *Global Justice and Transnational Politics: Essays on the Moral and Political Challenges of Globalization* (Cambridge Mass.: MIT Press, 2002).

<sup>27</sup> See Pogge, above n 26.

This sort of purely conceptual understanding of human rights is what Pogge sets out to provide in his institutional account in chapter two. According to him, this approach 'undercuts any systematic correlation between categories of human rights and ways of fulfilling them. The latter may vary in time and place'.<sup>28</sup> Thus, this approach allegedly 'reduces the philosophical and the practical-political importance of the actual controversies about [the] question' of human rights and 'this is another reason in its favour'.<sup>29</sup> There are, however, two difficulties with this approach.

First, Pogge believes that it is possible,<sup>30</sup> despite 'a good deal of substantive disagreement', 'to establish some structural constraints that any acceptable (conception of) morality must satisfy'.<sup>31</sup> However, it is difficult enough to see how reasonable people can agree on matters of justice even at a very abstract level in the national order. It is even more difficult to expect agreement about justice and hence human rights in the global order. And this can be said independently of the level of abstraction of the concepts that are discussed; reason does not always unite us on issues of justice,<sup>32</sup> which are submitted to the very same burdens of judgement that apply to moral matters in the Rawlsian account to which Pogge subscribes.<sup>33</sup>

Second, to distinguish the concept of human rights from its conceptions will not solve the problem; determining the meaning of normative concepts such as that of human rights implies an evaluation and hence potential reasonable disagreement. This applies even to the case where it is the concept of human rights per se that is at stake rather than the clearly evaluative issue of the different types of human rights the concept may encompass. True, Pogge engages in a normative argument in order to defend his institutional conception of human rights in chapters one and two; he even actually acknowledges that his account of human rights is normative despite being conceptual in focus.<sup>34</sup> Moreover, the author does not seem to adhere to the widely accepted Wittgensteinian conceptual point of 'agreement in judgement' as a necessary base for further disagreement; he merely states later in the book that 'it will be easier to engage in substantive moral argument, once we have a shared understanding of what human rights are'.<sup>35</sup> It could be argued, however, that Pogge too quickly trusts

<sup>28</sup> *World Poverty* at 70.

<sup>29</sup> *Ibid.*

<sup>30</sup> Note that it is not an ideal condition to be reached, for Pogge, but a real possibility.

<sup>31</sup> *World Poverty* at 90.

<sup>32</sup> For a critique of the Rawlsian idea of reasonable overlapping consensus (at the national level), see J. Raz 'Disagreement in Politics' (1998) 43 *American Journal of Jurisprudence* 25 at 32-7; J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), ch 7; S. Clarke 'Contractarianism, Liberal Neutrality and Epistemology' (1999) 47 *Political Studies* 627.

<sup>33</sup> *World Poverty* at 48.

<sup>34</sup> *Ibid.* at 58. On the mootness of the distinction between the conceptual and the normative in the case of evaluative concepts like human rights, see J. Gray 'On Liberty, Liberalism and Essential Contestability' (1978) 8 *British Journal of Political Science* 385 at 391; D. Miller, 'Linguistic Philosophy and Political Theory' in D. Miller and L. Siedentop (eds), *The Nature of Political Theory* (Oxford: Clarendon Press, 1983) 35 at 48.

<sup>35</sup> See Pogge, above n 26.

that 'even if we continue to disagree about which goods should be included in a conception of human rights, we can then work together on the same institutional reforms instead of arguing over how much praise or blame is deserved by this state or that'.<sup>36</sup> The mere fact that the author engages with so many controversies, such as the libertarian critique of social and economic rights, the opposition between negative and positive duties or the tension between legal and moral rights, shows just how contestable any conception of the concept of human rights can be and how unlikely it is that we will all agree on their institutional nature and the ways forward with institutional reforms. For the sake of the argument, however, I will assume that such a single criterion of global justice can be established through the language of human rights. How then does the remainder of Pogge's institutional account fare?

## 2. *The Institutional Understanding of Human Rights*

Pogge's understanding of human rights is rather idiosyncratic. His general definition of human rights reads as follows:

a commitment to human rights involves one in recognizing that human persons with a past or potential future ability to engage in moral conversation and practice have certain basic needs, and that these needs give rise to weighty moral demands. The object of each of these basic human needs is the object of a human right.<sup>37</sup>

Pogge is using the concept of human rights as an independent concept. According to him, 'human rights' are not a subspecies of 'rights' that happen to be 'human', but are rather an independent and self-sufficient normative concept. The main feature of Pogge's understanding of human rights is that it is meant to be *institutional* in contrast to what he calls *interactional* understandings.<sup>38</sup> The latter present human rights as placing the treatment of human beings under certain constraints that do not presuppose the existence of social institutions. The institutional understanding aims at engendering a responsibility for institutions only, as they should prevent and compensate 'official disrespect' of human rights.<sup>39</sup>

Pogge's point is not to contest the existence of purely interactional moral rights and responsibilities,<sup>40</sup> but to argue that the only moral rights that may be regarded as human rights *stricto sensu* are institutional rights. Moreover, this understanding applies to rights' violations that result not only from official, but also from interactional or interindividual action or omission, as long as an

<sup>36</sup> *World Poverty* at 70.

<sup>37</sup> *Ibid* at 58.

<sup>38</sup> Note that both accounts of human rights apply to the domestic as well as to the global order, as shown by the different examples used by Pogge later in the book.

<sup>39</sup> *World Poverty* at 59.

<sup>40</sup> *Ibid* at 65: 'A commitment to human rights goes along with interactional moral commitments'.

institutional responsibility for not preventing or remedying a non-institutional violation of rights can be established.

Pogge finds support for his understanding of human rights in Art. 28 of the Universal Declaration of Human Rights which provides that: 'Everyone is entitled to a social and international order in which the rights and freedoms set in this Declaration can be fully realized'. Accordingly, Pogge proposes to understand the concept of human rights as follows:

The postulate of a human right to X is tantamount to the demand that, insofar as reasonably possible, any coercive social institutions be so designed that all human beings affected by them have secure access to X. A human right is a moral claim *on* any coercive social institutions imposed upon oneself and therefore a moral claim *against* anyone involved in their imposition.<sup>41</sup>

It is easy to understand how Pogge's account reflects the difficulties human rights protection encounters in the global institutional order; it targets the coercion that can be exercised on individuals behind an international and transnational institutional screen.<sup>42</sup> Pogge's account is also relevant to human rights protection in the domestic order.<sup>43</sup> The institutional approach to human rights captures, indeed, in a single theoretical model, recent evolutions in comparative constitutional and human rights law. These evolutions relate to the so-called *positive duties of protection of human rights*.

Constitutional orders that have recognized a horizontal effect to some human rights in given circumstances (*Drittwirkung* in the German constitutional tradition) have now gradually moved back to a vertical approach of rights, one that privileges institutional sources of human-rights' violations. This vertical approach has not, however, resulted in an increased disrespect for human rights by individuals, as it has a strong institutional element to it that encompasses negative as well as positive duties of protection of human rights against interindividual violations (*Schutzpflichten* in the German constitutional tradition).<sup>44</sup> Thus, imagine a legal order where the right to free expression cannot be invoked directly against other individuals' restrictions; the right remains indirectly protected against those restrictions as there is a positive duty of institutions to make sure the right to free expression is respected against all restrictions be they institutional or purely interactional.

Pogge's institutional account of human rights captures the importance of positive duties of protection, but it also enables us to propose solutions to

<sup>41</sup> Ibid at 46.

<sup>42</sup> On the differences between all those different institutional forms of global governance, see A.M. Slaughter 'Global Government Networks, Global Information Agencies and Disaggregated Democracy', Harvard Law School Public Law Working Paper No 018, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=283976](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=283976) (visited on 02/07/03).

<sup>43</sup> The fact that the debate surrounding positive duties to protect human rights has remained at the national level so far does not pre-empt the analogy with Pogge's institutional account; on the contrary, that account provides means for improvements both at the national and the global level.

<sup>44</sup> See on this evolution in comparative constitutional law with special emphasis on American, German, Swiss and ECHR law, S. Besson 'Les obligations positives de protection des droits fondamentaux—un essai en dogmatique comparative' (2003) 1 *Revue de droit suisse* 49.

questions that have proved problematic in this context. Two such issues can be considered here.

First, whereas it is clear, on this account, that there are positive duties to protect and compensate for violations of human rights that occur in non-institutional ways, it is less clear whether these duties should be limited to cases of third party violations or whether they should also encompass rights' violations through natural causes or even self-inflicted rights' violations.<sup>45</sup> Pogge's institutional account enables us to establish different classes of insecurities and hence of positive duties. These are in decreasing order of moral significance: (i) officially mandated deficit, (ii) legally authorized conduct of private subjects, (iii) foreseeably and avoidably engendered deficit, (iv) legally prohibited but barely deterred private conduct, (v) avoidably unmitigated effects of a natural defect, (vi) avoidably unmitigated effects of a self-caused deficit.<sup>46</sup>

Second, it is contested whether violations of positive duties which amount to omissions rather than actions can still be regarded as 'violations' of human rights in a strict sense. There would indeed be difficulties if that were to be the case, as traditional constitutive elements of legitimization of rights' violations include tests that cannot easily be applied to omissions, such as the legality or proportionality tests. Pogge's institutional account offers two distinct responses to this difficulty. First, he favours the term 'underfulfillment' over 'violation', as it transmits a broader and probabilistic *ex-ante* perspective: 'a valid complaint against our social institutions can be presented by all those whose physical integrity is not sufficiently secure, not by all those who happen to suffer an assault'.<sup>47</sup> Second, Pogge's institutional account accommodates the need to render conditions of restriction of human rights more flexible, in case of disrespect of positive duties in particular; not all insecurities should be blamed on an underfulfillment of positive duties and there should be a reasonable margin of appreciation for authorities. The author considers for instance that to be plausible any conception of human rights must incorporate an idea of reasonable security thresholds.<sup>48</sup> Thus, 'any human right of some person is fulfilled (completely) when access to its objects is sufficiently secure—with the required degrees of security suitable adapted to the means and circumstances of the relevant social system'.<sup>49</sup>

Despite its practical advantages, it is not clear how Pogge's institutional account really differs from an interactional one. Even if institutions are the first addressees of human rights claims in the institutional account, individual behaviour is also placed under human rights constraints. This is to prevent a dissociation of individuals and non-state actors from institutions and their unburdening

<sup>45</sup> See, for instance, J. Shue, *Basic Rights* (Princeton: Princeton University Press, 1980) at 159 who limits positive duties to third party violations and excludes violations through natural causes. See on these issues in German constitutional law, P. Unruh, *Zur Dogmatik der grundrechtlichen Schutzpflichten* (Berlin: Duncker & Humblot, 1996) at 23; J. Dietlein, *Die Lehre von den grundrechtlichen Schutzpflichten* (Berlin: Duncker & Humblot, 1992) at 102 ff.

<sup>46</sup> See Pogge, above n 26.

<sup>47</sup> *World Poverty* at 47.

<sup>48</sup> *Ibid* at 47–8. See also Pogge, above n 26.

<sup>49</sup> See Pogge, above n 26.

which both are even easier at the global level than at the national level. Human rights therefore have as their counterpart individualized domestic and cosmopolitan responsibilities, in particular when individuals support national and global institutions that 'play an important role in the reproduction of human misery'.<sup>50</sup> According to Pogge,

since citizens are collectively responsible for their society's organization and its resulting human rights record, human rights ultimately make demands upon citizens.<sup>51</sup>

Pogge's institutional account of human rights may thus be depicted as both institutional *and* interactional. It aims at encompassing institutional forms of coercion into human rights protection, but without renouncing the imposition of the same interactional constraints on individuals; the latter are responsible for supporting institutions that violate human rights. Since these duties oblige individuals to one another, they cannot avoid being interindividual and hence interactional. On this account, indeed, the victim of a human rights' violation has a direct human right against the institution that did not protect her effectively against an interindividual or institutional violation of her rights, thus violating its positive or negative duties, but she also has an indirect human right against the individuals who support those institutions in violation of their negative duties not to uphold unjust institutions, thus making the account both institutional and interactional. Although these duties are in principle institution-oriented, like duties to vote for or against a specific law for instance, there are many cases in non-ideal contexts in which it is difficult to distinguish the actions by which individuals are actually supporting or not supporting institutional schemes from the purely individual actions they are pursuing to distance themselves from an unjust institutional system.<sup>52</sup> Let us imagine, for instance, duties of passive resistance to an unjust law like the *à la* Oskar Schindler duties Pogge often mentions as examples of institutional duties;<sup>53</sup> the person bound by these duties does not officially disobey an unjust law but finds other private ways of remedying its injustice. How do such duties differ from the duties which give rise to purely private boycotts of products imported from a dictatorial regime that are usually regarded as purely interactional duties? What degree of institutional involvement do they need to show in order to become truly institutional?<sup>54</sup> Not only does Pogge's account of institutional duties not discriminate clearly between institutional support and more private action thus merging institutional and interactional duties, but this also prevents him from providing any guidance as to the

<sup>50</sup> *World Poverty* at 49.

<sup>51</sup> *Ibid* at 64.

<sup>52</sup> On the debate that opposes purely institutional to purely interactional or combined approaches of justice more generally, see L. Murphy 'Institutions and the Demands of Justice' (1999) 27/4 *Philosophy and Public Affairs* 251; G.A. Cohen, 'Where the Action is: On the Site of Distributive Justice' in *If You're an Egalitarian, How Come You're So Rich?* (Cambridge Mass. and London: Harvard University Press, 2000); T.W. Pogge 'On the Site of Distributive Justice: Reflections on Cohen and Murphy' (2000) 29/2 *Philosophy and Public Affairs* 137.

<sup>53</sup> See Pogge, above n 52 at 168.

<sup>54</sup> Note that there is an interesting question I cannot pursue here which is a *quantitative* question: how much do we need to cooperate before our institutional duties can be regarded as satisfied? Is it enough to abstain from voting for an unjust law or do we need to engage politically in order to prevent the law from being passed? etc.

extent of our individual responsibilities for domestic and global injustice. Finally, although the duties imposed on individuals who should not support unjust institutions are often mediated through institutional rules, cases of duties to react to institutional failures and grave institutional injustice usually are not and are therefore plainly interactional.

The difficulty is that it is crucial for Pogge's allegedly institutional account of human rights that the distinction between the institutional and the interactional understandings be maintained. True, the combination of both understandings enables Pogge to avoid many of the pitfalls that await purely interactional accounts in theory, as well as those that threaten purely institutional accounts of human rights. The problem is that this combination is not always openly acknowledged by the author whose account remains, in its Rawlsian inspiration, purely institutional.

Before assessing whether Pogge can both have his cake and eat it, so to speak, let me present what I take to be the shortcomings of both accounts when defended separately and the ways in which Pogge manoeuvres to avoid them.

First, the shortcomings of a purely interactional conception of human rights. A primary shortcoming of purely interactional accounts of human rights is that they cannot account for the difference there is between being deprived of one's property rights by a private party and being deprived of them by an official intervention;<sup>55</sup> only the latter strikes us as a violation of human rights and the interactional account cannot differentiate between them. Institutional understandings, by contrast, define human-rights violation as the result of an official disrespect. Hence Pogge's institutional understanding, whether it is totally or only partly so, enables him to steer clear of this important pitfall. Although this point may strike us as sound, it may well be that it is because our intuitions are influenced by our current legal human rights arrangements which favour an institutional approach over a purely interactional one. I will come back to this issue later in the review. A second shortcoming of purely interactional accounts of human rights is that they only protect against direct violations and do not offer a larger protection against underfulfillment of human rights by omission, for instance. The institutional account of human rights, by contrast, offers a general protection against underfulfillment of human rights by institutions, be it against direct official violations or against official omissions to prevent private violations. This last point connects nicely with the next one, as the ways in which institutional accounts avoid this pitfall may create further difficulties for them.

Second, let us consider the shortcomings of a purely institutional conception of human rights. One of the main shortcomings of such a conception is that it would seem to assimilate civil and political rights to social and economic rights and thus succumb to the libertarian critique of the latter and of positive duties more generally.<sup>56</sup> According to Pogge, indeed, official disrespect and underfulfillment

<sup>55</sup> *World Poverty* at 57.

<sup>56</sup> *Ibid* at 63.

of human rights encompass not only violations by official authorities, but also violations by other individuals or through natural causes when authorities fail to prevent or to react to them.<sup>57</sup> This means, in other words, that in Pogge's account human rights create not only negative duties not to harm through official means, but also positive duties to prevent harm that may occur through non-official and interactional means.<sup>58</sup>

So, what exactly does Pogge mean when he says that the institutional understanding of human rights allows him to transcend the debate over the libertarian critique of social and economic rights?<sup>59</sup>

It seems that the author can only escape the libertarian threat if he combines his institutional understanding of human rights with some elements of interactional responsibility. Hence his introduction of a secondary recipient of human rights: the individuals who support the institutions that underfulfil human rights in the first place. Since this responsibility corresponds to negative duties not to support institutions who do not respect human rights on a Kantian model, whether the institutions violated negative or positive duties, Pogge's account escapes some of the ready critiques opposed to positive rights' accounts.<sup>60</sup> According to him, the 'institutional understanding can accept [the minimal negative] constraint without disqualifying social and economic rights'.<sup>61</sup>

In order to avoid critiques of the interactional account, then, Pogge adheres to an institutional account, but to escape some of the shortcomings of the latter, he reintroduces some interactional elements in his account. He seems aware of this, as he recognizes later that the institutional understanding

occupies an *appealing middle ground*: it goes beyond (minimalist interactional) libertarianism, which disconnects us from any deprivations we do not directly bring about, without falling into a (maximalist interactional) utilitarianism of rights, which holds each of us responsible for all deprivations whatever, regardless of the nature of our causal relation to them.<sup>62</sup>

One may wonder, however, whether it is possible to hold such a middle ground between, on the one hand, interactional and institutional understandings of rights and, on the other, minimalist and maximalist interactionalism, without the risk of falling into either type of shortcoming discussed before.<sup>63</sup> The difficulty is indeed that the libertarian critique cannot be evaded simply by splitting negative and positive duties among two different levels of human rights' recipients. What individuals, who violate their negative duty not to support institutions which do

<sup>57</sup> Ibid at 59–62.

<sup>58</sup> Ibid at 61.

<sup>59</sup> Ibid at 64–7.

<sup>60</sup> See Pogge, above n 26.

<sup>61</sup> *World Poverty* at 67.

<sup>62</sup> Ibid at 66 (my emphasis).

<sup>63</sup> Of course, one may want to discard the libertarian critique of positive rights and duties altogether, but this is not what Pogge does in his book. Pogge needs, for the purpose of his general argument for the existence of individuals' negative duty not to support unjust institutions and hence to compensate for the harm done by these institutions, to show that such a negative duty can be distinguished from the institutions' negative and positive duties.

not respect positive duties, are ultimately asked to answer for are violations of positive duties by institutions which represent them and therefore cannot entirely be separated morally from them. Moreover, individuals can only compensate for their breach of negative duties for supporting institutions who violate their positive duties, through their institutions' compensation for a breach of these positive duties—and even more so at the global level. This means that the way in which negative duties and positive duties are enforced in the institutional model is the same, thus undermining the distinction between individuals' negative duties and the positive duties of the institutions they support. Finally, some of the alleged negative duties individuals have 'not to support unjust institutions' in fact hide positive duties; let us think, for instance, of duties actively to support institutions when they are just or to interfere actively with unjust institutions in order to prevent some of the unjust consequences of their decisions to be enforced.

In short, then, too many compromises may jeopardize Pogge's institutional account which, from one page to the next, depending on the argument it opposes, becomes more or less institutional or, alternatively, more or less interactional in order to gain the kind of general agreement the author hopes for. The difficulty with doing so successfully is perhaps due to the fact that a balance is not attainable without openly acknowledging the hybrid nature of human rights and, even then, a certain amount of disagreement might be here to stay.<sup>64</sup> Provided one agrees that a minimal amount of agreement can be reached on Pogge's institutional account of human rights, however, another interesting feature of his account is a strong dissociation of human rights from legal rights.

### 3. *Human Rights and Legal Rights*

Another feature of Pogge's institutional account is that human rights are addressed at institutions which can choose whether they want to use legal or other institutional means of protection. They are first and foremost moral rights that may be translated into legal rights in some cases, but need not be in order to be respected. The author wants to distance his institutional account from what he calls other more familiar institutional understandings of human rights that conceive 'a human right to X as a kind of meta-right: a moral right to an effective legal right to X'.<sup>65</sup> Of course, Pogge acknowledges that legal rights can be an effective means of protection of human rights, but they will not always be.<sup>66</sup>

There are many reasons for the separation of human and legal rights in Pogge's account and some are already shared by other political theorists.<sup>67</sup> First, 'a society

<sup>64</sup> See even Pogge, above n 52 at 169 who concedes, albeit in another context, that 'a fully satisfactory version [of his interactional account] may prove elusive' and that there are ways of developing combined accounts of justice which can accommodate different goals or principles and hence would not encounter the problems he thinks purely 'same goal' ones like Murphy's and Cohen's accounts do.

<sup>65</sup> *World Poverty* at 45.

<sup>66</sup> *Ibid* at 46.

<sup>67</sup> See, e.g. Waldron, above n 32 at 217 ff. and Shue, above n 45 at 16.

may be so situated or organized that its members enjoy secure access to X, even without a legal right thereto'.<sup>68</sup> Second, 'legal and even constitutional rights, however conscientiously enforced, often do not suffice to ensure secure access'.<sup>69</sup> Finally, this way, 'we are then open', he says, 'to the idea that, in different economic and cultural contexts, secure access to the objects of human rights may be established in diverse ways'.<sup>70</sup> Pogge wants to avoid the cultural critique opposed to the import of Western human rights, on the one hand, and to allow for gradual international juridification of human rights in lieu of purely national legal guarantees, on the other. It is interesting, however, to see how Pogge's separate account of human rights qua moral rights fares with respect to their legal translations at a later stage. Let me illustrate this point with two examples.

First, Pogge's views in chapter six about the constitutional entrenchment of certain minimal conditions of democracy are difficult to reconcile with his earlier distrust of legal guarantees.<sup>71</sup> Pogge contends in chapter two that requiring constitutional guarantees may be too strong in some cases. Using his argument, therefore, it could be argued that, in the case of fledgling or transitory democracies,<sup>72</sup> constitutional guarantees are too strong as, even if they may stabilize democracy, they may also bind the people in ways far too stringent to allow further debate and progress;<sup>73</sup> this may be even more so as Pogge suggests a type of entrenchment that makes such guarantees 'untouchable' on the German *Grundgesetz* model. Moreover, the issues Pogge proposes to entrench are not democratic minima or other constitutive essentials that even the authors most opposed to constitutional precommitment are usually ready to accept,<sup>74</sup> but restrictive economic measures that could not realistically gain the unanimous assent necessary for such entrenchments.<sup>75</sup> Finally, the ways in which Pogge suggests these democratic guarantees should be enforced and protected may in fact prove quite dangerous. Normative concepts like the concepts of democracy and constitutional legitimacy are bound to be very contested. Pogge proposes an international democratic panel whose function would be to settle controversies over the meaning of the entrenchments and especially the meaning of democracy

<sup>68</sup> *World Poverty* at 45.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.* at 46.

<sup>71</sup> *Ibid.* at 153–8. Note that I leave aside other non-constitutional arguments against such a constitutional entrenchment.

<sup>72</sup> On the difficulties of constitutional entrenchments in Eastern European new democracies, see S. Holmes and C. Sunstein, 'The Politics of Constitutional Revision in Eastern Europe' in S. Levison (ed.), *Responding to Imperfection. The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995) at 275.

<sup>73</sup> See on this point Waldron, above n 32, ch 12; I. Kant in H. Reiss (ed.), *Political Writings* (Cambridge: Cambridge University Press, 1991) at 57; J. Locke, *A Letter on Toleration* (Oxford: Clarendon Press, 1968) at V.xi.11.

<sup>74</sup> See in particular J.C. Bayon 'Diritti, democrazia, costituzione' (1998) 10 *Ragion Pratica* 41, in the context of an interesting discussion with R. Gargarella 'Il ruolo dei giudici di fronte al "terreno proibito"' (1998) 10 *Ragion Pratica* 65 and J.J. Moreso 'Sulla portata del vincolo preventivo' (1998) 10 *Ragion Pratica* 75.

<sup>75</sup> On how a majority may bind the next majorities, see J. Elster, *Ulysses unbound* (Cambridge: Cambridge University Press, 2000) at 168; J. Elster, 'Introduction' in J. Elster and R. Slagstad (eds), *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) 1 at 6.

and constitutional legitimacy in each national context.<sup>76</sup> It remains to be seen, however, how such an international and non-elected body of distinguished international lawyers could gain sufficient democratic legitimacy to decide on constitutional issues in a way that binds national authorities.

Second, it seems that Pogge cannot escape the intuitions that the development of human rights qua vertical legal rights has made ours.<sup>77</sup> This is so, for instance, when he contends that 'human-rights violations, to count as such, must be in some sense official'.<sup>78</sup> Many moral philosophers have no difficulty with human rights qua interindividual constraints, and what seems to underlie Pogge's intuition in this case could be said to relate more to legal experience with human rights than to a purely moral judgement about their nature.

The final step in Pogge's institutional account of human rights I will discuss in this review amounts to its political application, and, more particularly, its significance for political sovereignty.

#### 4. *Human Rights as a Basis for Cosmopolitan Sovereignty*

Chapter seven addresses the relationship between the form of cosmopolitanism and cosmopolitan responsibility Pogge describes in earlier chapters and political sovereignty. In this chapter, cosmopolitanism is defined as a moral approach that 'holds that all persons stand in certain moral relations to one another'.<sup>79</sup>

Given the cosmopolitan orientation of the book's account of human rights and negative duties, the further step made here towards linking cosmopolitanism to human rights does not come as a surprise.<sup>80</sup> Nor does the following move in which Pogge develops an institutional account of cosmopolitanism and cosmopolitan responsibility on the exact model of his institutional account of human rights and on the basis of a similarly structured argument.<sup>81</sup> What is new in the chapter is the way the author draws implications from his institutional account of cosmopolitan responsibility and human rights for how political sovereignty is organized at the national and global levels. If we want to face up to our responsibility in harming others and ensure institutional respect of human rights in the national and global orders, he argues, then decentralizing some institutional competences and recentralizing others might be necessary.

Pogge starts by stating something that only a few would contest 10 years after this essay was first published, i.e. that 'the idea of the autonomous territorial state as the pre-eminent mode of political organization'<sup>82</sup> is no longer defensible in a

<sup>76</sup> *World Poverty* at 155 ff. On a development of this very idea, see Singer, above n 11 at 96–105.

<sup>77</sup> The opposition between the vertical and horizontal effects of human rights takes its roots in the German constitutional tradition and the contested idea of *Drittwirkung*. So does the relatively new concept of *Schutzpflichten* or institutional positive duties to protect fundamental rights, discussed earlier.

<sup>78</sup> *World Poverty* at 57.

<sup>79</sup> *Ibid* at 169.

<sup>80</sup> *Ibid* at 170.

<sup>81</sup> *Ibid* at 170 ff. This argument echoes the argument presented on pp 67 and 135.

<sup>82</sup> *Ibid* at 178.

global context and with respect to cosmopolitan morality. When suggesting alternatives, Pogge is not proposing a centralized world state, as some do, but, on the contrary, a vertical dispersal of authority or sovereignty.<sup>83</sup> This should not, however, be identified with a form of global federalism one often encounters among alternatives to the world state, as it intentionally excludes any form of hierarchy: 'persons should be citizens of, and govern themselves through, a number of political units of various sizes, without any one political unit being dominant and thus occupying the traditional role of state'.<sup>84</sup>

What are the arguments for this radical departure from classical accounts of political sovereignty? According to Pogge, this model corresponds to a reality of vertical division of competences and of ultimate conflict in most areas. Pogge also advances different moral arguments for the vertical dispersion of sovereignty and a global institutional reform with significant reductions in national sovereignty: peace and security, reduction of oppression, global economic justice, ecology and democracy. I will only take up the latter here. According to the author, 'persons have a right to an institutional order under which those significantly and legitimately affected by a political decision have a roughly equal opportunity to influence the making of this decision'.<sup>85</sup> Concentrating sovereignty at one level is no longer apt to take people's interests and rights sufficiently into account.

One may want to go further and argue not only for a vertical division of sovereignty, but also for a *cooperative* conception of sovereignty itself. Such an account could be founded on Pogge's institutional cosmopolitanism, even if it has not been expressly defended as such in the book which focuses more on 'cosmopolitanizing' sovereignty than on unravelling the cosmopolitan feature of the concept of sovereignty itself. Let me state briefly what cooperative sovereignty could amount to.

On such an account of sovereignty, not only should we 'feel at home' in all the political units that mould our lives and be ready to take our responsibilities for their actions,<sup>86</sup> but we should also want those units to be related in a dynamic of cooperation in a global perspective. This approach to sovereignty reflects the cooperative dimension that has recently characterized international relations between interdependent states.<sup>87</sup> When understood in this cooperative way, sovereignty becomes a reflexive and dynamic concept as its invocation creates a constant questioning of the allocation of power by the individuals who are members of these political units. This reflexive exercise not only puts into question others countries' sovereignty as well as one's own, but it also questions individuals' relationship to these political units.<sup>88</sup>

<sup>83</sup> Ibid at 178.

<sup>84</sup> Ibid at 178.

<sup>85</sup> Ibid at 184.

<sup>86</sup> Ibid at 178.

<sup>87</sup> See, e.g. S. Hobe 'Der kooperationsoffene Verfassungsstaat' (1998) 37 *Der Staat* 521.

<sup>88</sup> On sovereignty qua essentially contestable concept, see S. Besson, 'Post-souveraineté ou simple changement de paradigmes? Variations sur un concept essentiellement contestable' in T. Balmelli, A. Borghi and P.A. Hildebrand (eds.), *La souveraineté au XXIème siècle* (Fribourg: Editions Interuniversitaires Suisses, 2003) forthcoming.

When read together with the principle of subsidiarity,<sup>89</sup> this conception of sovereignty requires that all the authorities at stake look for the most efficient way to realize the values and rights that they should protect as sovereigns.<sup>90</sup> Sovereignty should indeed be understood as a normative concept which encompasses different contestable values, like human rights, equality or democracy, and exercising sovereignty implies enforcing those values in the best way one can. Thus, cooperative sovereignty may require a division, a centralization or even a decentralization of competences depending on the circumstances. This common exercise of political sovereignty could then be reflected in the structure of the relationship between the different legal orders at stake; none of them would ultimately and entirely be submitted to another. This is what many nowadays describe as legal pluralism.<sup>91</sup>

This cooperative account of sovereignty would allow Pogge's conception of individuals' cosmopolitan responsibility for their institutions' actions to lead straight into the heart of the concept of political sovereignty itself. It would thus avoid losing focus on the individual in the global authority context as John Rawls' *Law of Peoples* and other global political models often do.<sup>92</sup>

### 5. *The Way Forward*

The present review could not possibly do justice to all the issues addressed in *World Poverty and Human Rights*. The least it can do is to invite people to read this fascinating book. In combining rigorous normative arguments with disturbing factual data, the book will no doubt help raising consciousness among legal and political academics of our responsibilities in a global institutional order. It should also encourage us collectively to start the institutional reforms that are badly needed to make the world we share and the order from which we benefit more just. This would not cost us much. As Pogge rightly observes,

our countries can flourish quite well without depriving the global poor. . . . We can honor our negative duties and still build the most splendid republic that lofty nationalists, communitarians and patriots might even desire. Whether we can build such a republic while the dying continues is at least doubtful.<sup>93</sup>

<sup>89</sup> On the potential of the principle of subsidiarity in the European and global context, see L. Blichner and L. Sangolt 'The Concept of Subsidiarity and the Debate on European Co-operation: Pitfalls and Possibilities' (1994) 7/3 *Governance: An International Journal of Policy and Administration* 284.

<sup>90</sup> See in the European context in particular, N. MacCormick, *Beyond Sovereignty* (Oxford: Oxford University Press, 1999) at 142.

<sup>91</sup> For such an account, see for instance MacCormick, above n 90 at 117. Note that one may accept MacCormick's views on legal pluralism without endorsing his rejection of political and legal sovereignty per se.

<sup>92</sup> See on this point L. Wenar, 'Contractualism and Global Economic Justice' in T. Pogge (ed.), *Global Justice* (Oxford: Blackwell, 2001) 76 at 86.

<sup>93</sup> *World Poverty* at 145. On further suggestions as to how we could live up to our individual responsibilities independently from our institutions and on a more interactional account of cosmopolitan responsibilities more generally, see Singer, above n 11 at 185-95.