

THE RELEVANCE OF JÜRGEN HABERMAS'S *THEORY OF COMMUNICATIVE ACTION* AS THE PHILOSOPHICAL FOUNDATION OF HUMAN RIGHTS ENFORCEMENT IN INDONESIA

Muklis Al'anam

Faculty of Law, Universitas Airlangga
muklis.alanam-2023@fh.unair.ac.id

Radian Salman

Faculty of Law, Universitas Airlangga
radian.salman@fh.unair.ac.id

Abstract

Habermas's theory of communicative action is highly relevant as a philosophical foundation for upholding human rights, emphasizing the intrinsic value of each individual, which must not be eliminated by any power. This is supported by Article 6 paragraph (1) of the International Covenant on Civil and Political Rights, ratified as Law Number 12 of 2005. Critical theory, a school of philosophy, focuses on liberating human knowledge from transcendental and empirical oppression, critiquing ideologies that perpetuate social oppression. Human rights have become a dynamic issue in Indonesia, especially during the Presidential Election, with widespread discussions at national and international levels. Countries, organizations, and individuals are increasingly voicing concerns about human rights issues. These problems are complex, particularly in resolving and sanctioning perpetrators, leading some to view human rights as "merely theoretical." Applying critical theory is crucial in this context, as perfected by Jürgen Habermas. This research employs normative methods, including statutory, conceptual, and case approaches. It concludes that Jürgen Habermas's theory of communicative action and John Locke's natural law are similar, emphasizing the inherent meaning of external rights. This grounding makes Habermas's theory important for upholding law and human rights internationally, although its implementation remains ambiguous.

Keywords: *Critical Theory, Jürgen Habermas, Human Rights*

Intisari

Teori kritis tindakan komunikatif Habermas sangat relevan sebagai fondasi filosofis penegakan HAM yang menekankan nilai intrinsik setiap individu, yang tidak boleh dihilangkan oleh kekuasaan mana pun, sesuai dengan Pasal 6 ayat (1) International Covenant on Civil and Political Rights yang diratifikasi menjadi Undang-Undang Nomor 12 Tahun 2005. Teori kritis adalah aliran filsafat tentang pembebasan pengetahuan manusia dari segala bentuk penindasan transendental dan empiris. Ide teori kritis adalah kritik terhadap ideologi yang bertujuan menyadarkan manusia akan penindasan sosial dan mencoba membebaskannya.

Isu HAM menjadi perbincangan dinamis di Indonesia, terutama pada saat pemilihan presiden, serta di dunia internasional. Berbagai negara, organisasi, dan individu menyuarkan sudut pandang HAM yang ada. Problematika HAM sulit diselesaikan dan penerapan sanksi bagi pelaku sering dianggap “teorik belaka.” Penerapan teori tindakan komunikatif ini penting terkait HAM karena disempurnakan oleh Jürgen Habermas. Penelitian ini menggunakan metode penelitian normatif dengan pendekatan perundang-undangan, konseptual, dan kasus. Hasil penelitian menunjukkan adanya kesamaan konsep antara teori kritis Jürgen Habermas dan aliran hukum kodrat John Locke, yang menekankan hak-hak lahiriah. Teori Jürgen Habermas menjadi penting untuk penegakan hukum dan HAM di dunia internasional, meskipun penerapannya masih ambigu.

Kata Kunci: *Teori Kritis, Jürgen Habermas, Hak Asasi Manusia*

A. Introduction

This critical theory stems from the socialist concept attributed to Karl Marx in 1848, known as communism or commune during the turbulent dictatorship of the French Government. It is aimed at universal suffrage, popular critique of government, religious freedom and separation of church and state, and a non-militaristic perspective. In short, it is called equality in western democracy.¹ The terms “socialism” and “communism” are intertwined that Marx often uses them interchangeably. Regardless, they have a minor difference instead. The economic approach defines socialism as the shift of private ownership to the government through clear procedures and compensation. Meanwhile communism is the shift of private ownership to the government by coercion and without compensation.² Despite a minor difference, they have different objectives.

Marx’s philosophical depiction of human beings of human and world interconnection and interaction piques most attention. This interconnection and interaction occurs of people and the between individuals and society, and among individuals. Marx is therefore the first to realize that the moral values of the Enlightenment (which in his time were reflected in bourgeois values) are ineffective and unaffiliated with social relations.³ According to Marx, human

1 Thomas Sowell, “Karl Marx and the Freedom of the Individual,” *Ethics* 73, No. 2 (January, 1963): 119

2 Deliarnov, *Perkembangan Pemikiran Ekonomi* (Rajagrafindo Persada: Jakarta, 2014), 62

3 Marina F. Bykova, “On the Philosophical Relevance of Marx’s Views Today,” *Frontiers of Philosophy in China* 9, No. 3 (September, 2014): 372

beings, or potential human beings, are products of nature. Humans are the first to establish the physical organization of individuals and their relations with the rest of nature.⁴ For this reason, Habermas distinguishes three important knowledge interests in mediating human relations with nature, other people, and the social world, and themselves:⁵

1. technical-instrument interests, that develop to serve explanatory and objective purposes, i.e., knowledge of natural processes requires an application in labor and produces cognitive-instrumental knowledge;
2. hermeneutical interests in understanding others and the social entity, necessary and applied in communication and producing practical knowledge; and
3. emancipatory interests, occasionally called “interest in Reason”, in transforming societal domination relations that impede human development and producing emancipatory knowledge, the subject matter of critical theory.

The progress manifests in the creation of an international framework, allowing a third party to evaluate how a state assesses its rights record. This international regime has given human rights an operational substance. The operational substance entails protection to confirm and guarantee democracy along with freedom in a particular country or community. However, the concept of human rights and the relevance of its international regime have faced the most formidable challenge in Asia. Several categories of human rights include civil rights, political rights, socio-economic rights, and cultural rights. First, *civil rights* encompasses *integrity right* and *due process right*. Second, *political rights* encompass *the right to freedom of opinion and expression, assembly, and association, to take part in government, equal access to public service, and to elect and be elected*. Third, *socio-economic rights* encompass *right to work, equal pay for equal work, no forced labour, trade union, organization and bargaining, rest and leisure, adequate standard*

4 Karl Marx & Friedrich Engels, *The Germany Ideology* (International Publishers: New York, 1939), 7

5 Koen Raes, “Legalisation, Communication And Strategy: A Critique of Habermas’ Approach to Law,” *Journal of Law and Society* 13, No. 2 (Summer, 1986): 184

*of living, right to food, right to health, right to housing, right to education. In addition, cultural rights include the right to participate in cultural life, to benefit from scientific progress, protection of authorship and copyright, and freedom in scientific research and creative activity.*⁶

John Locke argues that all people are born with natural rights to life, liberty, property, and freedom which cannot be taken away by any state or other individual. This represents the ideal view of human rights. The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations on December 10, 1948 in response to World War I and World War II. As a continuation, an adoption of several international conventions occurs, such as International Covenant on Civil and Political Rights 1966; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination 1969; the International Covenant on Economic, Social and Cultural Rights 1976; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, and so forth.

The relevance of human rights stems from World War I, which ended after an armistice had been signed on November 11, 1918. Its scale is larger than that of the war overthrowing the Roman Empire and the Napoleonic wars in the previous century. Thus, shocking the world. The war involved 28 countries, the total population of which was around 1,600,000,000. It cost 17,000,000 injuries and 10,000,000 deaths, and approximately \$200,000,000,000 was spent.⁷ Then, the German government under Adolf Hitler, the leader of the Nazi Party, violated human rights by developing the *Lueger* theory. The theory blames the Jews on plunging Germany into economic and political chaos. In the 1960s, racism in Germany was often shown as an ideology, instead of an economic or political principle. Racism was used as a tool or compliment, even more important than economics and politics. Rationally, Germany was a democracy. However, irrationally, it did not respect human rights, the

6 Nurul Qamar, *Hak Asasi Manusia dalam Negara Hukum Demokrasi* (Sinar Grafika: Jakarta, 2014), 96-99

7 Kelly Miller, *Kelly Miller's History of the World War for Human Rights* (Public Domain, 1939), 20

cornerstone of a democracy.⁸ Therefore, the *Lueger* theory spread with the concept of Aryan as the strongest and superior race. Eventually, leading to the Holocaust at that time.

An improvement in human rights is still imperative despite the end of the authoritarian regime and the stronger of democracy as the political foundation of the state, nation, and society. This is because of the neglect of human rights, showing that human rights are elementally foreign to democracy.⁹ Human rights are an important duty on the international stage. The human oppression in Palestine, for instance, shows the importance of upholding human rights rationally. According to Professor Richard Falk from the University of California, a state that fails to satisfy the basic needs of its citizens abuses human rights.¹⁰

When it comes to human rights violations in Indonesia, the Tanjung Priok incident in 1984 bears a resemblance to Nazi racism against Jews. It arises from ethnicity, religion, race, and other social divisions (SARA) and politics. A number of people living in Tanjung Priok protested against the government's plan to move Mbah Priok's sacred tomb. As a result, causing a conflict with police and TNI. It claimed around 400 victims, and it is said that 700 people died and were missing.¹¹

It is interesting to relate the cases above to Jürgen Habermas's thoughts on human rights. The basis of the critical theory he developed through the Frankfurt School. Although his critical theory was only systematized in his book "Theorie des kommunikativen Handelns" (1981), the theory shall be inseparable from his long learning process that began in the late 1950s. Adorno, Horkheimer, and Marcuse of the Frankfurt School are pioneers of the critical theory. The proposed theory criticizes reification in modern society and rationality that eliminates identity and human values.¹² Theorists inspired

8 Gisela Bock, "Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State," *The University of Chicago Press, Spring* 8, No. 3 (1983): 400

9 Suparman Marzuki, "Politik Hukum Hak Asasi Manusia Tentang Kebebasan Beragama Pasca Orde Baru," *Jurnal Hukum Ius Quia Iustum* 26, No. 2 (2019): 218

10 Richard Falk, "Human Rights," *Foreign Policy*, No. 141 (March-April, 2004): 22

11 Sindy Prasetyo, "Pelanggaran Hak Asasi Manusia di Indonesia," *Indigenous Knowledgev* 2, No. 1 (June, 2023): 53

12 Umdatul Baroroh, "Filsafat Ilmu Dalam Madzhab Kritis Jurgen Habermas," *JAQFI:Jurnal*

by the Frankfurt tradition once again debated the meaning of “critique”. This debate resurfaced with an unexpected renewal after Critical Theory gradually broke away from its Marxist roots. Subsequently, giving birth to a new form of critique called “critique of ideology”. In its development, Habermas’s notion has three theoretical concepts:

- a. Theory of communicative action;
- b. Critique of ideology; and
- c. The concept of science is not free of values and interests.

Habermas’ ideas about ideological critique remain a contributive theory, despite the rejection of ideological critique that returns to the realm of social philosophy. He always suspects the possibility of talking about “false consciousness” from an epistemologically privileged position. Initially, this baffles the theory because there was confusion over the absolutism of ideology.¹³ Several main points of Habermas’s ideas deserve consideration:

1. They aim to emancipate and enlighten historical actors. Therefore, they will realize that history often hides violence and coercion and understand that social interests determine their position in history;
2. They are claimed to be reflective or *self-referential*; and
3. Their reflective role is cognitively acceptable to evaluate and actualize.

Habermas’s critical theory continues the tradition of the Frankfurt school as a contemporary exponent (second generation). The existence of the Frankfurt school and its critical theory Hitler’s rise of fascist regime with its anti-semitism is worth remembering. However, the Nazis power influences the ceased operation of the Institute for Social Research in Frankfurt and its exponents, including Habermas. Consequently, forcefully exiling the institutions in New York. This reality depicts a theoretical emergence that has a close linkage to human rights in Germany at that time. This second generation of thinkers incorporates ideas from philosophy and social theory.

Aqidah dan Filsafat Islam 8, No. 1 (2023): 118

13 César Ortega-Esquembre, “Social Pathologies And Ideologies in Light of Jürgen Habermas: a New Interpretation of the Thesis of Colonisation,” *Article, Humanities And Social Sciences Communications*, No. 72 (2020): 2, <https://doi.org/10.1057/s41599-020-00563-2>

For instance, Gadamer's hermeneutics, systems theory and structural functionalism, empirical social science, analytic and linguistic philosophy, and moral and cognitive development theory. Habermas' moral development theory is prominent to his various thoughts on criticizing communicative action. This theory aims to reach an agreement, consider basic human interests, show mutual respect, and reinforce shared values or a certain way of life.¹⁴ Habermas developed critical theory to analyze actual social relations, and each societal individual is responsible for social circumstances.

In theory, this idea assumes that there is a minor philosophical difference between the critical theory of society and the uncritical theory. However, this critical theory carefully focuses its research and conceptual framework on the goals and activities of the social movement of opposition involving critical participants.¹⁵ Therefore, Habermas considers the legislative process a form of objectification that causes a certain social class to lose its specificity due to the importance of public participation in it.¹⁶ Human rights enforcement must be built on a firm philosophical foundation. This can be achieved using Habermas's theory of communicative action, which focuses on the basic concept of reproduction as a system and the living environment of modern society.

Likewise, according to John Locke, human rights are based on moral and mental axioms: (1) all humans are created equal; and (2) humans have the same moral value.¹⁷ It is in line with what Habermas says about the theory of moral development, on which his theory of communicative action is based. For this reason, upholding human rights is of paramount importance based on his ideas and his theory of communicative action, which has 4 stages:¹⁸

1) His theoretical foundation of the action on the understanding of

14 Erin Kelly, "Habermas on Moral Justification," *Social Theory and Practice* 26, No. 2 (2000): 223

15 Nancy Fraser, "What's Critical About Critical Theory? The Case of Habermas and Gender," *Duke University Press*, No 35 (1985): 97, <https://doi.org/10.2307/488202>

16 Koen Raes, "Legalisation, Communication And Strategy: A Critique of Habermas' Approach to Law," 194

17 Gary B. Herbert, "John Locke: Natural Rights and Natural Duties," *Annual Review of Law and Ethics* 4 (1996): 593

18 Hugh Baxter, "System and Life-World in Habermas's "Theory of Communicative Action"," *Theory and Society* 16, No. 1 (January, 1987): 39

- communicative action;
- 2) His construction of the life-world as the social background to communicative action;
 - 3) His critical review of systems-theoretical concepts; and
 - 4) His construction of a model of society which can integrate insights through the theory of communicative action.

The theory of communicative action, proposed by Habermas in his magnum opus, *Theorie des kommunikativen Handelns*, aims to reformulate the theory of reification (a central topic in the Frankfurt School's thoughts) which Adorno considered stagnant.

B. Habermas's Theory of Communicative Action as The Philosophical Foundation of Human Rights Enforcement in Indonesia

Habermas is a probable prominent recent exponent of the critique of society and culture in the Frankfurt school's tradition. He proposes the so-called "strongest" theory to investigate the relations of critical theory to epistemology and philosophical anthropology.¹⁹ Therefore, the critical theory developed by Habermas is enormously useful to simultaneously study with philosophical anthropology and epistemology. Critical theory is a social theory that emerges from deep thinking about various imperative social aspects. The aspects include the nature of knowledge, social research structure, social interaction norms, and political, economic, and socio-cultural trends. It aims to understand and change society in a practical way.²⁰ Habermas pays particular attention to the epistemological (the study of knowledge) aspect of critical theory. This is evident from his efforts to develop the thoughts of his predecessors in the Frankfurt School. His thoughts show a close relation between power and knowledge, which he calls the politics of epistemology.²¹

The book "*Knowledge and Human Interests*" discusses the history and critique of the concept of knowledge from the time of Kant to Freud. Figures such as Hegel, Marx, Comte, Peirce, Dilthey, Fichte, and Nietzsche include

19 Dominick LaCapra, "Habermas and the Grounding of Critical Theory," *Wiley for Wesleyan University* 16, No. 3 (October, 1977): 237

20 Thomas McCarthy, *The Critical Theory of Jürgen Habermas* (The MIT Press: London, 1978), 1

21 Iwan, "Menelaah Teori Kritis Jürgen Habermas," *Jurnal Edueksos* 3, No. 2 (2014): 150

a thorough discussion in this book. Habermas's perspective highlights the three aspects of knowledge are natural sciences, social sciences, and critical reflection. In his view, natural sciences expresses how humans are interested in controlling the natural environment. Social sciences follows the need to understand others and act within a social context. Regardless, studying society can shed light on laws of social life or patterns of actions stemming from unjust power and ideological mystification. In addition, critical reflection aims to identify features of personal and social life brought about by irrational restrictions or unjust norms. According to what Habermas mentions in the theory of communicative action, emancipation is freedom from individual irrationality and social injustice.²² Habermas argues that knowledge and human interests are tools to achieve mutual understanding and preserve social unity without coercion.²³

“if we cannot conceive of knowledge or belief divorced from interest and if our procedures of investigation are legitimate only in their contexts of interests, then the reality we investigate and describe must itself be one that could not exist if human interests did not”.

In his analysis of knowledge and human interests, Habermas emphasizes that the core of human interests is to control natural sciences, hermeneutics or humanities, and critical sciences.

The theory of communicative action follows two main goals of public participation: (1) calculating egocentric utility where the degree of conflict and cooperation varies depending on individual interest positions; and (2) achieving understanding in a cooperative societal interpretation process where people work together to understand each other and reach agreement. Therefore, Habermas identifies two subtypes:²⁴

1. Open communicative action (public sphere); and
2. Concealed communicative action (private sphere).

Habermas's notion is the concept of communicative freedom relying on

22 Roger S. Gottlieb, “The Contemporary Critical Theory of Jürgen Habermas,” *Ethics* 91, No. 2 (January, 1981): 282

23 Jürgen Habermas, *Knowledge and Human Interests (Translated by Jeremy Shapiro)* (Beacon Press, 1972), 264

24 Hugh Baxter, “System and Life-World in Habermas's “Theory of Communicative Action,”” 42

free or coerced agreement, emphasizing “free dialogue”. In the dialogue, all speakers can access a fair distribution of the three basic dialogue roles:²⁵

1. Assertion or challenge to claims about truth;
2. Sincerity; and
3. Moral rightness.

In the private sphere, the public sphere excludes private matters or becomes private consumption. In the public sphere, such as coffee shops in Germany and salons in France, people gather to exchange ideas and discuss various social issues and seek solutions, involving the general public in solving those problems.²⁶ Therefore, making the public sphere allowing public opinions as human right. Habermas’s theory of the public sphere develops with the hermeneutic method of social practice. Habermas disagrees with the idea that we should accept taking tradition for granted. According to him, tradition can restrict us. His personal experience reinforces this belief. He grew up in Nazi Germany and initially followed its ideology. However, after learning and reflecting on its history, he became a strong opponent of the Nazis. Habermas argues that tradition without reflection is an untrue knowledge. He likens it to a toddler who acts without understanding its meaning. The toddler may follow the tradition his parents teach, but he is yet to understand the tradition’s importance. It is only after his parents explain its meaning that the toddler can understand what he is doing.²⁷

Article 1 of the Universal Declaration of Human Rights, adopted by the United Nations on December 10, 1948, begins with the statement “All human beings are born free and equal in dignity and rights.” The Preamble of the Declaration also mentions human dignity and human rights in the same breath. It reaffirms “faith in fundamental human rights, dignity, and worth of the human person.” Adopted more than sixty years ago, the Basic Law for the Federal Republic of Germany begins with a chapter on basic rights. Article 1 reads: “Human dignity shall be inviolable.” Such a formula was

25 Roger S. Gottlieb, “The Contemporary Critical Theory of Jürgen Habermas,” 284

26 Frets Keriapy, “Pendidikan Agama Kristen dalam Ruang Publik Virtual: Sebuah Analisis Pemikiran Jürgen Habermas,” *Harati: Jurnal Pendidikan Kristen* 2, No. 2 (2022): 120

27 Gerald Moratua Siregar, “Teori Kritis Habermas dan Kebijakan Merdeka Belajar,” *Jurnal Filsafat Indonesia* 4, No. 2 (2021): 146

used in three out of five German constitutions adopted between 1946 and 1949. “Human dignity” is now prominent in the discourse on human rights and judicial decision-making.²⁸

Regarding human rights, John Locke (1632-1704) states that everyone is born with inherent natural rights.²⁹ Therefore, arbitrary rule shall be unavailable. A ruler also has no right to delegate lawmaking power to others and deprive someone of his or her property with no consent. Locke argues that the ruler should expand the meaning of justice in theory and practice. He is subject to the law in making decisions regarding the rights of the people he governs. Therefore, a country needs to separate the legislative, executive, and federative (foreign affairs) powers.³⁰ In the theory of communicative action, Habermas explains that the government must satisfy several conditions for performing its role:

1. Clarity;
2. Rightness;
3. Honesty; and
4. Accuracy.

If the enforcement of human rights is based on the philosophy of this theory, the consensus will have a sound rational basis.

According to Habermas, humans are individuals who live in society and use language to communicate and interact with others. Therefore, humans are social beings whose daily action determines their existence. The basic actions humans take in their daily lives shall align with rational and critical thinking.³¹ Since humans are social creatures, the state must protect the basic rights of its people. Therefore, human rights are the central focus of this theory. John Locke can be considered a pioneer of human rights because his early ideas of human rights aimed to limit intrusive government interference

28 Jürgen Habermas, “The Concept of Human Dignity and the Realistic Utopia of Human Rights,” *Wiley, Metaphilosophy* 41, No. 4 (July, 2010): 464

29 John Locke, *Second Treatise of Government* (Public Domain, 1704), 97

30 Reko Dwi Salfutra, “Hak Asasi Manusia dalam Perspektif Filsafat Hukum,” *Jurnal Hukum Progresif* 12, No. 2 (2018): 2147

31 Syahrul Kirom, “Individu Komunikatif Menurut Jurgen Habermas dalam Perspektif Filsafat Manusia,” *Jurnal Yaqzhan* 6, No. 2 (December, 2020): 206

in private life.³² Human rights are inherent in human beings from birth. Each individual owns the rights because they are human beings. In his book “*The Second Treatise of Civil Government and a Letter Concerning Toleration*”, John Locke explains that God gives every human being basic rights to life, such as freedom and the right to own property. These rights are inherent in human beings and are irrevocable by the state.³³ Thomas Hobbes, through the *social contract*, conceptualizes people surrender some of their rights to the state to receive protection for their inalienable rights. According to John Locke, if the ruler rejects the social contract and willfully violates the natural rights of each individual, the state’s people can depose the ruler and replace the government with a new one that respects those natural rights.³⁴

In the end, what Habermas says about social critique has strong links to John Locke’s human rights concept. Why? According to Habermas, human rights have dualism: (1) the intersubjective basis of rights in the legal community; and (2) the idea of a discursive elaboration of human rights into a comprehensive system of rights.³⁵ The enforcement of human rights must orient to the main objective of law, i.e., justice. Therefore, rationalizing Jürgen Habermas’s highlight of the system of rights in a democratic state under the rule of law in his book “*Between Facts and Norms*”

According to Habermas, human rights exceed moral rights. They are “Janus-faced”: law and morality.³⁶ The government must implement policies with morality. Although Habermas adheres to social positivism, he still supports critical theory and avoids misaligning with the concept of human rights introduced by the pioneers of the classical school of natural law. The discussion relating law and morals in legal and the school of natural law has fundamental differences. The major difference lies in the source and validity of the law. Legal positivism deems law to be valid and binding.³⁷ According

32 *Ibid.*

33 Rhona K.M. Smith, *Hukum Hak Asasi Manusia*, (Pusat Studi Hak Asasi Manusia Universitas Islam Indonesia (PUSHAM UII): Yogyakarta, 2008), 12

34 *Ibid.*

35 Jeffrey Flynn, “Habermas on Human Rights: Law, Morality, and Intercultural Dialogue,” *Social Theory and Practice* 29, No. 3 (July, 2003): 431

36 *Ibid.*

37 Salman Luthan, “Dialektika Hukum dan Moral dalam Perspektif Filsafat Hukum,” *Jurnal*

to the natural law theory, human rights are universal (*erga omnes*) and eternal. They compel to all people anywhere and anytime. This follows the idea that human rights come from the inherent nature of each human being from birth.³⁸

The enforcement of human rights has close relations to Habermas's view. He says that law plays a prominent role in uniting complex and divided societies. When other mechanisms of social integration fail, law can be the solution to achieving social cohesion. The fact that legal norms have specific functions from an interesting combination of formal properties explains the integrative capacity. Modern law has subjective rights expressions. It is enacted, positive, imposed, or coercive. Meanwhile, modern law only demands behavior that conforms to the norms. The demand still has to align with legitimate expectations so that people can follow the norms, if they wish, out of respect for the law.³⁹

The Universal Declaration of Human Rights (UDHR) prohibits torture, crimes, or actions that are inhuman or can degrade human dignity with treatment or sanctions in the form of physical punishment. For instance, torture has become commonplace in public view. However, all the goals in the UDHR have not been achieved, for example in the conflict between Israel and Palestine. Israel has clearly violated international humanitarian law by using phosphorus bombs against the Palestinians. Humanitarian law limits the suffering caused by armed conflict. For instance, Article 22 of the *Hague Regulations* says that the right of *belligerents* to adopt means of injuring the enemy is not unlimited. In addition, Article 23.E of the *Hague Regulations* forbids the use of arms, projectiles, or material predicted to cause combatants and non-combatants to experience excessive suffering.

In early 2009, Israeli soldiers bombed the Gaza Strip. As a result, the attack inflicted several casualties: children, women, men, Palestinian civilians, and members of Palestinian military. The ceasefire was carried out by Israel, brutally attacking Palestine by using one of the chemical weapons, namely

Hukum IUS QUIA IUSTUM 9, No. 4 (2012): 507

38 Ferry Eka Sandy, "Aspek Epistemologi Hak Asasi Manusia (HAM) dalam Perspektif Filsafat Hukum," *Jurnal Dinamika Hukum dan Masyarakat* 5 No. 2 (2022): 3

39 Jurgen Habermas, "Between Facts and Norms: An Author's Reflections," *Denver Law Review* 76, No. 4 (January, 1999): 937

the *white phosphorus bomb*. The weapon is forbidden to use against densely populated areas or civilians because it can cause severe burns. In 2009, there were 1,034 Palestinian victims and 314 children under 18, while there were 9 Israeli citizens and 1 child under 18.⁴⁰

The use of white phosphorus bombs as chemical weapons used in armed conflict by IDF may violate the (1) *Laws and Customs of War on Land* 1907 or *the Hague Convention* 1907, (2) the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949* or the *Geneva Convention* 1949, (3) *Geneva Gas Protocol* 1925 or *Geneva Protocol, Biological Weapons Convention* 1972, (4) *Chemical Weapons Convention* 1993, and (5) *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons* 1980 or *Convention on Certain Conventional Weapons* 1980. Moreover, Protocol III of the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons 1980* (CCWC) or *Convention on Certain Conventional Weapons 1980* prohibits the usage of white phosphorus.⁴¹

The lack of clarity in the enforcement in international human rights law allows a state to act arbitrarily and deprive the rights of other citizens. Habermas argues that human rights must be legitimate limitation that prevents popular sovereignty from violating the inviolable limits of other individuals' freedom.⁴² Habermas does not rely solely on moral theory in his concept of human rights. Habermas says that human rights have two sides: law and morality. Human rights are not only derived from morality but also from the modern idea of individual freedom. Therefore, human rights have a special legal nature. This statement does not indicate that human rights are only legal rights that are officially recognized and enforced. He argued that human rights, like moral norms, are universally valid. It is true that the way moral norms and

40 Queency Gloria Sumeke, "Penggunaan Senjata Kimia dalam Konflik Bersenjata Antar Negara Ditinjau dari Hukum Humaniter Internasional," *Lex Privatum* 5, No. 6 (2017): 136

41 Muhammad Irsan and Mahfud Abdullah, "Tanggung Jawab Kombatan atas Penggunaan Bom Fosfor Putih (White Phosphorus Bomb) dalam Konflik Bersenjata Menurut Hukum Humaniter Internasional (Tinjauan Kasus Israel-Palestina)," *JIM Bidang Hukum Kenegaraan* 2, No. 4 (2018): 821

42 Jurgen Habermas, "Between Facts and Norms: An Author's Reflections," 937

human rights gain validity is similar. As a consequence, some people think of human rights only as moral rights. However, human rights are not merely moral norms. They are structurally embedded in the system of prevailing law and have coercive power.⁴³

C. Implementing Habermas's Theory of Communicative Action in The Concept of Human Rights in Indonesia

Many people think that regulations in Indonesia are good. The thinking contradicts the ineffective method implementation. This symptom concludes that in ontology (a branch of philosophy) terms or the context of justice, the law in Indonesia does defies from having problems. The real problem lies in the epistemology of those regulations. A problematic epistemology of regulations causes a malfunction in legal performance. Thus, unmaximizing law cannot its protection and advance the interests of citizens, upholding their basic rights, and realizing justice among them.⁴⁴ The domestic and international human rights concerns become an eminent discussion of their enforcement. Critical Theory, which initially supports the Enlightenment's emancipatory project, now comes under a lot of criticism. One of the main criticisms emerged after World War II, when moral catastrophes in countries showed that increased rationalization of thought, modernity, and technological innovation did not necessarily bring emancipation to humans.

Human rights violation resolutions must be carried out fairly and in a civilized manner. The punishment shall be appropriate for the perpetrators. It is important as a deterrent and prevention. The theory of communicative action highlights the importance of the public sphere in democracy. According to Habermas, human rights are an integral part of democracy, including in decision-making based on the normatively important will of the majority. Furthermore, democracy must meet certain requirements, such as respecting basic individual rights. Therefore, in his political philosophy, human rights are the premises underlying the democratic process. This process lies in the

43 Jeffrey Flynn, "Habermas on Human Rights: Law, Morality, and Intercultural Dialogue," 432

44 Ferry Eka Sandy, "Aspek Epistemologi Hak Asasi Manusia (HAM) dalam Perspektif Filsafat Hukum," 1

formal conditions for the legal institutionalization of the discursive opinion and will formation, in which popular sovereignty takes its legal form.⁴⁵

Repressive legal and human rights remedies can only be properly exercised through a review of fundamental norms and proper litigation.⁴⁶

Human rights violations in Indonesia can be classified into two types:⁴⁷

1. Human rights abuse
 - a. Unfair treatment
 - b. Discrimination
2. Gross violations of human rights

According to Article 7 of Law Number 26 of 2000 on Human Rights Court, gross violations of human rights are:

- a. Genocide
- b. Crimes against humanity

Therefore, the doctrine of human rights has been widely accepted by individuals and states, as *a moral, political, and legal framework and guideline* for creating a more peaceful society that upholds freedom from oppression of individuals or groups, even states, and fair treatment.⁴⁸

Kontras cites that at least 36 human rights violations are yet to be resolved in Indonesia. In Wamena on Easter in 2003, around 25 villages in the were raided by an unknown mob. They tried to break into the armory at the Headquarters of Kodim 1702/Wamena. As a result, according to Komnas HAM, 9 people were killed and 38 were seriously injured. An *ad hoc* team in Papua consisting of Komnas HAM's members conducted a *pro justitia* investigation into these two cases from December 17, 2003 to July 31, 2004. However, the Attorney General's Office legally rejected Komnas HAM's report on the grounds that it was incomplete.⁴⁹

45 Angel R. Oquendo, "Deliberative Democracy in Habermas and Nino," *Oxford Journal of Legal Studies* 22, No. 2 (2002): 194-195

46 Ikhwan, "Penyelesaian Kasus Pelanggaran HAM pada Masa Rasulullah SAW.," *MIQOT* 35, No. 2 (2011): 351

47 Zainal Abidin Pakpahan, "Mekanisme Penyelesaian Pelanggaran HAM di Indonesia Berdasarkan Undang-Undang No. 26 Tahun 2000 tentang Pengadilan HAM," *Jurnal Ilmiah Advokasi* 5, No. 1 (2017): 110

48 *Ibid.*, 109-110

49 Alifiyah Fitrah Rahmadhani dan Dodi Jaya Wardana, "Penyelesaian Pelanggaran HAM Berat di Indonesia," *UNES Law Review* 6, No. 1 (2023): 2800

Therefore, Habermas's theory can meet the epistemological and ethical needs of society. It encourages thinkers to critically reflect on individual and social beliefs based on social recognition.⁵⁰ The close relationship between human rights and cognitive social science aims to achieve understanding and acceptance or mutual acceptance in society. Due to Nazi aggression, Habermas reflects upon his thoughts and appropriation of the German tradition of thoughts. Mainly, the turmoil of the Frankfurt School during that time. The aspects of *reason*, individual freedom, and justice are beyond theory or discussion. They are elemental to practices shown by implementing and upholding human rights law, domestically and internationally. Habermas' reading of the reality of social science is based on several basic concepts and fundamental assumptions as its ontological foundation. The foundation centers on humans as factual beings bound by space and time. Habermas prioritizes rights over the good and justice in the public sphere over ethics in the private sphere in line with the liberal-democratic tradition that, like Kant, deems human individuals to be "legislative beings".⁵¹ Concepts such as worldly interests and life, system, rationality of argumentation, rationality of thoughts, and colonization are closely related to the life-world.

Habermas's concept of the life-world places communicative action in society. Communicative action occurs in a social context, a context of phenomenological sociology. According to the phenomenological tradition, the life-world is a "horizon" within which individuals seek to attain their goals. The choice of goals will determine which part of the life-world is relevant and the focus. This then influences the "interpretive scheme" the actor uses to reach the goals.⁵² The actor is the government which has the authority to implement it. A stable "life-world", in which social actors operate, depends on a legitimate institutional order, which Habermas calls "society", a component of the life-world. The life-world's two "structural components" are culture (cultural traditions), which shapes actors' interpretation schemes and value

50 Sindung Tjahyadi, "Teori Kritis Jurgen Habermas: Asumsi-Asumsi Dasar Menuju Metodologi Kritik Sosial," *Jurnal Filsafat* 34, No. 2 (2003): 182

51 Charles Rustin, "Habermas, Discourse Ethics, and International Justice," *Alternatives: Global, Local, Political* 24, No. 2 (Apr-June, 1999): 182

52 Hugh Baxter, "System and Life-World in Habermas's "Theory of Communicative Action"," 46

standards.⁵³

Rational consensus underlies relations between interests and science, communication and interaction in social life, and various ontological conditions.⁵⁴ The process of cultural reproduction in Indonesia requires Habermas' time and model for cultural interpretation. This model emphasizes popular legitimacy carried out by institutions and the contribution of individual behavior patterns to the formation of cultural identity. Social integration requires a culture of feeling of moral obligation. This culture is built through intersubjective relations.

Meanwhile, a sense of social belonging is necessary to form social integration. Socialization also includes a culture of interpretative ability, encouraging people to act by the norms. Moreover, socialization plays a role in developing personal interaction capabilities and individual identity.⁵⁵ For instance, public participation is required in lawmaking, such as:

1. *right to be heard*;
2. *right to be considered*; and
3. *right to be explained*.

Public participation plays a vital role in protecting the public interest from potential abuse of power by corporations and political elites. Law Number 6 of 2023 or the *Omnibus Law* arouses controversy among scholars or those directly affected. Habermas relates human rights to the theory of communicative action to better understand how corporations can undermine the democratic process. Habermas mentions they can turn democracy into system-wide "false consciousness".⁵⁶

Article 19 paragraph (2) of the *International Covenant on Civil and Political Rights* says:

"Everyone shall have the right to freedom of expression; this right shall

53 *Ibid.*,47

54 Sindung Tjahyadi, "Teori Kritis Jurgen Habermas: Asumsi-Asumsi Dasar Menuju Metodologi Kritik Sosial,"183

55 Jürgen Habermas, "Theorie des kommunikativen Handelns," *Suhrkamp* 2, Frankfurt A.M. (1988): 244

56 Joseph L. Staats, "Habermas and Democratic Theory: The Threat to Democracy of Unchecked Corporate Power," *Political Research Quarterly* 57, No. 4 (2004): 585

include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice”.

It is in line with the theory of communicative action as part of the philosophical foundation of enforcing human rights. This is because Habermas believes that human rights are a main element of true democracy, rather than being an external constraint on popular sovereignty.⁵⁷

D. Conclusions

Karl Marx introduced the concept of communism in 1848, basing critical theory. The Frankfurt School continued the development of this theory. The first generation of the critical theory, led by Adorno, Horkheimer, and Marcuse, focused on the reification or critique of modern society. Additionally, rationalizing the elimination of identity and value as human nature. Initially, Jürgen Habermas continued the tradition of critical theory pioneered by the previous generation. He is considered a contemporary exponent (second generation) of critical theory. However, the beginning of his critical theory is closely related to the era of Hitler’s fascist regime in Germany with its anti-semitism. In its development, Habermas’s notion has three theoretical concepts:

1. Theory of communicative action;
2. Critique of ideology; and
3. The concept of science is not free of values and interests.

The theory of communicative action emphasizes public participation as the main goal. This participation is driven by egocentric utility calculations. In this utility calculation, the degree of conflict and cooperation varies depending on the interests of a particular individual or group. However, this participation primarily aims to achieve an understanding through society’s cooperative process of interpretation. Therefore, Habermas identifies two subtypes:

1. Open communicative action (public sphere); and
2. Concealed communicative action (private sphere).

⁵⁷ Angel R. Oquendo, “Deliberative Democracy in Habermas and Nino,”189

Habermas believes that human rights have dualism in enforcing this theory as a human rights philosophical foundation: (1) the basis of intersubjective rights in the legal community; and (2) the idea of discursive elaboration of human rights into a comprehensive system of rights. Habermas argues in his article *Between Facts and Norms, starting from a rights system* in a democratic state under the rule of law. According to Habermas, human rights exceed moral rights. Instead, they are “Janus-faced”: law and morality.

Article 19 paragraph (2) of the *International Covenant on Civil and Political Rights*, aligns with the communicative action theory as the philosophical foundation of enforcing human rights. This is because Habermas theorizes that human rights are the main element of true democracy, rather than being an external constraint on popular sovereignty.

BIBLIOGRAPHY

- Abdullah, Mahfud. dan Muhammad Irsan.”Tanggung Jawab Kombatan Atas Penggunaan Bom Fosfor Putih (White Phosphorus Bomb) Dalam Konflik Bersenjata Menurut Hukum Humaniter Internasional (Tinjauan Kasus Israel-Palestina) .” *JIM Bidang Hukum Kenegaraan* 2, No.4, 2018.
- Baroroh, Umdatul. “Filsafat Ilmu Dalam Madzhab Kritis Jurgen Habermas.” *JAQFI:Jurnal Aqidah dan Filsafat Islam* 8, No. 1, 2023.
- Baxter, Hugh. “System and Life-World in Habermas’s “Theory of Communicative Action” .” *Theory and Society* 16. No. 1. January, 1987.
- Bock, Gisela. “Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State .” *The University of Chicago Press* 8, No 3, 1983.
- Bykova, Marina F. “On the Philosophical Relevance of Marx’s Views Today.” *Frontiers of Philosophy in China* 9, No. 3, September, 2014.
- Deliarnov. *Perkembangan Pemikiran Ekonomi*. Jakarta: Raja Grafindo, 2014.
- Engels, Karl Marx & Friedrich. *The Germany Ideology*. New York: International Publisher, 1939.
- Falk, Richard. “Human Rights.” *Foreign Policy* , No. 141, March-April, 2004.
- Flynn, Jeffrey. “Habermas an Human Rights: Law, Morality, and Intercultural Dialogue, Social Theory and Practice.” *Florida State University Department of Philosophy* 29, No. 3, July 2003.
- Fraser, Nancy. “What’s Critical About Critical Theory? The Case of Habermas and Gender.” *Duke University Press*, No 35, 1985: <https://doi.org/10.2307/488202>.

- Gottlieb, Roger S. "The Contemporary Critical Theory of Jürgen Habermas." *Ethics* 91, No.2, January, 1981.
- Habermas, Jürgen. "Between Facts and Norms: An Author's Reflections." *Denver Law Review* 76, No. 4, January 1999.
- Habermas, Jürgen. *Knowledge and Human Interests (Translated by Jeremy Shapiro)*. Massachusetts: Beacon Press, 1972.
- Habermas, Jürgen. "The Concept of Human Dignity and the Realistic Utopia of Human Rights." *Metaphilosophy* 41, No 4, July 2010.
- Herbert, Gary B. "John Locke: Natural Rights and Natural Duties." *Annual Review of Law and Ethics* 4., 1996.
- Ikhwan. "Penyelesaian Kasus Pelanggaran HAM Pada Masa Rasulullah Saw." *MIQOT* 35, No. 2, 2011.
- Iwan. "Menelaah Teori Kritis Jürgen Habermas ." *Jurnal Edueksos* 3, No 2, 2014.
- Kelly, Erin. "Habermas on Moral Justification." *Social Theory and Practice* 26, No. 2, 2000.
- Keriapy, Frets. "Pendidikan Agama Kristen dalam Ruang Publik Virtual; Sebuah Analisis Pemikiran Jürgen Habermas." *Harati Jurnal Pendidikan Kristen* 2 No. 2, 2022.
- Kirom, Syahrul. "Individu Komunikatif Menurut Jürgen Habermas Dalam Perspektif Filsafat Manusia." *Jurnal Yaqzhan* 6, No. 2, Desember 2020.
- LaCapra, Dominik. "Habermas And the Grounding of Critical Theory." *Wiley for Wesleyan University* 16, No. 3, October 1977.
- Locke, John. *Second Treatise of Government*. California: Public Domain, 1704.
- Luthan, Salman. "Dialektika Hukum dan Moral Dalam Perspektif Filsafat Hukum." *Jurnal Hukum IUS QUIA IUSTUM* 9, No. 4, 2012.
- Marzuki, Suparman. "Politik Hukum Hak Asasi Manusia Tentang Kebebasan Beragama Pasca Orde Baru." *Jurnal Hukum Ius Quia Iustum* 26, No. 1, 2019.
- McCarthy, Thomas. *The Critical Theory of Jürgen Habermas*. London: The MIT Press, 1978.
- Miller, Kelly. *Kelly Miller's History of the World War for Human Rights*. California: Public Domain, 1939.
- Oquendo, Angel R. "Deliberative Democracy in Habermas and Nino ." *Oxford Journal of Legal Studies* 22, No. 2, 2002.
- Ortega-Esquerre, César. "Social Pathologies And Ideologies In Light Of Jürgen Habermas: A New Interpretation Of The Thesis Of Colonisation." *Humanities And Social Sciences Communications*, No. 72, 2020: <https://doi.org/10.1057/S41599-020>.
- Pakpahan, Zainal Abidin. "Mekanisme Penyelesaian Pelanggaran HAM di Indonesia Berdasarkan Undang-Undang No. 26 Tahun 2000 Tentang

- Pengadilan HAM.” *Jurna Ilmiah Advokasi* 5, No. 1, 2017.
- Prasetyo, Sindy. “Pelanggaran Hak Asasi Manusia di Indonesia.” *Indigenous Knowledge* 2, No. 1, Juni 2023.
- Qamar, Nurul. *Hak Asasi Manusia dalam Negara Hukum Demokrasi*. Jakarta: Sinar Grafika, 2014.
- Raes, Koen. “Legalisation, Communication And Strategy: A Critique of Habermas’ Approach to Law .” *Journal of Law and Society* 13, No. 2, Summer 1986.
- Salfutra, Reko Dwi. “Hak Asasi Manusia Dalam Perspektif Filsafat Hukum.” *Jurnal Hukum Progresif* 12, No. 2, 2018.
- Sandy, Ferry Eko. “Aspek Epistemologi Hak Asasi Manusia (HAM) Dalam Perspektif Filsafat Hukum.” *Jurnal Dinamika Hukum dan Masyarakat* 5, No. 2, 2022.
- Siregar, Geraki Moratua. “Teori Kritis Habermas dan Kebijakan Merdeka Belajar .” *Jurnal Filsafat Indonesia* 4, No. 2, 2021.
- Smith, Rhona K.M. *Hukum Hak Asasi Manusia*. Yogyakarta: Pusat Studi Hak Asasi Manusia Universitas Islam Indonesia (PUSHAM UII) , 2008.
- Sumeke, Queency Gloria. “Penggunaan Senjata Kimia Dalam Konflik Bersenjata Antar Negara Ditinjau Dari Hukum Humaniter Internasional .” *Lex Privatum* 5, No. 6, 2017.
- Swoell, Thomas. “Karl Marx and The Freedom of The Individual.” *Ethics* 73, No.2, January 1963.
- Wardan, Alifyah Fitrah Rahmadhani dan Dodi Jaya. “Penyelesaian Pelanggaran HAM Berat di Indonesia.” *UNES LAW REVIEW* 6, No. 1, 2023.