Definition and development of human rights and popular sovereignty in Europe

Science and technique of democracy, No. 49

Venice Commission

Council of Europe Publishing

For a full list of other titles in this collection, see the back of the book.

The opinions expressed in this work are the responsibility of the authors and do not necessarily reflect the official policy of the Council of Europe.

The translation of several papers into English was made thanks to the contribution of the Cluster of Excellence.

Cover design and layout: Documents and Publications Production Department (SPDP), Council of Europe

Council of Europe Publishing
F-67075 Strasbourg Cedex
http://book.coe.int

ISBN 978-92-871-7134-4

Printed at the Council of Europe

Contents

The European Union

The national level (examples)

Foreword

by Jan Helgesen[1]

The "UniDem"– University for Democracy – programme was born with a specific aim: that of promoting and stimulating in-depth and mature reflection on issues of law and democracy. These issues are to be approached from several cultural, historical, and geographical angles, in an unbiased spirit of open-mindedness. The Venice Commission of the Council of Europe has strived to inject into these seminars the enriching and unique experience – both scientific and practical – which the Commission has accumulated through the years.

UniDem seminars have covered a range of issues including "The transformation of the nation-state in Europe at the dawn of the 21st century", "European and US constitutionalism", "Local self-government, territorial integrity and protection of minorities", "The protection of fundamental rights by the Constitutional Court", and, more recently, "Cancellation of election results" and "Controlling electoral processes".

None of these topics – neither the more technical ones, nor even the more philosophical ones – represent a sterile, abstract, academic discussion; they all translate into fresh, novel ideas which subsequently enrich the works of the Venice Commission, as well as – we like to believe – those of the scientists, the politicians, the judges, and the students who participate in or become familiar with the proceedings of the seminars.

The topic of the UniDem seminar where the papers included in this publication were presented – the role of popular sovereignty in the definition of human rights – touches upon one of the main areas of work of the Venice Commission. Broadly, the Commission has dealt with human rights in three respects, addressing:

– the national foundations of human rights protection, such as constitutional entrenchment and legislation;

– the national mechanisms of protection of rights guaranteed in the constitution, such as constitutional courts and ordinary courts;

1. Professor, University of Oslo, former President of the Venice Commission, Member of the Venice Commission.

– the international protection of human rights, for example through the Council of Europe system of protection, the role of the European Union, and the identification and development of international standards.

The international dimension of the protection of human rights indeed represents one of the core concerns of the Council of Europe (and of the Venice Commission). It protects the universality of human rights, and transcends the notion of human rights which depend on individuals belonging to specific communities or political groups.

Yet this international dimension now encounters increasing criticism. It is accused of lacking democratic legitimisation, and of imposing an abstract and authoritative definition of human rights upon national authorities. The obligations as defined by the international bodies are of course "minimum" ones: states are free to go beyond this minimum and to provide original solutions to human rights issues provided that they do not go below this minimum. This core content is non-negotiable. This dimension is not the controversial dimension now, however. It is the other way around. If one looks at the case law of the European Court of Human Rights, it is obvious that this core content has been progressively expanded and represents nowadays a sophisticated and very advanced set of human rights obligations. And some states, those which have joined the Council of Europe more recently, have not been part of the entire process of definition.

The Venice Commission, of course, has no position on these controversial issues. Neither does the President of the Venice Commission. The rationale behind the Venice Commission's involvement is that we think these questions need to be discussed. The Venice Commission is based on two pillars, as the full title of the Commission suggests: the European Commission of Democracy through Law. The Venice Commission is on alert whenever and wherever these two basic values of democracy and law are challenged.

As a *prima facie* observation, we see that this dilemma is perceived more acutely in the so-called old democracies in Europe. Then two questions present themselves. We hear claims that the root of the problem is that:

– the process of defining human rights commitments now belongs to an enlarged Europe. The old democracies are not in control any longer;

– the Court has, by extensive interpretation, created a sophisticated system of protection which goes far beyond the intention or acceptance of governments and parliaments in present-day Europe.

This dilemma, however, is not just a concern for the old democracies in Europe. It takes us outside the European continent. Actually this is, for the time being, a global dilemma. In January 2009, the Venice Commission organised, together with the Constitutional Court of South Africa, the first World Conference on Constitutional Justice, in Cape Town. On that occasion, I gave a press conference together with the Honourable Chief Justice Langa. The journalists challenged the

Chief Justice. How and why could the judges interfere with the decisions made by the people, *in casu* the Parliament, *in casu* the ANC? When the TV cameras turned on me, I tried to explain that this dilemma is not a South African issue only. This question is truly a global dilemma, a global challenge.

This call for democratic participation in the definition of human rights is rather evident at the international level. In the global human rights discourse governments in the South claim that they are not bound by international human rights standards, because they did not participate in the drafting of these documents.

Then one must ask: does this call manifest itself at the national level too? Do the people – of Europe today – claim to have a role to play in the definition and development of human rights, or is this task conferred merely on the courts, be they national or international?

Consistent with its aspirations and mandate, the Venice Commission should explore certain fundamental questions, such as: how would an increased democratic radication of human rights at the national and international level benefit the level of their protection?

Even more, we should not be afraid of asking the most radical and challenging question.

The international protection of human rights is a child born out of the two world wars. Already in 1941, the Allied forces stated that the war they were fighting was not only against regimes, it was also against ideologies. The United Nations Charter from 1945 is based on the premise that human rights are too precious, too dangerous to be left to national authorities, whether democratic or autocratic. They must be elevated into an international concern.

More than 60 years have elapsed since then. The world has witnessed the establishment and consolidation of full-fledged democracies. Sadly, the world has also witnessed brutal dictatorial regimes.

If one listens carefully to the most critical voices today, I think the question they wish to convey is this:

When can a democratic society be considered to be mature enough, when can a democratic society be trusted, to provide its own definition of human rights obligations?

Introduction

by Gret Haller[2]

A seminar on the subject of "Human rights and popular sovereignty in Europe" was organised by the Venice Commission jointly with Frankfurt University's Faculty of Law, the "Formation of Normative Orders" Excellence Cluster of the same university and with the Centre of Excellence in the Foundations of European Law and Polity Research of the University of Helsinki. This book reproduces the papers presented at the seminar and contains a number of comments.

The papers presented below on the relationship between human rights and popular sovereignty in Europe shed light on this extensive subject from various perspectives. While the discussion of basic issues provides a clear picture, the presentation of concrete approaches that might be adopted in resolving the issues raised remains necessarily incomplete. In particular, Europe's considerable diversity in terms of national institutionalisation is not adequately represented, although the examples chosen indicate to some extent the range of differences that exist. They provide the most direct starting point for conflicting assessments. However, existing controversies are also indirectly reflected at the supranational level, and this is illustrated in the issues taken up in different papers.

After an overview of the individual papers, a number of contentious issues are summarised below, intertwined with some ideas that were raised during the seminar, which this book revisits. Also included are a number of questions that go beyond the individual papers. Finally, the outlook for the democratic legitimation of fundamental rights and human rights is discussed.[3]

1. The papers

1.1. Basic issues

Klaus Günther reconstructs the definition and further development of human rights as an act of collective self-determination, and traces the evolution of

2. Guest lecturer, Goethe University, Frankfurt-am-Main, Germany, Associate Member of its "Formation of normative orders" Excellence Cluster, Member of the Venice Commission (Switzerland).

3. The term "human rights" is used below to denote the guarantees enshrined in declarations and treaties of international organisations that are based primarily on international law. Rights guaranteed at the national level are referred to as "fundamental rights". This term also denotes the rights guaranteed by the European Union, in accordance with the case law of the European Court of Justice. See Kühling J. (2003), "Grundrechte", Bogdandy A. V. (ed.), *Europäisches Verfassungsrecht. Theoretische und dogmatische*, Grundzüge, Berlin/Heidelberg/New York, pp. 583-630.Springer.

human rights policy from a gubernative to a deliberative approach. He cautions against losing sight of the fact that human rights can only be interpreted and developed through a form of self-determination involving all human beings, and draws attention to shortcomings in this regard by reference to two phenomena: first, the invocation of human rights to justify interventions by a state or group of states in the affairs of another state; and second, an individualised perception of human rights that may culminate in people asserting their human rights against one another in the same way as owners of private property assert their property rights.

In the second part of the paper, a moral justification for human rights is contrasted with an approach based on human rights as subjective rights. The former emphasises the mutual moral obligation to respect other people as subjects of human rights, but creates asymmetry between duty bearers and rights holders. The latter avoids this inasmuch as the rights holder makes active use of his or her right to self-determination.

The third part of the paper describes the relationship between human rights and popular sovereignty. The pitfall of falsely contrasting a liberalist conception of democracy with a perception of democracy as the homogeneous ethos of a particular community can be avoided only if human rights are perceived as enabling conditions for democratic self-government.

Samantha Besson considers whether there is a human right to democracy. She advocates a moral right to democracy as an international human right to democratic participation, drawing a distinction between the moral and the legal right to democracy and assessing the grounds for recognising the two categories. She separates the question of an instrumental or intrinsic relationship between human rights and democracy from the question of the existence and justification of a right to democracy, develops a revised interest-based argument in support of such a right to democratic participation, and discusses alternative arguments in support of that right.

The human right to democratic participation is then differentiated by reference to associated rights, and three main criticisms voiced against this right are discussed. A legal right to democratic participation should be adopted – pursuant to the arguments in the final section – albeit preferably at the national level. This presupposes a strengthening of the *"demoi-cratic"* underpinnings of international lawmaking and action to guarantee the legal right to democracy at the international level as a common interest of states and individuals. Summing up, the author postulates the existence of a universal moral right to democratic participation and of a national legal right to democratic participation.

Besson also contends that the international legal right to democratic participation, which is currently guaranteed by international law, can only be vested with democratic legitimacy if international lawmaking processes and, in particular,

human rights lawmaking processes are rendered both more democratic and more context-sensitive. This cannot be triggered solely by a moral right to democratic participation, for there is much more to democracy than human rights.

Richard Bellamy, in a paper entitled "The democratic constitution", compares two forms of constitutionalism, one legal and the other political. He advocates the latter, and attributes the continuing predominance of the former to the idealisation of the Constitution of the United States by distinguished American legal and political philosophers. The drafting and foundations of the United States Constitution were to some extent pre-democratic, he notes, so the Constitution is of doubtful legitimacy in a democratic age.

The key distinction between legal and political constitutionalism is held to stem from attitudes to the question of equality and the majority principle. Legal constitutionalism is based on the assumption that a consensus can be reached on how to organise society so as to ensure that it is democratic and treats all citizens with equal care and respect. Judicial proceedings are held to be a more appropriate means of bringing about this consensus than the democratic process. On the other hand, democratic constitutionalism presupposes the existence of irremediable dissent on the aforementioned question and calls for the settlement of differences of opinion on the matter through the democratic process. This not only leads to more legitimate outcomes but is also more effective than the judicial process.

The greater legitimacy of the democratic process is inferred, *inter alia* from the "one person, one vote" principle, which is inapplicable in judicial proceedings. This process tends to be more effective because, for example, people with different opinions are given the opportunity to articulate their views, and the majority has to consider the arguments of the minority. In parliament, the minority is not deemed to be "wrong" like the party which loses a court case. Both winners and losers preserve their dignity in circumstances of mutual respect. Drawing on a comparison between the United Kingdom and the United States with respect to the decision on pregnancy termination, the author explains how the democratic process can help the losing minority reconcile itself with the decision ultimately taken.

Sergio Dellavalle considers two approaches to the interpretation of human rights, an approach "from above" and an approach "from the bottom up". In the first part of his paper, he outlines ancient republicanism and its shortcomings, mentioning, for example, the difficulty of determining the content of rights without the direct involvement of the actual rights holders, and the danger that arises when virtually unsupervised bodies appoint themselves "guardians" of a putative ethical truth that is allegedly embedded in society.

He then describes the paving of the way towards a "bottom-up" approach to human rights, but draws attention to two significant problems inherent in this approach to modern philosophy: first, the exclusive focus on human rights

protection within the borders of a single nation, which reduces them to mere citizens' rights, thereby depriving them of a supranational dimension; second, the danger of projecting individual rights into the sphere of unrestricted popular sovereignty, which can easily degenerate into tyranny.

The solution to these problems lies, on the one hand, in an appropriate separation of powers and, on the other, in a multi-level approach to public law, including cosmopolitan public law, that is grounded in the premises of modern individualism. The final part of the paper, basing itself on these Kantian concepts, but moving beyond Immanuel Kant's paradigmatic horizon, proposes a new approach based on the communicative understanding of social interaction.

Hauke Brunkhorst sets out his paper on democracy in the global society in the form of seven theories. The first locates the paradigm of the democratic rule of law up to the present day in the modern nation-state, arguing that the universalistic and cosmopolitan ambitions of the great constitutional revolutions of the 18th century have been sacrificed to the formation of nation-states. According to the second theory, modern law links the functional efficiency now attributed to the state with the normative force of democratic constitutions, with the result that the fight for rights is now conducted within the law and revolutions have become legal revolutions. It follows that the Western legal tradition is both repressive and emancipatory.

However, this applies only to European nation-states and not to the colonised world, which, according to the third theory, remained bereft of law. In this connection, a major change occurred in the second half of the 20th century when democratisation became universal and human rights became global civil rights. According to the fourth theory, human rights violations, lack of rights, and social inequality also became a problem for people in the West, wherever they occurred. However, the global constitutionalisation that then began did not provide a solution to the problem but – according to the fifth theory – created a new problem of undemocratic world domination, if understood only in the liberal sense. Global law can only be used to combat undemocratic rule if it preserves some remnant of normative force.

In this connection, the sixth theory paints a gloomy picture, since the environmentally blind autonomisation of markets is leading to crises in economic and social systems, environmentally blind autonomisation of executive power is leading to crises of legitimacy, and the growing independence of religious value systems is leading to crises of motivation. The seventh theory provides a glimmer of hope: although the 20th-century legal revolution was successful, it remains incomplete. A democratic legal formalism that involves all subjects of law in the generation of law seems imperative. Only democratically produced law can free people from informal governance.

1.2. The Council of Europe

Jarna Petman discusses the tension between sovereign will and international standards, basing her paper on the assumption that human rights protection and the promotion of popular sovereignty are inherently incompatible. The European Court of Human Rights rapidly became aware of the inherent tension between respect for popular sovereignty and the safeguarding of rights, since every society must limit collective power in order to respect individual differences.

What is ultimately called a human right is the product of the contextual balancing of different priorities and alternative notions of what constitutes a good life. Rights are accordingly the product of a political community. The paradox for the Court is that although it has defined pluralism, tolerance, and openness as the core components of a democratic society, it has to be prepared to subordinate these values to the protection of other more important "European" values. As a result, however, democracy is perceived merely as an instrument for achieving superior values.

But there is more than one concept of democracy. When ruling on different concepts, the Court necessarily becomes a political player which must side with some groups against other groups and values. In so doing, the Court may not assume that what some groups – perhaps even the majority – think about a society and what constitutes the good life must be binding on everyone. Finally, the author points out that the crucial question in the area of conflict between the sovereign will and international standards is not whether a decision must be made but who is empowered to take the decision.

Inge Lorange Backer comments on the practice of the Court. On the basis of an analysis of four cases before the Court, he demonstrates why the expansion of its case law constitutes a threat to the European human rights system, to legal certainty in member states, and to both national sovereignty and democracy.

The author argues that the current practices of the Court are not sustainable in the long run, either with respect to national and democratic sovereignty or to legal certainty, let alone the Court's actual function as a last resort against violations of fundamental human rights. In order to rectify the situation, the Court should both reconsider its traditional canons of interpretation and take a more detached view of applications alleging violations that do not affect the core of rights under the European Convention on Human Rights (ECHR).

The tension between human rights and popular sovereignty is discussed from the point of view of the European Commission for Democracy through Law (the "Venice Commission") by Jan Helgesen, who was President of the Commission until the end of 2009. He draws attention in particular to the balance between democracy and the rule of law as an essential precondition for the development of a living democracy.

1.3. The European Union

Catherine Schneider discusses the competence of the European Union (EU) to lay down human rights standards. Noting at the outset that there has never been a formal transfer of human rights sovereignty to the EU, she shows how economic and political integration has nevertheless triggered a process of further development of fundamental rights. However, this occurred under the heading of "integration" and not under that of the transfer of sovereignty to the EU by member states.

In the area of human rights, international law raises the question of the consistency of national legal systems with international treaties or the differences among them. The evolution of fundamental rights in the EU transcends this question and develops new linkages characterised as "normative integration". This is based on the co-existence of a set of European human rights linked to the establishment of the European Community and national human rights systems in their entirety.

This development is reviewed by means of numerous examples, and the omnipresence of disputes concerning jurisdiction between member states and the EU is also a central theme. A purely economic approach to human rights at the inception of the European Community was replaced by a more autonomous approach. As a result of the Treaty of Amsterdam, respect for fundamental rights was promoted to the status of "founding principles of the Community system". Commenting on the incorporation of the Charter of Fundamental Rights of the European Union into positive law through the entry into force of the Treaty of Lisbon, the author stresses that it confirms these rights in a modern form that is open to further development. Another interesting aspect is the Charter's ability to speed up the further development of human rights through national constitutional practice and legislation.

In his commentary on Catherine Schneider's contribution, Christoph Möllers explains, in particular, why fundamental rights could not have been important in the early days of the European Community, noting that they initially owed their development to a strategy for legitimising the expansionism of the European Court of Justice (ECJ). The Charter of Fundamental Rights is, in his view, particularly important in the context of interference with fundamental rights resulting from European sovereign decisions. Finally, he draws attention to the EU's institutionalised fundamental rights policy. In this field, questions may be raised not just regarding competences but also, with particular urgency, regarding the very legitimacy of European action if charges of paternalism are to be avoided.

Armin von Bogdandy and Jochen von Bernstorff then describe the position of the European Union Agency for Fundamental Rights in the European human rights architecture and its further development through the Treaty of Lisbon. They first review relevant developments in the EU and then describe the work and mandate of the Agency as a specialised supranational administrative body for the

promotion of fundamental rights. In the last part of their paper, they analyse the Agency's anticipated role in the constitutional structure of fundamental rights protection in the EU.

1.4. The national level (examples)

Kaarlo Tuori describes the Finnish model as a combination of theoretical *ex ante* and concrete *ex post* review, which is consistent with the Northern European phenomenon of "New Constitutionalism". Before the revision of its constitution in 2000, Finland relied exclusively on *ex ante* reviews of the constitutionality of bills by the parliament's Constitutional Law Committee, a quasi-judicial body the decisions of which can only be overridden by parliament in special proceedings through a "statute of exception". As in other states with a strong tradition of the supremacy of the parliamentary legislature, the ECJ's power to review laws in the light of EU law has also contributed in Finland to the introduction of an additional *ex post* review, but only in specific cases.

Finland's Constitutional Law Committee continues to play a key role in reviewing the constitutionality of laws. The judiciary has not acquired the dominant role of the American and German models, which has been attacked by critics, but only exercises a complementary function. A judicial *ex post* review can be conducted only if there is evidence of a conflict with the Constitution of Finland. Since the constitutional amendment there has been an increase in the number of references to constitutional provisions on fundamental rights in government bills submitted to the Parliament of Finland, which reflects a heightened awareness of basic rights in legal and political culture.

Finally, the author points out that, with the introduction of the criterion of an evident conflict with the constitution, the Finnish and Swedish constitutions have enshrined a plea for judicial restraint. Primacy is clearly given to interpretative means in order to avoid incompatibility with the constitution. This links the Finnish model to such examples of the "new Commonwealth model of constitutionalism"[4] as the New Zealand Bill of Rights and the British Human Rights Act of 1998, which are also premised on the primacy of interpretative tools.

Richard Clayton bases his comments on the situation in the United Kingdom and defends the further development of basic rights by the courts with two arguments. First, although the courts can defeat legislative intent in the light of the ECHR under the Human Rights Act 1998 either by a strained statutory interpretation or by making a declaration of incompatibility, parliament retains the last word. Second, the politically dispossessed are better protected by court decisions on their human rights than by democratic decisions on those rights since they have no stake in the political process.

4. Gardbaum S. (2001), 'The new Commonwealth model of constitutionalism', *American Journal of Comparative Law* Vol. 49, No. 4.

Peter Paczolay justifies the competence of courts – for instance the Hungarian Constitutional Court – to define and develop human rights by reference to the United States tradition. The legitimacy of judicial review may be inferred from the fact that, compared with political opinion-forming processes and the resulting majority decisions, a court is an anti-majoritarian institution and can therefore contribute to a higher level of human rights protection than the political process. Human rights have to be "withdrawn from the vicissitudes of political controversy".

A review of historical development highlights the continuous shift of weight in favour of the courts. Judicial review in the United States was perceived from the outset as the tension between higher law and popular sovereignty: popular sovereignty embodied will and fundamental rights the limits imposed on that will. Hans Kelsen, the father of the European tradition, acknowledged the competence of courts to review the constitutionality of laws but only as "negative legislators". However, the author notes that this restriction on the role of constitutional courts has now also been set aside in Europe.

The decisive breakthrough came with a publication by Robert Dahl in 1957 that paved the way for a dramatically new approach to the political role of judges.[5] Judges exercise "quasi-guardianship" over the democratic process, according to Dahl. However, judicial review does not limit popular will but substitutes it as a forerunner of future political decisions. Judges decide instead of politicians. As positive examples, the author mentions the decisions on racial segregation and the legalisation of abortion in the United States, and the decisions on the death penalty, data protection, and same-sex partnerships in Hungary.

In her comments on Peter Paczolay's paper, Regina Kreide discusses the function of judicial review from a normative point of view. She asks whether the replacement of popular sovereignty by judges is not tantamount to mistrust in democracy. If judges act as legislators, their acts may correct a somehow "defective" democratic culture, but the referral of cases to parliament is preferable. If a "top-down learning process" is ordered, then democracy can degenerate into a "meaningless argy-bargy without real decision competences". Finally, with reference to Ingeborg Maus and Kant, the author refers to the intrinsic value of popular sovereignty.

2. Contentious issues

Various basic positions on a number of themes are compared below. The adherents of these positions are not necessarily grouped together in the same way for each issue. Accordingly, when mention is made of one or the other viewpoint, its proponents may vary according to the subject concerned.

5. Dahl R. A. (1957), "Decision-making in a democracy: The Supreme Court as a national policy-maker", The Journal of Public Law 6, pp. 279-95.

(1) First of all, a distinction needs to be made between the positivisation of human rights, the procedure whereby they are transferred from a pre-legal state to applicable law, and the application of such law to concrete individual cases. In practical terms, it is necessary to differentiate between two questions. "Who establishes the content of rights?" is not the same as "Who decides when and to what extent rights have been violated?" Human rights are initially set out in declarations or international treaties, and fundamental rights are usually enshrined in constitutions. National constitutions and legislation establish the scope of rights and specify their limits.

In democracies, the incorporation of fundamental rights into positive law is the responsibility of the parliamentary bodies elected by the sovereign people. In some cases referenda, in which decisions of parliamentary bodies require approval, have been institutionalised. Courts can also be empowered to intervene in the positivisation process either via a general request to rule on the constitutionality of a law or in response to one arising from specific proceedings. On the one hand, constitutional courts can be authorised to set laws aside when they breach fundamental rights or human rights. Their powers can also extend to reviewing constitutional provisions to ensure their compliance with particularly high-ranking constitutional provisions. On the other hand, judges may, when interpreting the applicability of rights to an individual case, go so far as to make law themselves – by means of extension or limitation.

(2) The application to an individual case of human and fundamental rights enshrined in declarations, international treaties, constitutions, and legislation does not give rise to controversy in terms of institutional jurisdiction: no one questions the right of access in the event of alleged violations of fundamental and human rights to a judicial body that interprets the rights in the individual case. States are also required under international law to set up such bodies.

The discussion becomes contentious when judges create law themselves. At the supranational level, this is relatively normal since (with the exception of the European Parliament) democratically elected institutions do not exist or (as in the case of the Council of Europe Parliamentary Assembly) they have no power to transform human rights into positive law. At the national level, too, a final court of appeal may have been empowered to make positive law by virtue of the organisational approach to the separation of powers. The separation of powers varies from one European state to another owing to their different constitutional traditions. Depending on historical experience, the executive, the legislature, or the judiciary may be perceived as particularly threatening, so that powers are allocated in a manner that takes account of these fears.[6]

6. Möllers C. (2008), *Die drei Gewalten. Legitimation der Gewaltengliederung in Verfassungsstaat, Europäischer Integration und Internationalisierung*, Weilerswist, p. 20, Velbrück Wissenschaft.

2.1. Genesis of rights

(3) The establishment of human rights constitutes a starting point for divergent views. The question is whether the act of positivisation consists in recognising predefined rights by means of a joint declaration or whether the rights are only constituted through the act of positivisation. There are also different views on the status of persons entitled to rights. If it is assumed that the rights are granted to individuals and passively received by them, their status is simply that of addressees of those rights. On the other hand, if the rights are held to stem from the self-determination of those entitled to them, then they come into being through the democratic balancing process. The rights holders are then not only addressees but also authors of the rights in question.

The approach to human rights based on the self-determination of rights holders is derived from the second of these views. The rights are perceived as strictly horizontal inasmuch as they no longer require a higher authority. This approach is delimited by another idea that has acquired some importance historically: the assumption that human beings granted each other mutual rights but only at a specific original point in time, after which their interpretation was left to a higher authority. Individuals thus enter into a vertical relationship with the bodies that interpret their rights. As a result, the strict horizontality is lost.

A coherent approach to human rights that derives its origin from the self-determination of those entitled to them thus demands that they themselves, "together with other individuals, determine and assert their freedoms as rights – and do so not only once but again and again" (Klaus Günther). The process of self-determination is understood as the interplay of institutionalised parliamentary bodies with the formation of political opinion in informal channels of political communication, which precedes the institutional decision.[7]

(4) Opinions differ on the relationship between human rights and popular sovereignty. Alongside two mutually exclusive basic positions, there is a third position which mediates between the two. Historically, sovereignty was vested in the ruler, who could exercise it absolutely and autocratically. In the revolutions of the late 18th century, sovereignty was claimed by the peoples of individual nation-states and was transferred to them. Both basic positions assume that sovereignty in its absolute and autocratic form has been transferred to the people.

The less commonly held basic position recognises the primacy of democracy over human rights and is thus prepared to accept that human rights may be limited by democratic decisions. For instance, the human rights of minorities may be sacrificed to a populist majority democracy. This is the type of situation that advocates of the more commonly held basic position which recognises the primacy of human rights over democracy wish to avoid. Rights are assigned the

7. Habermas J. (1992), *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*, Frankfurt, p. 334 Suhrkamp.

task of limiting popular sovereignty, which is why democratic decisions are ultimately subjected to judicial review.

The intermediate position is based neither on the primacy of democracy or human rights but regards human rights and popular sovereignty as equally fundamental. On the one hand, human rights are a basic prerequisite for the democratic process of drawing up a constitution, because those involved in the process must have recognised each other's free and equal participation in advance. On the other hand, the democratic process is a prerequisite for the genesis of human rights, because it is through this process that rights holders jointly determine the content and scope of the rights concerned. The concept of equal primacy differs from the two basic positions in that it focuses on a form of sovereignty which shed its primal absolute form when it passed to the people. The earlier claim to absoluteness is replaced by the requirement of democratic deliberation, but this is subject to extensive formal conditions.[8] The protection of minorities is safeguarded by a proper constitution-drafting procedure, so that such protection can be regarded as inherent in popular sovereignty.

2.2. Power to transform into positive law

(5) The practical consequence that ensues is the controversy surrounding the institutional issue of whether the transformation of human rights into positive law should ultimately be made via democratically elected bodies or by courts, although a distinction needs to be made between the national level and the level above individual nations. At the national level, the discussion focuses in practical terms on which entity is best equipped to provide effective protection for human rights, including those of minority groups. While one side considers the democratic decision-making process to be more appropriate, the other disputes the effectiveness of the political process because the politically dispossessed have no stake in it (Richard Clayton).

The different approaches to the assessment of jurisdiction may be illustrated by reference to decisions on termination of pregnancy. The *Roe v. Wade* (1973) ruling of the United States Supreme Court is mentioned as a positive example of judges rather than politicians taking a decision, thereby serving as precursors of future political decisions and extending the protection of human rights (Peter Paczolay). That decision is compared with the discussion of the Medical Termination of Pregnancy Bill by the British House of Commons. This example shows that the parliamentary debate led opponents, in particular, to acknowledge the respectful hearing given to their views, which went some way towards reconciling the defeated minority to the decision. By contrast, such reconciliation could not be achieved in the case of the US Supreme Court (Richard Bellamy). A third position advises against citing the example of abortion in this discussion because, in contrast to most *travaux préparatoires*, it is dominated by moral and ethical considerations (Kaarlo Tuori).

8. Ibid., 349 ff.

(6) The example of Finland is interesting in this connection because it adopts a middle-of-the-road position in which a number of the aforementioned elements are combined. On the question of whether a law complies with fundamental and human rights, it differentiates in two ways, on the one hand between an *ex ante* and an *ex post* review and, on the other, between a general review and an individual case review. As far as the general review of laws is concerned, the parliament's legislative supremacy has been preserved by transferring power to review constitutionality to its Constitutional Law Committee, a quasi-judicial body that issues its assessments *ex ante*. A review procedure organised in this way enriches the process of democratic "negotiation" and leaves ultimate responsibility with the democratically elected body.

In concrete cases, however, Finland's courts are allowed to halt the enforcement of laws *ex post* if their enforcement is incompatible with the Constitution of Finland. However, enforcement may be refused only if there is clear evidence of such a conflict. This approach provides a promising starting point for addressing many of the contentious issues mentioned here, at least as far as the national level is concerned. The solution is noteworthy because ultimate responsibility for the enactment of abstract general rules is left with the parliament. Nonetheless, this approach enables violations of fundamental rights and human rights to be avoided in concrete individual cases.

(7) Irrespective of the institutional diversity that characterises the national level, the transformation of human rights into positive law and the creation of legal remedies at the international level have generated a tradition of legal development by judicial bodies that are unaccountable to any democratically elected bodies, at least not in the manner customarily found at the national level. The Council of Europe Parliamentary Assembly is made up of delegations from national parliaments and hence possesses democratic legitimacy, but when it comes to shaping human rights its sole option consists in submitting proposals to the Committee of Ministers. In the context of the Council of Europe, it is the task of the Court to decide in individual cases (by interpreting the ECHR) how far the national legislature's sovereign will can extend (Jarna Petman).

This is the starting point for a contentious debate concerning international jurisdiction, especially with respect to the Court. In particular, the question arises as to whether the Court's decisions on the development of human rights might go further than the standards that would be acceptable to national parliaments. If this question is answered in the affirmative, it follows that the Court should be required to exercise restraint in its judgments (Inge Lorange Backer).

At the EU level, parallels to the institutional organisation of the Council of Europe are to be found primarily in the work of the ECJ, which, following the example of the Court, is also contributing to the development of fundamental rights and will do so institutionally in the future under the Treaty of Lisbon. However, the European Parliament also makes pronouncements on

the development of fundamental rights when it works on legislation that has a bearing on such rights, and it played a key role in the drafting of the Charter of Fundamental Rights. A key factor, however, is the marked tension between the EU and its member states, which view fundamental rights as part of their constitutional order and reject any interference in this regard (Catherine Schneider). However, the EU's lack of general competence to act in the area of fundamental rights cannot be invoked to rule out all forms of competence (Catherine Schneider). After all, the EU differs from an international organisation like the Council of Europe in that it exercises public powers itself and therefore needs to formulate accompanying fundamental rights policies (Armin von Bogdandy/ Jochen von Bernstorff).

2.3. Multi-level aspects

(8) Additional questions arise when institutions at the national level and institutions at a higher level are considered jointly. Those who hold the view that democracy has primacy over human rights at the national level are critical of any international judicial review of national enactments. Those who assume, on the other hand, that human rights have primacy over democracy, and hence advocate judicial review of decisions by national parliamentary bodies that affect human rights, find an international judicial review procedure to be valid. The lack of democratic institutions at the international level is not perceived as a shortcoming, at least not as far as human rights are concerned. According to this view, the highly developed review of such rights in individual cases by European courts, a process that can also contribute to general development and hence to incorporation into positive law, also resonates at the national level because, given the pre-eminence of judicial proceedings in the international sphere, a procedure for national judicial review of decisions taken by democratically elected bodies seems equally justified.

The diametrically opposed assessments by advocates of the two basic positions of the relationship between human rights and popular sovereignty should not, however, obscure the fact that the international transformation of human rights into positive law without the involvement of constitutional or ordinary legislators must also seem problematic to advocates of the intermediate position of equal primacy. The equal primacy of human rights and popular sovereignty is obviously not possible in the context of international organisations that are based solely on international law. They are dependent on the transformation of rights into positive law through diplomatic negotiations. Although the ratification of negotiated treaties by the "native" *demos*[9] renders them formally valid, it cannot

9. Niesen P. (2008), "Deliberation ohne Demokratie? Zur Konstruktion von Legitimität jenseits des Nationalstaates", Kreide R. and Niederberger A. (eds), *Transnationale Verrechtlichung. Nationale Demokratien im Kontext globaler Politik*, Frankfurt/New York, p. 256, Campus p. 248, with reference to Habermas J. (1992), *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*, Frankfurt am Main, Suhrkamp, p. 235.

be a substitute for the democratic process of deliberation on the content and development of the rights concerned.

Discussing ways to democratise transnational lawmaking addresses this problem and makes it a central theme through the concept of global constitutionalisation. However, a global perspective of undemocratic constitutionalisation also arises in connection with human rights and is perceived to be problematic. A possible, albeit modest, alternative consists in the slow further development of the successful but incomplete revolutions of the 20th century, in the struggle for rights within the law. Constitutionally guaranteed rights that were previously granted only to privileged groups can be claimed in this struggle by those previously excluded: slaves, women, or indigenous populations (Hauke Brunkhorst). Success in the struggle depends, however, on ensuring that the law still has some remaining standard-setting force.

(9) The multi-level analysis is not limited to institutional aspects but leads back to the issue of establishment of rights. Opinions differ as to how the universality of such rights can be guaranteed. If universal validity is inferred from the fact that the rights are predefined and hence ultimately non-negotiable, the primacy of human rights over democracy is strengthened, with the aforementioned consequences for the institutional allocation of powers, including at the national level.

Another approach postulates the strengthening of the individual's hitherto underdeveloped awareness of belonging both to a national polity and to a global community of all human beings in a world that is becoming increasingly integrated (Sergio Dellavalle). If this position is adopted, human rights are always implicitly – or possibly even explicitly – discussed in the context of negotiations concerning fundamental rights at the national level. Deliberative processes at the national level are thus assigned an additional function in that they also indirectly contribute to the strengthening of the democratic legitimacy of universally valid human rights.

Thus, both positions develop arguments from multi-level analysis in support of their view concerning the institutional allocation of powers at the national level. The first position is in favour of the primacy of the courts over democratically elected bodies at the national level, so that the national situation tends to resemble that prevailing at the international level. The second position infers from multi-level analysis the need to strengthen the deliberative process at the national level because it is only at that level that a final decision can be taken by democratic bodies. The discussion of the legal institutionalisation of a human right to democracy, which currently appears sensible only at the national level, must also be placed in this context (Samantha Besson).

2.4. The public political sphere and individualisation

(10) The question of the importance of the public political sphere at the national level arises at this point. In another context, it leads back to the controversy

mentioned earlier concerning the establishment of rights. The public political sphere plays a less important role for advocates of the approach to human rights that regards their universality as ultimately assured, because they are partly predefined and hence non-negotiable, than for advocates of the approach that infers the genesis of rights from the self-determination of rights holders.

The importance of the public political sphere also has a normative component. The organisation of state institutions and the allocation of responsibilities in the context of the separation of powers involve not only practical arrangements to meet specific social demands but also a normative dimension. Advocates of the democratic negotiation process accordingly point to the public learning process which is thus triggered. If this is absent, the responsibility of politicians and individual citizens for the content of human rights declines. Court decisions cannot, however, according to the proponents of this view, replace the learning process (Regina Kreide).

This question is fundamental and forms the basis for a number of the controversies already mentioned. This basis is more emotional than legal. It involves a different assessment of the risks facing fundamental rights and human rights or, more broadly, the culture of human rights. According to one approach, the most serious threat to rights lies in possible violations in concrete individual cases, while the proponents of the other approach are most fearful of a weakening of rights due to the erosion of the social consensus concerning the meaning and development of fundamental rights and human rights. The first approach tends to give such high priority to ensuring the exercise of human rights in concrete individual cases – protected by the courts' power to transform such rights into positive law in a final judgment – that the route leading to this transformation appears to be of secondary importance. By contrast, those who favour the other approach consider that the guaranteed exercise of rights in concrete individual cases is at risk if the path of democratic negotiation leading eventually to their incorporation into positive law by democratic bodies has not been followed. According to the second approach, the basic precondition for this guarantee lies in the social consensus on the shaping of human rights. Its advocates believe that even a partial erosion of this consensus cannot be offset through court judgments – that is, through the protection of rights in concrete individual cases.

(11) A further question arises under the heading of individualisation, which refers to a development in which fundamental rights and human rights are perceived to be legitimate only to the extent that they enable individuals to improve their personal situation. This can lead to people asserting their human rights against one another in the same way as owners of private property assert their property rights (Klaus Günther). This situation is typical of multi-polar disputes about fundamental rights that involve not only the state and a particular individual but also the rights of several holders of fundamental rights. If fundamental rights and human rights are negotiated in democratic processes by those entitled to them, the preliminary question to be resolved is the content of such rights. This

is followed by the more demanding exercise of fleshing them out and, in particular, establishing their limits. Only then will one person's rights become compatible with those of another person or of all other people.[10]

In an approach based on predefined or at least partially predefined rights that are merely recognised in a process of negotiation, such individualisation may appear consistent, but it must be perceived as problematic by those who support the approach to human rights that locates their genesis in the negotiating process conducted by rights holders. After all, if judicial proceedings involve competing claims by different people which are derived from fundamental rights and human rights, but are mutually exclusive, negotiations concerning the limits applicable to rights are removed from the democratic process.[11]

(12) Here, too, the issue is one of public perception, the development of which may lead to individualisation becoming a self-strengthening process because of two complementary phenomena: on the one hand, devaluation of procedures for the democratic negotiation of fundamental rights and human rights, combined with increasing unpopularity of the political institutions responsible; and on the other, the upgrading and increasing popularity of judicial proceedings instituted to assert and enforce rights in individual cases. The greater the loss of respect for political institutions, the greater the increase in esteem for the highest courts.[12] When these two elements are combined, the public impression that human rights are "granted by the judge" to those entitled to them may gain ground, calling into question a basic aspect of the derivation and justification of such rights.

The significance of issues relating to the public sphere and individualisation becomes particularly clear in the multi-level analysis. As there can be no deliberative negotiating and decision-making process by democratically elected bodies in international organisations that are based primarily on international law, expectations in this regard also focus on national negotiating processes, on the one hand, and on global civil society deliberations, on the other (Sergio Dellavalle). However, it should be noted that such deliberations cannot be readily understood as a step towards democratisation of the global community.[13]

10. Haller G. (2010), "Individualisierung der Menschenrechte? Die kollektive – demokratische – Legitimation der Menschenrechte und ihre Bedeutung für Integrationsprozesse, illustriert durch das Beispiel des State-Building in Bosnien und Herzegowina", *Zeitschrift für Rechtssoziologie* Vol. 31, Issue 1, pp. 123-44: 129.
11. Möllers C. (2008), *Die drei Gewalten. Legitimation der Gewaltengliederung in Verfassungsstaat, Europäischer Integration und Internationalisierung*, Weilerswist, 143 ff, Velbrück Wissenschaft.
12. Maus I. (1999), "Menschenrechte als Ermächtigungsnormen internationaler Politik oder: der zerstörte Zusammenhang von Menschenrechten und Demokratie", Brunkhorst H. R., Köhler W. and Lutz-Bachmann M. (eds), *Recht auf Menschenrechte. Menschenrechte, Demokratie und internationale Politik,* Frankfurt am Main, pp. 276-92: 280, Suhrkamp.
13. Niesen P. (2008), "Deliberation ohne Demokratie? Zur Konstruktion von Legitimität jenseits des Nationalstaates", Kreide R. and Niederberger A. (eds), *Transnationale Verrechtlichung. Nationale Demokratien im Kontext globaler Politik*, Frankfurt/New York, pp. 240-59: 241, Campus.

3. The democratic legitimacy of fundamental rights and human rights – future prospects

According to Günter Frankenburg, "There are paradoxes in the twin existence of human rights and the nation-state that are passed over in silence by parables on the evolution of the human rights idea and also by doctrines of sovereignty".[14] This sentence was written before the end of the Cold War, but nothing has changed regarding the failure to mention such paradoxes,[15] although it is basically the democratic legitimacy of fundamental rights and human rights which is at stake. This concept doubtless merits closer analysis because it can also be placed in a historical context.

(1) The first time that human rights were given democratic legitimacy was in the late 18th century, when rights deemed to be universal were incorporated into positive law with the formation of nation-states. Such incorporation was possible at the time only at the level of nation-states, which meant that their universality had to be relinquished. An exception was the Declaration of the Rights of Man and of the Citizen in France (1789), which sought to retain universality despite its incorporation into law at the national level. In practice, however, universal human rights became national civil rights in France too. Democratic legitimacy could ultimately be achieved only at the expense of universality.

As a result of the incorporation of rights into positive law in the context of the United Nations and the Council of Europe, part of the price paid was "refunded" in the second half of the 20th century. Human rights that were not only universally valid but also recognised as universally positive law were placed alongside fundamental rights, albeit here again with a partial abandonment of democratic legitimacy. No attempt to achieve such legitimacy was possible at the level of international law owing to the absence of democratically elected institutions with decision-making powers.[16] Universality could ultimately be achieved only at the expense of democratic legitimacy.

The tension between universality and democratic legitimacy has been a feature of fundamental rights and human rights since they were first transformed into positive law, and it continues to set a framework within which individual nation-states position themselves. The historical context plays a major role in that regard for each state. In particular, encroachments on fundamental rights and the lessons learned therefrom are crucial when it comes to shaping rights at the national level.[17] In addition, states espouse different legal and constitutional

14. Frankenberg G. (1988), "Menschenrechte im Nationalstaat. Das Beispiel: Schutz vor politischer Verfolgung", Ulrich K. and Kriele M. (eds), Menschen- und Bürgerrechte, Wiesbaden/Stuttgart, pp. 81-96: 82, Steiner.
15. Möllers C. (2008), *Die drei Gewalten. Legitimation der Gewaltengliederung in Verfassungsstaat, Europäischer Integration und Internationalisierung*, Weilerswist, p. 209, Velbrück Wissenschaft.
16. Ley I. (2009a), "Kant versus Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Issue 2, pp. 317-45: 339.
17. See note 15, p. 20.

philosophies. As a result of their different historical experiences, states attach varying importance to the democratic legitimation not only of fundamental rights but also of human rights.

(2) The historically engendered paradox between the universality of human rights and popular sovereignty should no longer be passed over in silence, especially in Europe, where national, international, and supranational provisions for human rights protection are so intertwined that reference has been made to an "association of constitutional courts" *(Verfassungsgerichtsverbund*).[18] Supranational judicial protection of human rights has developed further in the continent of Europe than anywhere else. However, the raising of such protection to the supranational level could be achieved only at the expense of the democratic legitimacy of the rights concerned. "Judicialisation" could not be combined with the simultaneous democratic legitimation of rights at that level. The result was the promotion of individualisation, which conflicts with democratic legitimacy at the national level because there is a danger that individual "enforcement by legal action" will largely supplant democratic negotiation in the public perception.

If the time factor is also taken into consideration, it might further be argued that judicialisation has run ahead of democratic legitimation in Europe. At the level of nation-states, the drafting of the constitution always preceded the introduction of judicial remedies. The adoption of a constitution meant that fundamental rights were already democratically legitimised provided that the possibility of bringing a legal action to enforce them was introduced, a procedure that could easily take place concurrently, especially in the younger democracies. At the international level, arrangements for filing complaints were created without a constitution being drafted. If one assumes that judicialisation ran ahead of democratic legitimation, it follows that the European human rights culture expects democratic legitimation to catch up in normative terms. The question of which organisation is best equipped to make a contribution in this regard calls for careful consideration.

(3) The Council of Europe, as the only pan-European organisation, can claim credit for inventing the international judicial protection of human rights, for continuing to develop it, and for making it available to the inhabitants of its 47 member states. It is now impossible to imagine European legal culture without the protective mechanism provided by the ECHR. That mechanism was a revolutionary creation and has gained global recognition, serving as a model for other regions.[19]

By dint of its success, however, the mechanism has contributed to the phenomenon of individualisation. At the same time, it is an "accidental secondary effect of a good intention, namely the establishment of procedures for filing individual

18. Vosskuhle A. (2010), "Der europäische Verfassungsgerichtsverbund", *Neue Zeitschrift für Verwaltungsrecht*, Issue 1, pp. 1-8: 1.
19. Ibid., p. 2.

complaints to courts" (Klaus Günther), in which human rights can only be incorporated into positive law through a process of diplomatic negotiation.

Europe – the pan-European Europe of the Council of Europe member states – needs the ECHR protective mechanism, and it is to be hoped that its effectiveness will increase. An inseparable concomitant of this hope is the "ineluctable" recognition that the increase will foster individualisation and thus contribute to an escalation of the aforementioned conflict. The protection mechanism must nevertheless be strengthened and further developed. The ECHR and its protection mechanism are of such crucial importance for Europe that the individualisation it fosters must be tolerated. However, it is all the more important under these circumstances to consider how the democratic legitimation of rights can also be promoted, as a counterbalancing force so to speak, at the European level.

(4) A strengthening of the democratic legitimacy of human rights cannot be achieved in the context of the Council of Europe. This was decided as long ago as 1951, when the first President of the Parliamentary Assembly (then called the "Consultative Assembly"), former Belgian Foreign Minister Paul-Henri Spaak, resigned in disappointment because governments refused to extend the Assembly's powers.[20] Spaak subsequently turned his attention to the development of the European Coal and Steel Community. In retrospect it is clear that responsibility for sowing the first seeds to overcome, at the regional level, the contradiction between the validity of human rights at a higher-than-national level and their democratic legitimacy, was shifted at the time from the Council of Europe to the organisation that preceded the EU.

It took decades, however, for this possibility to assume concrete form in the structures of the EU. Here, too, it was noted that progress in building a culture of fundamental rights was impossible unless democratic decision-making mechanisms were developed at the institutional level at the same time.[21] Today, the ECJ is counterbalanced by legislative bodies. In particular, the European Parliament enjoys clear-cut democratic legitimacy since it is directly elected. Accordingly, the preconditions exist, at least institutionally, for a discussion on whether the final incorporation of fundamental rights into positive law should be undertaken by courts or democratically elected bodies.

The phenomenon of the multi-level identity of rights holders in terms of fundamental and human rights has already been mentioned in connection with the universal development of rights. In EU member states, this identity has a far stronger and more concrete impact vis-à-vis the EU than vis-à-vis global institutions.[22] Even if individual EU citizens are unaware of this abstract phenomenon, they

20. Brunn G. (2009), *Die europäische Einigung. Von 1945 bis heute*, Stuttgart, p. 64, Reclam.
21. Denninger E. (2000), "Anmerkungen zur Diskussion um europäische Grundrechte", *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* Vol. 83, pp.145-52: 151.
22. Ley I. (2009b), "Verfassung ohne Grenzen? Zur Bedeutung von Grenzen im postnationalen Konstitutionalismus", Pernice B. et al. (eds), *Europa jenseits seiner Grenzen. Politologische, historische und juristische Perspektiven*, Baden-Baden, pp. 91-126: 110, Nomos.

repeatedly experience the possibility of exercising rights guaranteed by the EU in concrete situations.

(5) However, the key argument in support of the perspective discussed here lies in the normative aspect. Unlike international organisations, which are based either exclusively or predominantly on international law, an inherent characteristic of the EU is the normative trend towards democratisation.[23] The reason for this lies mainly in the aforementioned circumstance that the EU exercises public powers, and hence sovereign authority, on a scale that is inconceivable today for other organisations at a level higher than the national. The powers of the European Parliament have been tenaciously extended in various stages, and this trend will continue in the future. The more extensive the areas in which the EU exercises sovereign authority, the stronger the demand becomes for prior consideration, assessment, and ultimately joint determination of such activities through democratic debate.[24]

By virtue of the same mechanism, however, the fundamental rights initially formulated at the national level find their way into the EU, even if the member states insist that this field falls solely within their area of responsibility. Sovereign action taken by authorities requires the protection of the individual's fundamental rights against any resulting violations.[25] In democracies, sovereign acts require democratic legitimacy. Once this principle is recognised, power to take sovereign action cannot be devolved from the nation-state without a persistent normative demand for democratic legitimacy following close behind. Any action to restrict once again the degree of democratic legitimacy reached in the EU is therefore inconceivable.

If both the normative demand for democratic legitimacy and the demand for guarantees of fundamental rights follow close behind any sovereign action devolved to the EU, then it is only a matter of time, from the normative point of view, before the European Parliament is vested with increased authority to incorporate fundamental rights into positive law. Each instance of the exercise of sovereign powers by the EU fosters this development. In addition, the Charter of Fundamental Rights, which has become positive law as a result of the Treaty of Lisbon, is certainly open to further development (Catherine Schneider).

(6) The democratic legitimacy of fundamental rights and human rights can also be debated, since it is necessary to differentiate, in connection with the genesis

23. Ley I. (2009a), "Kant versus Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Issue 2, pp. 317-45: 342 ff.
24. Rittberger B. (2009), "'Copy and paste': Parlamentarisierung jenseits des Nationalstaates", Deitelhoff N. and Steffek J. (eds), *Was bleibt vom Staat? Demokratie, Recht und Verfassung im globalen Zeitalter*, Frankfurt/New York, p. 155, Campus.
25. Hufeld U. (2009), "Die Legitimationskraft der europäischen Bürgerfreiheit. Fundamentalkritik am Lissabon-Urteil des Bundesverfassungsgerichtes", *Publikationen der Konrad Adenauer Stiftung*, Budapest, p. 16.

of rights, between concrete processes of transformation into positive law, and a discussion of the status of democratic legitimacy in these processes. The formal question of which bodies are involved in which phase of the process of establishing the content must be separated from the question of the content that the process produces. All the papers in this book are limited to the former question. They exclude the matter of content – that of the fundamental rights and human rights to be incorporated into positive law – and only consider such rights as examples. In other words, the discussion of the democratic legitimacy of fundamental rights and human rights does not take into account the concrete results of the various processes aimed at incorporating them into positive law.

Accordingly, when it comes to answering the question of whether the EU has the power to address the issue of the democratic legitimacy of fundamental rights and human rights, no role is played by the aforementioned conflict between the EU and its member states with respect to the power to incorporate the content of fundamental rights into positive law. The EU can consider general constitutional issues that also involve the democratic legitimacy of fundamental rights and human rights, and its Agency for Fundamental Rights can also be commissioned to carry out relevant studies.

Such studies do not have to be limited to the supranational or the international level but can also take into account the situation in member states. The Agency can make the relevant findings available through its networks and thus foster, or at least initiate, a discussion on the democratic legitimacy of fundamental rights in member states as part of a communication strategy to raise public awareness of fundamental rights (Armin von Bogdandy/Jochen von Bernstorff). Awareness-raising is important, since the different levels are closely intertwined on the question of the democratic legitimacy of fundamental rights and human rights, as shown by the multi-level identity which has already been mentioned a number of times.

(7) This again raises the question of institutional responsibility in EU member states. At the national level, there is considerable scope for allocating powers to incorporate fundamental rights into positive law. In some member states, the ECJ's powers to review laws in the light of EU law have paved the way for constitutional reviews (Kaarlo Tuori). As the example of Finland shows, however, this should not lessen the power of democratically elected bodies to transform fundamental rights into positive law.

The example of Finland also shows how an active contribution can be made at the national level towards reducing the tension between individual human rights protection and the democratic legitimacy of rights. The protection of human rights is guaranteed through the courts' jurisdiction to conduct a review in individual cases. Nonetheless, when it comes to incorporating fundamental rights into positive law, ultimate responsibility for the enactment of general rules of an abstract nature lies with the parliament, so that politicians' responsibility for the

social consensus regarding the content of human rights is strengthened. Individual citizens take part in a learning process and help to ensure, through parliamentary elections, that their rights are developed "from the bottom up".

On the other hand, largely court-based protection of fundamental rights at the national level fosters a "top-down" understanding of fundamental rights by bringing about a shift of power from the legislature to the judiciary.[26] Democratically elected bodies may under certain circumstances also contribute thereto by exercising restraint on their own initiative. When the process of negotiating fundamental rights in a parliament ends with an indication that the defeated minority will in any case take legal action, this amounts to a premature termination of the process, thus calling into question the approach according to which rights are generated through the self-determination of rights holders.

(8) From a normative perspective, the ambition to overcome existing tensions between the universality of human rights and their democratic legitimacy should not be abandoned.[27] Democratic legitimacy requires that human rights be developed through a deliberative process, but deliberative negotiations are not sufficient to achieve democratic legitimacy. Rather, the process must lead to decisions by democratically elected bodies.[28] It follows that the institutional implementation of this demand will remain a very long-term goal worldwide.

In practice, the goal of providing supranational rights with democratic legitimacy can be achieved sooner at the regional level. It calls for the establishment of political participation rights for individuals who are involved in this process and elect the relevant bodies. These participation rights are bound up with the status of those involved as members of a political community, so that the entitlement can be established only where there are regional external borders.[29] That is the case in the EU. The constitutionalisation of European law differs from that of international law and provides for the first time a concrete basis for achieving the normative ambition of overcoming, at least at the regional level, the contradiction between the universality of human rights and their democratic legitimacy.[30]

As Europe also plays a leading role in the global protection of human rights under international law, the fundamental rights and human rights policy based

26. Kühling J. (2003), "Grundrechte", Bogdandy A. V. (ed.), *Europäisches Verfassungsrecht. Theoretische und dogmatische*, Grundzüge, Berlin/Heidelberg/New York, Springer, p. 593.
27. Haller, G. (2010), "Individualisierung der Menschenrechte? Die kollektive – demokratische – Legitimation der Menschenrechte und ihre Bedeutung für Integrationsprozesse, illustriert durch das Beispiel des State-Building in Bosnien und Herzegowina", *Zeitschrift für Rechtssoziologie* Vol. 31, Issue 1, p. 134.
28. Niesen P. (2008), "Deliberation ohne Demokratie? Zur Konstruktion von Legitimität jenseits des Nationalstaates", Kreide R. and Niederberger A. (eds), *Transnationale Verrechtlichung. Nationale Demokratien im Kontext globaler Politik*, Frankfurt/New York, p. 256, Campus.
29. Ley I. (2009b), "Verfassung ohne Grenzen? Zur Bedeutung von Grenzen im postnationalen Konstitutionalismus", Pernice B. et al. (eds), *Europa jenseits seiner Grenzen. Politologische, historische und juristische Perspektiven*, Baden-Baden, p. 110, Nomos.
30. Ibid., p. 121.

on European law should be carefully weighed up against that based on international law. Again and again, a clear distinction must be drawn between the development of fundamental rights and human rights and their overall planning in an abstract environment, on the one hand, and their implementation and application to concrete individual cases, on the other. It is this differentiation that lays down the basis for a clearer description of the contributions that the Council of Europe, the EU, and the member states of both organisations can make to this policy – which in this context means only internal European policy and not policy vis-à-vis third states.

(9) However, the two functions cannot always be clearly separated. In particular, in judicial decision-making on individual cases, the transition from the mere application of provisions to further development of the law is fluid. In the case of the ECJ, attention is drawn to the "judicial discretion" *(richterliche Zurückhaltung)* that is required to ensure that the Community legislature's room for manoeuvre is not constricted.[31] Similarly, reference is made in the case of the Court to "judicial restraint" (Inge Lorange Backe), although this remark refers to the relationship with national supreme courts. However, such restraint also has an indirect impact on the relationship with national ordinary and constitutional legislatures.

The terms used here indicate that mentality also plays a role. Judges can indicate, in the wording of their judgments, that they consider themselves better qualified to transform fundamental rights into positive law than the relevant parliament. In doing so, they contribute to the aforementioned shift in public perception, conveying the impression that fundamental rights are "granted by the judge". Whether intentionally or not, politicians are thereby forced to abdicate their responsibility for human rights, or are at least released from it.

To ensure that the process of debate among rights holders on the status of fundamental rights and human rights and their development does not come to a standstill, this responsibility must remain with the democratically elected institutions. National and international judges can make their own contribution, provided that they attach importance to the democratic legitimacy of rights.

31. Vosskuhle A. (2010), "Der europäische Verfassungsgerichtsverbund", *Neue Zeitschrift für Verwaltungsrecht*, issue 1, pp. 1-8.p. 3.

Basic issues

From a gubernative to a deliberative human rights policy definition, and further development of human rights as an act of collective self-determination

by Klaus Günther[32]

1. The processes of globalisation have also globalised the public. Although the public only selectively expresses opinions on individual human rights violations around the world, and does not carry the same weight in all regions, global communication facilities embrace all human beings. To be sure, these facilities are not accessible to all members of this public to the same extent, and there are segments of the public that use the media to specialise in areas of interest to themselves, but we can determine the existence of a global discussion on human rights, and especially violations thereof. While it is clear that there are serious human rights violations taking place that are not publicly discussed, Immanuel Kant's dictum (perhaps exaggerated for the age in which he lived) that so much progress has been achieved among the peoples of the world that "a violation of rights in one place is felt throughout the world"[33] now appears to have become a reality, at least in electronic form.

In the discourse of human rights, experiences of injustice, suffering, and violence draw the attention of the public. Not everyone understands the concept of human rights in the same way, and people often disagree about the rights and wrongs of individual cases. However, this disagreement no longer takes place outside a generally accepted human rights discourse but within it. Even inveterate opponents of human rights have now allowed themselves to become involved in this discourse inasmuch as they are at least making a strategic attempt to engage with it – if they are not blatantly resorting to the force of arms – and with even an insincere engagement they increasingly find that they cannot keep on pretending to respect human rights without having their actions assessed by reference to them. Hardly anyone can now evade the global human rights discourse. John Tasioulas notes that the "discourse of human rights [has acquired] in recent times … the status of an ethical lingua franca."[34]

Despite the serious violations of human rights that still take place, the confidence in progress being made to secure rights seems well founded. It might be thought that the obstacles to human rights lie outside the legal dimensions of the sector,

32. Professor, Goethe University, Frankfurt-am-Main, Germany.
33. Kant I. (1795/96), "Zum ewigen Frieden", Weischedel W. (ed.), *Werke*, Vol VI, Darmstadt, 1975, p. 216 (A 46).
34. Quoted in Raz J. (2007), "*Human rights without foundations*", *Oxford Legal Studies Research Paper*, No.14, p. 1.

in the conditions and procedures for their realisation and in the conflicting aims that result from efforts to implement human rights, democracy, and peace all at the same time.[35] Joseph Raz begins his treatise on human rights without foundations with the admittedly ironic statement: "It is a good time for human rights in that claims about such rights are used more widely in the conduct of world affairs than before."[36] If this impression is correct, however, it obscures the fact that a big danger lies in the ubiquity of the human rights discourse. With everyone talking about human rights, there is the risk the concept will gradually lose a key element of its legal substance. Although we claim our human rights everywhere and at all times, we behave towards them as we do towards ready-made products, which we passively consume without being involved in their production and without knowing how they work. We thus become dependent on those who make these products and on those who sell them to us, and ignorant of their construction. To put it bluntly, we allow ourselves to be governed by human rights without asking those responsible for the human rights regime for proof of their authority. We appear to accept that they keep talking about them, and we lose any sense of the fact that human rights can only be interpreted and developed through self-determination that includes all human beings.

This shortcoming can be made clear with reference to two phenomena. The first is that human rights currently function as a legal pretext for states or groups of states to intervene in another state. The nature of these interventions varies, but they are often posited as a means of protecting the citizens of a state against human rights violations by their own government. Military intervention is only one of a number of measures that can be employed. Raz is therefore right when he cites with reference to John Rawls the function and significance of human rights as grounds justifying interference in the internal affairs of a sovereign state: human rights are "rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena."[37] In this way, human rights are instrumentalised by the political system of international relations. The politics of international human rights "is drifting towards becoming just the politics of international relations, insofar as they acknowledge human rights."[38]

However, this means that the task of interpreting human rights, establishing the preconditions for their application in an individual case, and further developing them in the light of similar or dissimilar cases becomes the responsibility of governments. Governments keep an eye on one another, and in the event of a human rights violation, may choose to intervene in the other's affairs, claiming

35. On these conflicting aims, see Geis A., Müller H., and Wagner W. (eds) (2007), *Schattenseiten des demokratischen Friedens. Zur Kritik einer Theorie liberaler Außen- und Sicherheitspolitik*, Frankfurt-am-Main/New York.
36. Raz J., see footnote 34, p. 1.
37. See footnote 34, p. 11.
38. See footnote 34, p. 20.

that the offending government has forfeited the sovereignty invested in it. Such an approach can be described as a "gubernative human rights policy".

In the light of similar developments in basic rights enshrined in domestic law, Ingeborg Maus has described the fate of human rights under the dominance of the gubernative human rights policy as a paradox:

> The dominance of basic rights in every current legal discourse is in particular linked to the dilution of the original intention to guarantee the freedom of the individual vis-à-vis the state. Basic rights detached from their context with an attempt to implement the principle of popular sovereignty lose their purpose of resisting or limiting state policy and function as rules that legitimise policies.[39]

It is in no way intended to deny that complex issues of technical co-ordination need to be solved in the case of the application and, especially, the implementation of human rights at the international level. Nor is there any intention to dispute that cases of serious human rights violations have provided and will continue to provide sufficient grounds for intervening in a state's affairs. However, the procedure through which such measures are taken accords governments priority regarding the interpretation of human rights. This also applies to the concept of "Responsibility to Protect" (R2P), which means that states are responsible for respecting and providing for the human rights of their own citizens.[40] With this concept, legal justification is created for foreign interference in the event of a state failing to discharge its duty to protect the human rights of its population. It spells out what Raz meant with his analysis that the primary meaning and function of human rights is currently simply to constitute a legal justification for foreign interference. Even if military intervention is the last resort when it comes to assuming responsibility for the prevention of impending human rights violations and is complemented by a "responsibility to rebuild" in the post-intervention period, it is governments that remain the principal players. They interpret the legal requirements of the duty to provide protection, establish any breach of this duty by a government, take measures to prevent current and impending human rights violations, and set up institutions for the enforcement of human rights within a state after military intervention. Once again, this is not about denying the progress that lies in enshrining humanitarian intervention in law through the R2P principle. The only aim is to note the danger threatening human rights policy when governments become the key global human rights players, providing active human rights protection and at the same time assuming responsibility for the further development of human rights.

39. Maus, I. (1999), "Menschenrechte als Ermächtigungsnormen internationaler Politik oder: der zerstörte Zusammenhang von Menschenrechten und Demokratie", Brunkhorst H., Köhler W. R. and Lutz-Bachmann M. (eds), *Recht auf Menschenrechte*, Frankfurt-am-Main, p. 282.

40. Klein E. (ed.) (2000), *The duty to protect and to ensure human rights*,, Berlin; Evans G. (2008), *The responsibility to protect. Ending mass atrocity crimes once and for all*, Washington DC; Verlage C. (2009), *Responsibility to protect. Ein neuer Ansatz im Völkerrecht zur Verhinderung von Völkermord, Kriegsverbrechen und Verbrechen gegen die Menschlichkeit*, Tübingen. For a critical discussion, see Foley C. (2008), *The thin blue line. How humanitarianism went to war*, London/New York, pp. 145-70.

The second phenomenon to be discussed is a complement to the gubernative human rights policy: an increasingly "individualised understanding" of human rights which is emerging among individuals as holders of human rights. This has developed almost as an accidental secondary effect of a good intention, namely the establishment of procedures for filing individual complaints to courts or similar judicial bodies against human rights violations. Though such recourses are not yet available everywhere, they are undeniably one of the most important contributions to the uniform assertion of human rights as rights conferred on individuals. The indirect implication that only the institution of the individual complaint leads to a general awareness that everyone is a holder of human rights must not be overlooked either. An outstanding example of this is the right of the citizens of all Council of Europe member states to file an application with the European Court of Human Rights (ECHR) in Strasbourg alleging human rights violations by their respective governments.

However, while citizens are mobilised to assert individual rights, their awareness of collective responsibility for human rights is in danger of declining. Human rights only seem to be legitimate to individuals recognised by law as having both rights and duties to the extent that they can improve their personal situation. Gret Haller summarises the situation thus: "Worldwide and in the public perception, a development is being fostered in which the individual legitimation of human rights is supplanting the collective."[41] The individual's perspective is narrowed to his or her particular case, which forms the realm of experience and level of expectations of those affected by breaches of their human rights. They are mobilised when this is likely to benefit their own particular case. Haller continues: "Less and less collective self-determination is being shown and interest is being directed more and more exclusively to the individual act of going to court to enforce rights in a specific case."[42]

The danger of such an individualised understanding of human rights is also clear from the growing number of cases in which allegations about human rights violations are made not only in respect of a state and its government but also in respect of non-state players. The effect on third parties of human rights or their horizontal role is mainly relevant where they are directed against powerful collective players that systematically violate the rights of the weaker members of society. If such conflicts can be discussed as human rights violations, then any substantial third-party or horizontal effect will itself contribute to the worldwide enforcement of human rights.[43] All legal relationships between private individuals will, as it were, be rationalised in human rights terms. This horizontal effect

41. Haller, G. (2008), *Individualisierung der Menschenrechte?,* p. 13.
42. Ibid., p. 13.
43. See, with regard to Europe, Clapham A. (2006), *Human rights obligations of non-state actors*, Oxford. With regard to global developments, see Teubner G. (2006), "Die anonyme Matrix: Zu Menschenrechtsverletzungen durch 'private' transnationale Akteure", *Der Staat: Zeitschrift für Staatslehre und Verfassungsgeschichte, deutsches und europäisches öffentliches Recht* 44, pp. 161-87; Günther K. (2009), "Menschenrechte zwischen Staaten und Dritten: Vom vertikalen zum horizontalen Verständnis der Menschenrechte", Deitelhoff N. and Steffek J. (Hg.), *Was bleibt vom Staat?*

will, however, become problematic when people assert their rights against one another in the same way as private owners assert their property rights. This will not only result in an understanding on the part of those involved of human rights as boiling down to private rights analogous to property rights, but will also mean that the courts will become a place where rights that clash in an individual case are weighed up against each other in such a way as to produce a generalising effect on comparable cases. In the meantime, it is quickly forgotten that the limits to human rights must primarily be drawn by those who themselves possess general and identical human rights – that is, by the subjects of human rights themselves, and not by a court. The concordance between potentially conflicting human rights thus also requires an abstract and general arrangement in which the interests of all the subjects of human rights are taken into account independently of any actual individual case. This problem becomes more acute when one person's human rights are asserted against those of another person with the aid of a gubernative human rights policy. Just as the language of human rights is employed by people to legitimise their own interests and objectives, powerful players and organisations can use governments for their own goals in terms of human rights policy in the international arena. There is then a danger that what is described in public choice theory as "regulatory capture" will occur.[44] State agencies that are supposed to protect and enforce general and identical rights are used for the advancement of particular interests, in this case to secure a specific interpretation of human rights that is favourable to them against other interpretations.

The political shortcomings manifested in the case of both a gubernative human rights policy and an individualised conception of human rights point to a complex connection between the individual nature of human rights as rights conferred on individuals and the sovereignty of the people as the authority that, in a secularised, post-metaphysical world, can be the only legitimate lawmaking body. Both shortcomings are symptoms of the fact that the awareness of this connection is waning. As is often the case, the reasons for this lie not in the evil intentions of those concerned. Rather, they lie in the unintentional and perhaps even unwanted side-effects of the basically desirable general orientation of international politics towards human rights, and in the growing awareness of people that they are also legal persons who possess human rights and can accordingly make claims in their own name against others concerning human rights violations. The difficulties that arise in trying to keep people aware of this connection are obvious. One of the biggest difficulties is the fact that there is no equivalent at the international level of a popular sovereignty that has up to now only existed in the plurality of nations, making it impossible to imagine what a global human rights policy resulting from collective self-determination might look

Demokratie, Recht und Verfassung im globalen Zeitalter, Frankfurt-am-Main/New York (Campus), pp. 259-80.

44. Laffont J.J. and Tirole J. (1991), "The politics of government decision making. A theory of regulatory capture", *Quarterly Journal of Economics* 106, pp. 1089-127.

like. The second difficulty results from the fact that human rights are being violated here and now, so there is an urgent need for action in crucially important cases involving human rights. All institutions, especially individual governments, that take effective action to protect human rights are themselves called upon to act as interpreters of human rights, and as players are subject to the limitations imposed by a lack of time and insufficient information. When it is a question of using military resources, the governments of states are called upon to take decisions and they usually do so, either individually or within an international body such as the United Nations Security Council, by considering whether the case involves a serious violation of or threat to human rights, and what measures are appropriate. Here, too, there is no equivalent at the international level of what is taken for granted at the national level of a constitutional state subject to the rule of law, namely the fact that urgent action carried out by the executive can be examined *ex post*, whether it be by the courts or through democratic public debate.

The main arguments for revisiting the connection between human rights and popular sovereignty are briefly set out below, the aim being to stimulate the institutional imagination with a view to conceiving functional equivalents for popular sovereignty.

2. As universal rights, human rights have a self-referential structure. If they apply to all human beings, that is, to each individual, then there cannot be one person (or an exclusive group of people) who grants these rights to all others and decides on their substance as such a procedure would run counter to the meaning of human rights. Only individuals themselves can decide on the substance and scope of their human rights. The self-empowerment of human beings to achieve their own self-determination is therefore always in the spirit of human rights. Historically, its actual revolutionary importance has been in the fact that it was seen as a provocation by the long-established institutions, especially the Christian churches, which continued to cling to their traditions. These institutions continue to understand the self-empowerment of human beings to mean that they are denying their constitutive dependence on God, arrogating to themselves a God-like position, and repeating and deepening the Fall.[45] For a political theology, such self-empowerment is justification to reject a political philosophy of human rights.[46]

However, everything depends on this self-empowerment not being misunderstood in the absolute sense of complete independence, as self-positing in the Hobbesian-Fichtean sense. What is meant is the additional element involved when the legal content of human rights is interpreted not only as a mutual moral obligation to respect every human being but in a specific sense as an individual

45. Meier H. (2009), *Die Lehre Carl Schmitts. Vier Kapitel zur Unterscheidung Politischer Theologie und Politischer Philosophie* (3rd edn), Stuttgart/Weimar, p. 133.
46. Ibid., p. 135.

right. If in the modern period, especially against the background of the European Enlightenment, people do not "recognise any other, higher authority (such as God, Nature or Reason) as a moral ground for obliging them to respect one another's moral rights, then the logical conclusion is that they recognise themselves as this authority".[47] This postulate can mainly, but not only, be found in those conceptions of human rights that justify it on moral grounds. As moral rights, they can in a secularised society only be justified by the people involved. According to Ernst Tugendhat, it follows from an ethic of mutual respect that:

> We recognise all human beings as individuals entitled to rights and subject to obligations … that it is we ourselves, in so far as we consider ourselves bound by the ethic of universal respect, who accord all human beings the rights that flow from that ethic. Moral rights are thus also rights that have been granted, and the body that grants them is, in Kantian parlance, the moral legislation itself – or ourselves if we subject ourselves to this legislation.[48]

For Rainer Forst, who locates the core of human rights in a moral right to justification, human rights flow from rights that every individual possesses vis-à-vis all other individuals and generally cannot be dismissed.[49] However, Jürgen Habermas, who dispenses with a moral justification of individual (human) rights in favour of a functional explanation for their development from a complementary relationship to a universalistic post-conventional ethic, also believes that the union of legal persons in the context of the establishment of a constitution begins with the mutual granting of (human) rights.[50]

As long as the emphasis is put on the mutual moral obligation to respect other people as individuals with human rights and obligations, the specific character of human rights and individual rights does not become sufficiently clear. As Georg Lohmann has stressed, "It does not yet automatically follow from the mere reciprocity of moral obligations that the persons involved regard one another as holders of rights."[51] This is because the mutual obligation to show respect for one another could be understood to mean that one individual actively accords the other respect that he or she passively receives – with the reciprocal obligation to accord the other individual the same respect, which also makes that person only the object of an obligation. In that case, the relationship between the person who owes the other respect and the person respected in fulfilment of the mutual

47. Lohmann G. (1998), "Menschenrechte zwischen Moral und Recht", Gosepath S. and Lohmann G. (eds), *Philosophie der Menschenrechte*, Suhrkamp, Frankfurt-am-Main, pp. 62-95: 86.
48. Tugendhat E. (1993), *Vorlesungen über Ethik*, Frankfurt-am-Main, p. 345 (edited by K.G.).
49. Forst R. (1999), "Das grundlegende Recht auf Rechtfertigung. Zu einer konstruktivistischen Konzeption von Menschenrechten, Brunkhorst H. et al. (ed.), *Das Recht auf Menschenrechte*, Frankfurt -am-Main, 66 ff.
50. Habermas J. (1993), *Faktizität und Geltung*, Frankfurt-am-Main, Chapter 3, *in* Habermas J. (1992), *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*, Frankfurt-am-Main.
51. Lohmann G., see footnote 47, p. 86.

moral obligation would be asymmetrical.[52] There is only symmetry between individuals involved to the extent that each not only receives the respect of every other person but, because of the reciprocity of the moral obligation, always also owes that respect. Hypothetically, a moral world could be constructed in which everyone owes everyone else the same respect and everyone passively receives the same respect without there being a complementary right corresponding to these mutual obligations. As Lohmann puts it, "What change takes place when, assuming that they demonstrate the same moral behaviour, the citizens involved in these constructs accord each other rights?"[53]

In a still very vague form, the change that takes place with the reciprocal exchange of rights can be characterised thus: the emphasis is shifted to the person who has hitherto only been a passive recipient of respect owed to him or her. A right not only protects a person from third-party infringements of his or her claim to respect but also has the active sense of giving its holder the possibility of, and authority for, self-determination and of being recognised and respected with regard to statements made as part of that self-determination. This active sense mainly manifests itself in the fact that a rights holder can demand that another person shall do or refrain from doing something and that he or she has a right (*actio*) to something from someone else. As the holder of the right to self-determination makes more and more active use of that right – if only by demanding that another person refrain from a particular action – then he or she becomes aware of his or her power and authority. This is both an awareness of being allowed ("the individual can make use of its freedom in certain directions") and being able (with something being added to the individual's ability to act "that he or she does not naturally possess").[54]

It is on this awareness that holders of a right base their self-respect and right to be respected, which they can actively assert vis-à-vis other people. It is an awareness of their own freedom in the sense that they determine their own actions and are not subject to any outside determination. This element is added to the mutual moral obligation with the granting of rights, so that "in a society of mutually accorded identical rights, moral subjects with their justified claims vis-à-vis other people can establish and develop their self-respect".[55] Habermas summarises this transition: "The morally necessary care and consideration afforded another, vulnerable person is replaced by the self-confident demand for legal recognition

52. This asymmetry seems to me to be implicit in the arguments put forward by Menke and Pollmann for human rights: Menke C. and Pollmann A. (2007), *Philosophie der Menschenrechte zur Einführung*, Junius, Hamburg, 66 ff.
53. Lohmann G., see footnote 47, p. 88.
54. Georg Jellinek describes this "being allowed" as referring to private rights and "being able" (as the capacity to enjoy rights and be subject to obligations) as referring to public rights: Jellinek G. (1979), *System der subjektiv-öffentlichen Rechte* (2nd edn), Tübingen 1919, reprint: Aalen (Scientia), pp. 45-8.
55. Lohmann G. (1998), "Menschenrechte zwischen Moral und Recht", Gosepath S. and Lohmann G. (eds), *Philosophie der Menschenrechte*, Suhrkamp, Frankfurt-am-Main, p. 88.

as a self-determined individual."[56] It is the element of being a human being with his or her own characteristics on which this claim of the rights holder is based.

3. It would be possible for the strict horizontality of human rights to be limited to their origin, in the same way that Thomas Hobbes conceived the Leviathan. People mutually acknowledge their human rights once and leave it up to a legislative or judicial body to flesh them out and put them into concrete form, as we currently see in the case of the gubernative human rights policy or the tendency to refer human rights issues to courts or similar judicial institutions. After the original mutual recognition of human rights, the individual would thus once again enter into a vertical relationship with those bodies that interpret and positivise human rights, which were originally abstract, and develop them in the light of new cases involving the application of the relevant provisions. However, the original autonomy would then once again be lost. The autonomy established with self-empowerment to achieve self-determination is only semi-autonomy as long as individuals are only passive recipients of their rights and now only assert them in their own interest in the same way as other rights. Two people might conceivably agree on according one another the same rights, but then one person might become a slave and leave it up to his master to grant de facto the rights originally mutually agreed on, and to interpret and develop them under changed circumstances. The master would grant the slave human rights as privileges enabling him to live his life, but would always intervene if he felt his slave was exceeding the limits of the original rights in exploiting his privileges. Would the slave be just as free as before, even though he would be a passive recipient of those privileges without any say in the interpretation and application of the originally identical rights? It is an old republican intuition that slaves are not already free when they passively receive certain freedoms from their masters but only when they themselves, together with other individuals, determine and assert their freedoms as rights – and do so not just once but again and again.[57]

The strict horizontality of human rights must therefore be included in the further process of giving human rights concrete form. It is then, ultimately, the individuals themselves who decide on the concrete form to be given: "Accordingly, the irreversible link between human rights and popular sovereignty is that only the holders of the rights themselves can decide on the substance of their rights."[58] The concept of popular sovereignty is admittedly only a historical way of expressing the republican intuition that the human right to freedom presupposes independ-

56. Habermas J. (2009), "Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte", *Ms.*, p. 12.
57. Historically: Quentin Skinner; most recently: *Freiheit und Pflicht – Thomas Hobbes' politische Theorie*, Frankfurt-am-Main 2008, 12 ff. and 49 ff.; systematically: Pettit P. (2001), *A theory of freedom*, Oxford, 65 ff.
58. Maus I. (1999), "Menschenrechte als Ermächtigungsnormen internationaler Politik" or "Der zerstörte Zusammenhang von Menschenrechten und Demokratie", Brunkhorst H. et al. (eds), *Recht auf Menschenrechte*, Frankfurt-am-Main, pp. 276-92: 287.

ence from outside (even benevolent) dominance and can only be based on the self-regulation of its holders. It is too dangerous to see associations with the historical figure who had to compete with the sovereignty of an absolute monarch for greater legitimacy and in doing so adopted a number of the monarch's autocratic and usurpatory characteristics. This is the only reason why it was possible for a distinction and conflict to arise between popular sovereignty and human rights, leading to misplaced absolutisations. This distinction manifests itself in the dispute about human rights as barriers to democratic self-legislation.

Certain forms of democracy, historical and current, deny a connection with human rights and accordingly either limit democracy through human rights or sacrifice the human rights of minorities to a populist majority democracy. The first case stems from a liberalist conception of democracy according to which it is nothing more than an aggregation of individual preferences that leads to changing majority decisions against which the human rights of the respective minority have to be protected. In the second case, democracy represents nothing more than the homogeneous ethos of a particularist community that discriminates against or excludes minorities by its majority decisions. However, both cases fall short of the *telos* of democracy. It is neither a procedure for the mere summation of individual preferences nor a body for the expression and enforcement of a collective ethos.

It is only possible to avoid these false distinctions if human rights are understood as enabling conditions of democratic self-government. This is not only in the sense that, with political human rights, democracy can be institutionalised in a way that simultaneously permits the inclusiveness and openness of the democratic process. Human rights also enable the institutionalisation of a process of collective self-determination in which the self-empowerment to achieve the self-determination of each individual, that is to say his or her dignity and self-respect as well, is expressed in such a way that it is compatible with the same dignity of all other individuals. Only if human rights are secured does each individual have the same right to express an opinion with "yes" or "no", have a vote that carries the same weight, and enjoy the same authority. At the same time, each individual has the same right to demand that any political decision is justified to him or her.[59] Only human rights guarantee the voluntary nature of political participation, the recognition that all participants have the same dignity, and the inclusiveness of the process. Only democratic self-legislation in which human rights in the sense that has just been defined are contained as enabling conditions initiates at the same time a process of public criticism and justification and, consequently, a public learning process. Habermas expresses this in the principle that only those norms are valid to which everyone who may be affected

59. On the right to freely express opinions, see Günther K. (1992), "Die Freiheit der Stellungnahme als politisches Grundrecht", in Koller P., Varga C. and Weinberger O. (eds), *Theoretische Grundlagen der Rechtspolitik*, Archiv für Rechts- und Sozialphilosophie, Beiheft Nr. 54, pp. 58-73; on the right to justification, see Forst R. (2007), *Das Recht auf Rechtfertigung*, Frankfurt-am-Main.

can agree as participants in a rational discourse.[60] The discursive character of democracy subordinates the individual preferences of individual citizens to a process of mutual revision, since no individual interest can be binding for all other people without being examined in the light of argument and counter-argument by all other people.

Accordingly, human rights need have no fear of a democratically constituted popular sovereignty. On the contrary, they depend on it if they are not to lose any contact with collective self-determination in a gubernative human rights policy or an individualistic understanding of human rights. Albrecht Wellmer summarises the relationship between human rights and democracy as follows:

> While they *bind* the democratic discourse on the one hand, they must also first be repeatedly produced within it, namely by means of reinterpretation and reimplementation; there can be no authority above or outside this discourse, which could ultimately decide what the correct interpretation and concretisation of these fundamental rights would be.[61]

60. Habermas J. (1992), *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*, Frankfurt-am-Main, p. 138.
61. Wellmer A. (1999), "Hannah Arendt über die Revolution", Brunkhorst H. et al. (eds), *Recht auf Menschenrechte*, Frankfurt-am-Main, pp. 125-56: 146; Wellmer A. (1993), "Bedingungen einer demokratischen Kultur", *Endspiele: Die unversöhnliche Moderne*, Frankfurt-am-Main, pp. 54-80: 60 ff.

The human right to democracy – a moral defence with a legal nuance

by Samantha Besson[62]

The principle of all sovereignty resides essentially in the nation. No body or individual may exercise any authority which does not proceed directly from the nation.
(Article 3, Declaration of the Rights of Man and of the Citizen)

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.
(Article 21, Universal Declaration of Human Rights)

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.
(Article 25, International Covenant on Civil and Political Rights)

Introduction

Needless to say, the relationship between human rights and democratic sovereignty[63] – or democracy, as I will refer to it in this paper – is among the most

62. Professor of Public International Law and European Law, University of Fribourg, Switzerland. This is a revised version of the paper I gave at the UniDem seminar on the relationship between popular sovereignty and human rights, organised by the Venice Commission at the University of Frankfurt-am-Main on 15 and 16 May 2009. Many thanks to all participants for their helpful criticism and suggestions, and in particular to Armin von Bogdandy, Hauke Brunkhorst and Günter Frankenberg. I would also like to thank Allen Buchanan and George Letsas for useful discussions about the legitimacy of international human rights in the course of the spring and summer of 2009. A German translation of this chapter was published in a collection of essays edited by Gret Haller and Klaus Günther at Campus Verlag.

63. On the relationship between democratic sovereignty and democracy, see Cohen J. L. (2008), "Rethinking human rights, democracy and sovereignty in the age of globalization", *Political Theory* 36:4, pp. 578-606; Forst R. (2010), "The justification of human rights and the basic right to justification. A reflexive approach", *Ethics* 120:4, pp. 711-740.

classical questions of political and legal theory. Who has not thought at least once about the priority of human rights over democracy or vice versa,[64] about the democratic legitimacy of the constitutional entrenchment of human rights, or about the human rights-based judicial review of democratic legislation?[65] The prima facie paradoxical and circular idea of a human right to democracy is just as sadly (in)famous. Should and could democracy be protected *qua* human rights, and if so, would not it be paradoxical to do so without or against the will of the people themselves? Besides that paradox, would not such a human right risk being circular as a right depending on the realisation of the very interests it aims at protecting: how could one benefit from a right to democracy other than through democratic channels?

Among the various reasons one may have to debate this question again, besides the pleasure of engaging with others who have considered it,[66] one should mention its versatility, depending on how its two constitutive elements, democracy and human rights, are defined. This is particularly striking when the question is understood to refer to an international or universal human right to democratic participation, as it will be in this paper,[67] and not, as has traditionally been the

64. This is often exemplified by reference to Article 3 of the Declaration of the Rights of Man and of the Citizen, according to which human rights stem from political sovereignty. See also Forst R. (2010), footnote 63.

65. See, e.g. Waldron J. (1999), *Law and disagreement,* Oxford University Press, Oxford; Habermas J. (1998), *Between facts and norms,* MIT, Cambridge, Mass.; Habermas J. (1996), "Ueber den internen Zusammenhang von Rechtsstaat und Demokratie", *Die Einbeziehung des Anderen,* Suhrkamp, Frankfurt-am-Main, p. 301.

66. See, e.g. Menke C. and Pollmann A. (2007), *Philosophie der Menschenrechte*, Junius, Hamburg, Ch. 4; Dworkin R. (2006), *Freedom's law*, Harvard, Cambridge, Mass.; Dworkin R. (2000), *Sovereign virtue, The theory and practice of equality*, Harvard, Cambridge, Mass.; Habermas J. (1996), see footnote 65; Habermas J. (1998), see footnote 65; Alexy R. (1998), "Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat", Gosepath S. and Lohmann G. (eds), *Philosophie der Menschenrechte*, Hartkamp, Frankfurt-am-Main, pp. 244-64; Böckenförde E.-W. (1998), "Ist Demokratie eine notwendige Forderung der Menschenrechte", Gosepath S. and Lohmann G. (eds), *Philosophie der Menschenrechte*, Hartkamp, Frankfurt-am-Main, pp. 222-43; Michelman F. I. (1996), "Parsing a 'right to have rights'", *Constellations* 3:2, pp. 200-8; Brunkhorst H. (1996), "Are human rights self-contradictory? Critical remarks on a hypothesis by Hannah Arendt", *Constellations* 3:2, pp. 190-9; Cohen J. L. (1996), "Rights, citizenship, and the modern form of the social: Dilemmas of Arendtian republicanism", *Constellations* 3:2, pp. 164-89.

67. As a result, I am leaving aside the question of international democracy. On this issue, see e.g. Besson S. (2009a), "Institutionalizing global demoi-cracy", Meyer L. (ed.), *Justice, legitimacy and public international law*, Cambridge University Press, Cambridge, pp. 58-91; Besson S. (2009b), "*Ubi Ius, Ibi Civitas*. A republican account of the international community", Besson S. and Martí J. L. (eds), *Legal republicanism and republican law – national and post-national perspectives*, Oxford University Press, Oxford, pp. 204-37; Besson S. (2009c), "The authority of international law – lifting the state veil", *Sydney Law Review* 31:3, pp. 343-80; Christiano T. (2010), "Democratic legitimacy and international institutions", Besson S. and Tasioulas, J. (eds), *The philosophy of international law*, Oxford University Press, Oxford, pp. 119-37; Pettit P. (2010), "Legitimate international institutions: a neo-republican perspective", Besson S. and Tasioulas J. (eds), *The philosophy of international law*, Oxford University Press, Oxford, pp. 139-60; Buchanan A. and Keohane R. (2006), "The legitimacy of global governance institutions", *Ethics and International Affairs* 20(4), p. 405-37; Gould C. (2004), *Globalizing democracy and human rights*, Cambridge University Press, Cambridge.

case, to a national or local right to democratic participation.[68] Indeed, when such a right is guaranteed from outside a given political community and is as a result decoupled from that community, it seems both more plausible and more controversial; it is more plausible because the guarantee of a human right takes place from outside the citizenry and is hence less circular, but more controversial because the paradox of protecting democracy through non-democratic means seems even more intractable.

The recent boom in international law theory in general, and in human rights theory in particular, makes it particularly pressing to redefine both concepts in their relationship to one another,[69] but also in relationship to broader concepts such as global justice and legitimacy. If human rights and/or democracy are commonly advanced criteria for the legitimacy of international law,[70] their relationship to one another needs to be assessed anew in the international context. Questions such as the democratic legitimacy of international human rights law or of international judicial review have been raised more distinctly in the wake of discussions on the legitimacy of international law in general. Furthermore, recent developments in human rights theory, and especially current discussions pertaining to the so-called political conception (of the function or of the justification) of human rights that explain human rights *qua* external limitations on state sovereignty[71] make the idea of a human right to democracy more controversial

68. It is not decisive for the argument, however, to regard that right as a right to national or international democracy, as the interest protected is largely the same and democracy can no longer be uniquely national, regional or international, but has to include all levels of decision-making that can affect people's fundamental interests whether national or international and at the same time (see Besson (2009a), footnote 67 on "*demoi*-cracy"). For a joint treatment of both issues, see Forst R. (2010), footnote 63; Cohen J. L. (2008), footnote 63; Crawford J. (2000), "Democracy and the body of international law", Fox G. and Roth B. (eds), *Democratic governance and international law,* Cambridge University Press, Cambridge, pp. 91-122.

69. See, e.g. Forst R. (2010), footnote 63; Cohen J. L. (2008), footnote 63; Griffin J. (2008), *On human rights*, Oxford University Press, Oxford, Ch. 14; Beitz C. R. (2007), "Democracy and human rights", *Human Rights and Human Welfare 7*, pp. 100-4; Menke C. (2005), "The 'Aporias of human rights' and the 'one human right': regarding the coherence of Hannah Arendt's argument", New School Research Paper; Cohen J. (2006), "Is there a human right to democracy?", Sypnowich D. (ed.), *The egalitarian conscience*, Oxford University Press, Oxford, pp. 226-48; Talbott W. J. (2005), *Which rights should be universal?*, Oxford University Press, Oxford; Buchanan A. (2004), *Justice, legitimacy, and self-determination: moral foundations for international law*, Oxford University Press, Oxford, pp. 142-7; Gould C. (2004), footnote 67; Beitz C. R. (2001), "Human rights as a common concern", *American Political Science Review* 95:2, pp. 269-82; Sen A. (1999), *Development as freedom*, Anchor Books, New York; Beetham D. (1999), *Democracy and human rights*, Polity Press, Cambridge; Rawls J. (1999), *The law of peoples*, Harvard University Press, Cambridge, Mass.; Shue H. (1996), *Basic rights: subsistence, affluence and US foreign policy* (2nd edn), Princeton University Press, Princeton, pp. 67-78.

70. See, e.g. Buchanan A. (2008), "Human rights and the legitimacy of the international order", Legal Theory 14, pp. 39-70; Buchanan A. (2010a) "The legitimacy of international law", Besson S. and Tasioulas J. (eds), *The philosophy of international law*, Oxford University Press, Oxford, pp. 79-96; Tasioulas J. (2010a) "The legitimacy of international law", Besson S. and Tasioulas J. (eds), The philosophy of international law, Oxford University Press, Oxford, pp. 97-116; Besson S. (2009c), footnote 67.

71. See, e.g. Rawls J. (1999), footnote 69; Raz J. (2010), "Human rights without foundations", Besson S. and Tasioulas J. (eds), *The philosophy of international law*, Oxford University Press, Oxford,

and the relationship between human rights and democracy a central feature of future human rights theories. Finally, and more practically, the coming of age of international human rights law, and the consolidation of national democracies thanks to those rights in Europe and other regions of the world, justify stepping back to reflect on their impact on the circumstances of national constitutional democracy. This implies in particular developing a constructive critique of the democratic legitimacy of the legal *acquis* in the human rights context.

The question has become even more interesting now that the human right to democracy has become an integral part of positive international law. Since the 1990s and the end of the Cold War, the human right to democratic participation and its various derivative or associated rights such as the right to free elections, freedom of speech, or freedom of association, have clearly been identified among the rights protected by international human rights law.[72] True, human rights in general were guaranteed and promoted in the post-1945 era also with the indirect aim to enhance national democracies, at a time when international standards for national democracy could not be developed due to fierce sovereignty-based resistance and human rights standards seemed much less intrusive.[73] Through the gradual development and enforcement of mainstream human rights guarantees, bits and pieces of a democratic regime started consolidating and confirming the growing interdependence in practice of international human rights protection and democratisation.[74] But it is only post-1990 that international law and international human rights law in particular have started openly setting and enforcing democratic standards to be respected in national polities. This has been as true in Europe as beyond it. Earlier guarantees such as Article 25 of the International Covenant on Civil and Political Rights (ICCPR) or Article 3 of the first Protocol to the European Convention on Human Rights (ECHR), which had remained dead letter for years, have finally come to be invoked, applied, and interpreted further in practice.[75] New guarantees have

pp. 321-37. With a slight difference, see also Beitz C. R. (2001), footnote 69, and Beitz C. R. (2007), footnote 69; Cohen J. L. (2008), footnote 63. For a critique, see Tasioulas J. (2009), "Are human rights essentially triggers for intervention?", *Philosophical Compass* 4:6, pp. 938-50; Forst R. (2010), footnote 63; and Cohen J. L. (2008), footnote 63.

72. Steiner H. J. (2008), "Two sides of the same coin? Democracy and international human rights", *Israel Law Review* 41, pp. 445-76; and the essays in Fox G. and Roth B. (eds) (2000), *Democratic governance and international law*, Cambridge University Press, Cambridge; and in particular Fox G. (2000), "The right to political participation in international law", Fox G. and Roth B., op. cit., pp. 48-90; Franck T. (2000), "Legitimacy and the democratic entitlement", Fox G. and Roth B., op. cit., pp. 25-47 and Crawford J. (2000), footnote 68. Compare with early discussions in Steiner H. J. (1988), "Political participation as a human right", *Harvard Human Rights Yearbook* 1, p. 77; or Franck T. (1992), "The emerging right to democratic governance", *American Journal of International Law* 86, pp. 46-91.

73. Steiner H. J. (2008), footnote 72, pp. 447-9; Letsas G. (2007), *A theory of interpretation of the European Convention on Human Rights*, Oxford University Press, Oxford, pp. 18-21; Moravcsik A. (2000), "The origins of human rights regimes: Democratic delegation in postwar Europe", *International Organization* 54:2, pp. 217-52.

74. Steiner H. J. (2008), see footnote 72, p. 460 ff.

75. Fox G. (2000), footnote 72; Steiner H. J. (2008), footnote 72.

been adopted since, in particular, Article 23 of the American Convention on Human Rights (ACHR) and Article 1 of the Inter-American Democratic Charter (IADC).[76] Nowadays, both kinds of international legal requirements have tended to reinforce each other to an extent that makes them largely indissociable from an international legal perspective.[77]

Faced with these developments in the positive law guarantees of the human right to democracy, some have deplored a conceptual mistake, claiming that human rights are used in this context as a proxy for legitimacy or worse, as a justification for international intervention and not as moral propositions and hence as bases for correlative moral duties.[78] Others argue that international guarantees of the human right to democratic participation are still too weak or insufficiently explicit.[79] After all, the term "democracy" is not expressly used in any of the main international law guarantees of the right to democratic participation (Article 21 of the Universal Declaration of Human Rights or UDHR, Article 25 of the ICCPR and Article 3 of the first Protocol to the ECHR), although it is mentioned elsewhere in those instruments (for instance in Article 29 of the UDHR, and Articles 14, 21, and 22 of the ICCPR). Even the Human Rights Committee's General Comment No. 25 of 1996 does not provide much detailed information as to what a democratic government ought to look like.[80] However we answer such critiques, it has become clear to most authors that the question is no longer whether there is a human right to democracy in international law, but whether there should be one and whether it should be guaranteed and protected differently. In other words, the question is no longer a positive, but a normative one.

There are two ways of understanding that normative question, however: a legal and a moral one. The question of whether there should be a legal right to democracy is not the same as the question of whether there is a moral right to democracy. Clearly, both questions are related; the existence of a moral right to X can be a reason to recognise a legal right to X. However, they are not identical, and it is important to focus on the existence of a moral right to democracy, as I will in this paper.

Two explanations are in order in this respect. First of all, there could be other reasons to recognise a legal right to X than the existence of a moral right to

76. Article 1 of the Inter-American Democratic Charter actually declares that "peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it."
77. Steiner H. J. (2008), footnote 72, p. 450 and p. 476.
78. For this distinction, see Letsas G. (2007), footnote 73, pp. 21-9; and Cohen J. L. (2008), footnote 63. See also Marks S. (2000), *The riddle of all constitutions – international law, democracy, and the critique of ideology*, Oxford University Press, Oxford, p. 40.
79. See the debates in Fox G. and Roth B. (eds) (2000), footnote 72; Steiner H. J. (2008), footnote 72, pp. 455-60.
80. Human Rights Committee, General Comment. The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), fifty-seventh session, 1996, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 168 (2003).

X.[81] This is less likely to be true of human rights, but the possibility cannot be excluded. Allen Buchanan mentions at least two reasons to recognise an international legal right to democracy that do not depend on the existence of a moral right to democracy: the instrumental value of democracy for the realisation of other human rights, and the legitimation of the role of state consent in international law as democratic state consent.[82] In this paper, I will not be considering those reasons except as contributing to an argument for the existence of a moral right to democracy, and for the legalisation of such a right independently from a moral right to democracy. Secondly, not all moral rights to X provide a reason to recognise legal rights to X. This is also true of human rights; it is enough to consider the moral human right to health or the right to not be poor and the lack of legal correspondents (at least for a very long time). Various reasons are often put forward for the legalisation of moral rights, such as clarity, security, or effectiveness.[83] Importantly, those reasons may differ depending on whether one is thinking of the national or international legalisation of human rights.[84] I will come back to this point later with respect to the passage from the moral human right to democracy to the international legal right to democracy.

The vast majority of authors who discuss the existence of a human right to democracy provide a positive answer to the question of whether there is a moral right to democracy, or at least to democratic participation.[85] Most, however, associate human rights and democracy with each other and move very quickly (sometimes too quickly) to a stronger claim: that of the existence of a human right to democracy. That move needs to be carefully scrutinised, however. To assess the existence of a moral human right to democracy, my argument will be four-pronged. First, I will define the two notions in the equation: human rights

81. See, e.g. Raz J. (1984a), "Legal rights", *Oxford Journal of Legal Studies* 4, p. 1; Raz J. (1984b), "On the nature of rights", *Mind* 93, pp. 194-214; Besson S. (2005), *The morality of conflict – reasonable disagreement and the law*, Hart Publishing, Oxford, pp. 421-4. Of course, most legal rights are also moral rights, but the latter need not exist prior to the former and can be created through legal means.

82. Buchanan A. (2004), footnote 69, p. 142 ff.

83. See, e.g. Alexy R. (1998), footnote 66, pp. 244-64; Besson S. (2005), footnote 81; Besson S. (2006), "The European Union and human rights: towards a new kind of post-national human rights institution", *Human Rights Law Review* 6(2), pp. 323-60; Tasioulas J. (2007), "The reality of human rights", Pogge T. (ed.), *The right not to be poor*, UNESCO, Paris, pp. 75-101; and the essays in Meckled-Garcia S. and Cali B. (eds) (2006), *The legalisation of human rights*, Routledge, London.

84. Gardbaum S. (2008), "Human rights as international constitutional rights", *European Journal of International Law* 19:4, pp. 749-68; Buchanan A. and Russell R. (2008), "Constitutional democracy and the rule of international law: are they compatible?", *The Journal of Political Philosophy* 16:3, pp. 326-49.

85. See, e.g. Forst R. (2010), footnote 63; Griffin J. (2008), footnote 69, Ch. 14 (albeit in modern conditions only); Menke C. (2005), footnote 69; Talbott W. J. (2005), footnote 69; Nickel J. (2005), "Gould on democracy and human rights", *Journal of Global Ethics* 1, p. 207 (albeit at the national level only); Buchanan A. (2004), footnote 69; Gould C. (2004), footnote 67, p. 183; Beitz C. R. (2001), footnote 69; Sen A. (1999), footnote 69; Beetham D. (1999), footnote 69; Rawls J. (1999), footnote 69; Shue H. (1996), footnote 69. The exceptions are Cohen J. L. (2008), footnote 63, p. 579; and Cohen J. (2006), footnote 69, although they both seem to argue for a minimal right to political membership. The same applies to Beitz C. R. (2007), footnote 69.

and democracy. I will then turn to the various connections which can be identified between human rights and democracy. Then I will discuss the validity of different arguments for the existence of a moral right to democratic participation, distinguish that right from other connected albeit distinct rights, and respond to three main critiques. Finally, I will assess whether there should be a legal right to democratic participation, at the national or at the international level.

1. The notions of human rights and democracy

1.1. Morality, human rights, and democracy

As noted, the answer to the question raised in this paper will vary greatly depending on how human rights and democracy are defined.[86] It is essential therefore to start by defining what those terms will be held to mean in the context of the idea of a human right to democracy. The point is not to present an exhaustive account of those two eminently normative and hence essentially contestable concepts, but to provide sufficient elements to be able to turn to their relationship hereafter.

It is important to first distinguish both concepts from two connected albeit broader concepts in morality: justice and legitimacy. While both democracy and human rights are part of what constitutes the value of justice, they should not be identified with it. Thus, it is not because justice requires democracy or because human rights are a requirement of justice, that there is a human right to democracy.[87] Nor, on the other hand, should the fact that both democracy and human rights may be regarded (together or alternatively) as important elements of the legitimacy of an institutional framework or of the international legal order imply that there is a human right to democracy. This is so even though the recognition of an international legal right to democracy may contribute to enhancing the legitimacy of international law.[88] In what follows, the two concepts will therefore be isolated and defined separately from each other and from other concepts in morality.

1.2. Human rights

Human rights can be understood as moral propositions, and more specifically as moral propositions that ground moral duties. They are part of morality, just as reasons, values, duties, principles, or interests are. They should not, however, be identified with all of the latter, nor should human rights be taken to comprise the totality of morality. In particular, human rights are of value and can be justified on the basis of values, but are not themselves values.

86. This can also be true for the same author (compare Cohen J. L. (2008), footnote 63, who opts for a political conception of human rights with Cohen J. L. (1996), footnote 66, who is ready to defend a universal moral right to political membership).
87. Cohen J. (2006), footnote 69.
88. Buchanan A. (2004), footnote 69, p. 142.

More specifically, human rights are moral rights of a special kind, as they protect fundamental and universal interests.[89] This definition will now be examined.

A moral right exists when an interest is regarded as a sufficient reason to hold someone else (the duty bearer) under a duty to respect that interest vis-à-vis the rights holder.[90] For a right to be recognised, a sufficient interest must be established and weighed against other interests and other considerations with which it might conflict in a particular social context.[91] Rights are, in this conception, intermediaries between interests and duties.[92] It follows, first of all, that a right may be recognised and protected before specifying which duties correspond to it.[93] Once a duty is specified, it is correlative to the right, but the right may pre-exist without all its specific duties being identified. The relationship between rights and duties is therefore justificatory and not logical.[94] A right is, secondly, a sufficient reason for holding other individuals to all the duties necessary to protect the interest rather than in terms of the details of these duties.[95] It follows that a right might provide for the imposition of many duties and not only one. Besides, rights have a dynamic nature and, as such, successive specific duties can be grounded in a right depending on the circumstances.[96] As a result, the determination of the duty bearer of a right and its claimability are not conditions of the existence of moral right.[97]

Human rights are also moral rights of a special intensity, in that the interests protected are regarded as fundamental and universal interests. They include individual interests when these constitute part of a person's well-being in an objective sense. That person need not believe that it is the case for his or her interest to require protection as a human right. These interests also extend to others' interests in the community and even to common goods in some cases.[98] Such external interests can boost the importance of an individual interest and justify the recognition of that interest as a human right.[99] The fundamental nature of the protected interests will have to be determined by reference to the context and time rather than established once and for all.[100] This is particularly important not only

89. For a detailed presentation of the modified interest-based theory of human rights, see Besson S. (2005), footnote 81, and Besson S. (2006), footnote 83.
90. Raz J. (1984b), footnote 81, p. 195.
91. Raz J. (1984b), footnote 81, p. 200, p. 209.
92. Raz J. (1984b), footnote 81, p. 208.
93..MacCormick N. (1977), "Rights in legislation", Hacker P. and Raz J. (eds), *Law, morality and society*, Clarendon, Oxford, p. 201.
94. MacCormick N. (1977), footnote 93, p. 199-202; Raz J. (1984b), footnote 81, p. 196, p. 200.
95. Waldron J. (1984), "Introduction", *Theories of rights*, Clarendon, Oxford, pp. 10-11.
96. Raz J. (1984b), footnote 81, pp. 197-9.
97. Tasioulas J. (2007), footnote 83.
98. Raz J. (1992), "Rights and Individual Well-being", *Ratio Juris*, 5:2, pp. 127-42, p. 135.
99. Nickel J. (2005), footnote 85.
100. Tasioulas J. (2002), "Human rights, universality and the values of personhood: retracing Griffin's Steps", *European Journal of Philosophy*, (2002) 10, pp. 79-100; Tasioulas J. (2010a), footnote 70; Contra: Griffin J. (2001), "First steps in an account of human rights", *European Journal of Philosophy* 9, p. 306-27.

from the perspective of value pluralism but also of social pluralism, as human rights may protect a variety of different interests whose specific order may vary depending on the context.[101]

What makes it the case that a given individual interest is regarded as sufficient to generate a universal duty and that, in other words, the threshold between a mere interest and a human right is reached, may be found, arguably, in the normative status of that individual *qua* equal member of the moral-political community. Those persons' interests merit equal respect in virtue of their status. However, human rights are not merely a consequence of individuals' equal status, but also a way of actually earning that equal status and consolidating it. Without human rights, political equality would remain an abstract guarantee; through human rights, individuals become actors of their own equality. Human rights are power mediators:[102] they both enable political equality and maintain it.

In short, the proposed account and justification of human rights follows a modified interest-based theory, modified by reference to considerations of moral-political status in a given community.[103] Under a purely status-based or interest-based model, the Manichean opposition between the individual and the group, and between his private and public autonomy, would lead to unjustifiable conclusions.[104] More specifically, the proposed account is moral in the independent justification it provides for human rights, and political in the function it sees them vested with as both shields against the state and guarantees of political inclusion. In terms of justification, its moral-political dimension differs both from accounts based on a purely ethical justification of human rights,[105] and from accounts that seek a political form of minimalist justification of human rights.[106] With respect to the function of human rights, it can salvage their political role without diluting their moral justification.[107]

Based on this account of moral human rights, one may gain useful insights into legal human rights. Legal (human) rights are legal propositions and sources of legal duties. More specifically, legal rights are legally protected moral interests.[108]

101. Tasioulas J. (2010), footnote 70.
102. For the original idea of mediating duties, see Shue H. (1988), "Mediating duties", *Ethics* 98, pp. 687-704, p. 703.
103. See Besson S. (2005), footnote 81, and Besson S. (2006), footnote 83. See for similar attempts, Buchanan A. (2010b), "The egalitarianism of human rights", *Ethics* 120:4, pp. 679-710, for an egalitarian account of human rights; and possibly Tasioulas J. (2009), footnote 71; Tasioulas J. (2010b), "Taking rights out of human rights", *Ethics*, 120:4, pp. 647-78.
104. See Tasioulas J. (2010b), footnote 103, for a critique of Griffin J. (2008), footnote 69.
105. See Tasioulas J. (2010b), footnote 103, Griffin J. (2008) footnote 69.
106. See Raz J. (2010), footnote 71; Rawls J. (1999), footnote 69; Beitz C. R. (2007), footnote 69; Cohen J. (2006), footnote 69; Cohen J. L. (2008), footnote 63.
107. It comes very close to Forst R. (2010), footnote 63, and Forst R. (2007), *Das Recht auf Rechtfertigung. Elemente einer konstruktivistischen Theorie der Gerechtigkeit*, Suhrkamp, Frankfurt-am-Main, in this respect, but differs ultimately as Forst's account is based on a reflexive right to political justification and hence to political equality, whereas the present account is based on political equality and its mediation through human rights.
108. Raz J. (1984a), footnote 81, p. 12.

It follows that legal rights may also be regarded as moral rights. Of course, not all moral rights are or should be legally recognised. Rights should not therefore necessarily be understood as "moral rights to have legal rights", after Joel Feinberg.[109] Law does not always ensure better protection of rights-protected interests than other means.[110] Nor does this mean that legal rights necessarily pre-exist as independent moral rights. Some do and are legally recognised moral rights, but others are legally created moral rights.[111] In some cases, law and politics may change a person's interests, thus in a sense creating the moral interest and its moral-political significance, which are the foundations of the right.

1.3. Democracy

Democracy can be understood as an abstract value of political morality. It relies on the principle of basic moral equality and equal moral consideration or respect. According to the corresponding principle of political equality, all persons have by reasons of their equal status a claim to equal participation in the most important political decisions that concern them.[112] By reference to political equality, democracy is the political regime, governance, or scheme of collective decision-making in which all those whose fundamental interests are affected are included in the decision-making process and have an equal claim to participate (directly or indirectly) in making the decisions that affect them.[113]

Following Buchanan, there are three constitutive elements of democratic governance, namely:

(i) there are representative majoritarian institutions for making the most general and important laws, such that no competent individual is excluded from participation;

(ii) the highest government officials are accountable to the people by being subject to removal from office through the workings of these representatives;

(iii) there is a modicum of institutionally secured freedom of speech, association, and assembly, required for reasonably free deliberation about political decisions and for the formation and functioning of political parties.[114]

The latter are usually protected through human rights that constitute internal limits to democratic authority, but also its internal pull. Those limits and pulls are grounded in the very same principle as democracy: basic political equality.[115]

109. See, e.g. Feinberg J. (2003), "In defense of moral rights", *Problems at the roots of law: Essays in legal and political theory*, Oxford University Press, Oxford. See in the case of human rights, Alexy R. (1998), footnote 66; Habermas J. (1998), footnote 65.
110. See, e.g. Tasioulas J. (2007), footnote 83; Waldron J. (1999), footnote 65.
111. Raz J. (1984a), footnote 81, pp. 16-17.
112. Buchanan A. (2004), footnote 69; Christiano T. (2006), "A democratic theory of territory and some puzzles about global democracy", *Journal of Social Philosophy* 37:1, pp. 81-107.
113. Besson S. (2005), footnote 81.
114. Buchanan A. (2004), footnote 69, p. 146.
115. Christiano T. (2006), footnote 112, p. 90.

2. The relationship(s) between human rights and democracy

2.1. Moral interdependencies

As moral entities of different kinds, human rights and democracy can enter into various relationships with each other. This can be true independently of the existence of a human right to democracy.

Many authors derive the existence of a human right to democracy from one of those relationships.[116] Most of the time, however, they do so without clearly distinguishing having a human right to democracy from democracy being intrinsically or instrumentally valuable to the realisation of human rights.[117] It is important therefore to clarify what those relationships can be before assessing in a third section whether those relationships can ground a human right to democracy or whether, independently of one of those relationships, such a right may be recognised.

Relationships between human rights and democracy can be described as being either instrumental or intrinsic, depending on whether democracy is instrumentally related to the protection of human rights or whether they are more closely dependent. Both relationships are compatible and democracy may be both instrumentally and intrinsically connected to human rights. Of course, once the existence of a moral human right to democracy is recognised, another question would be whether that right is itself instrumentally or intrinsically related to other human rights, and in particular whether it is a more basic right in that respect.[118] However, as we will see, its connection to other rights cannot provide justification for the right in the first place; it may reinforce its justification by providing further reasons for the right or its implementation, but may not ground the right itself.[119]

Most of the time, the relationship, whether intrinsic or instrumental, between human rights and democracy reveals the primacy of one over the other. It is important to emphasise moreover that the instrumental or intrinsic relationship

116. See, e.g. Griffin J. (2008), footnote 69; Talbott W. J. (2005), footnote 69; Beitz C. R. (2001), footnote 69; Beitz C. R. (2007), footnote 69; Sen A. (1999), footnote 69.
117. Shue H. (1996), footnote 69, is an exception, as in his account of the human right to democracy, basic rights are defined as rights the recognition of which is necessary (albeit not necessarily sufficient) to respect other human rights. Of course, his argument is about the basic nature of the human right to democracy rather than one about its right's nature in the first place. On Shue's "basic rights", see the recent essays in Beitz C. R. and Goodin R. (eds) (2009), *Global basic rights*, Oxford University Press, Oxford.
118. This question is beyond the scope of this paper, in particular whether the human right to democracy ought to be ranked higher than other human rights in case of conflict. On the various relationships of interdependence and indivisibility among human rights themselves, see Nickel J. (2008), "Rethinking indivisibility: Towards a theory of supporting relations between human rights", *Human Rights Quarterly* 30, pp. 984-1001: my inclination is to agree with the correlation Nickel makes between the greater implementation of human rights and their indivisibility. This means that burdening a developing country with indivisibility and the full implementation of the human right to democracy before the human right to subsistence is realised would not seem correct.
119. See also Nickel J. (2008), footnote 118, p. 999.

between human rights and democracy does not prevent them from entering into conflict in certain cases, and hence one from having to set *ex ante* priorities or from weighing and balancing *ex post*. Even in the absence of any instrumental or intrinsic relationship between human rights and democracy, those two kinds of moral considerations may enter into conflict, requiring a prioritisation.[120] Unlike the conflict between two values or the conflict between two rights or duties, this kind of conflict between reasons and values has to be solved by reference to other standards of commensurability, if this is at all possible. One may, of course, imagine weighing human rights and democracy by reference to the values that ground some human rights, whether they are the same as those that ground democracy, as is the case with political equality, or whether they are altogether different, as is the case most of the time.

2.2. The instrumental relationship

There are various ways of expressing the instrumental relationship between democracy and human rights. What those different approaches have in common, however, is that they view one as having instrumental value for the other.

Thus, democracy is said to have instrumental value for the protection of certain or even most human rights in that it is deemed to facilitate their realisation and enhance their effectiveness in practice.[121] Evidence for this has been gathered by Amartya Sen, who shows that violations of the right to resources for subsistence, and other human rights as well, are prevented where governments are democratic.[122] Another example that stems from political science is the "democratic peace" argument, according to which democracies tend not to go to war with each other, thus decreasing the occurrence of the human rights violations that occur during war. It is important to emphasise that democracy need not be effective and its impact on human rights verified for the instrumental value of democracy to be recognised.[123] The reverse argument is also made, as human rights may be said to help realise democratic conditions of governance. This is clearly the case for political rights such as freedom of speech, freedom of association, or the right to vote.[124] While both may be true, it is also possible to consider the instrumental value of democracy for human rights without endorsing

120. No need to rehearse the famous opposition between the liberal critique of democracy based on human rights and the democratic critique of human rights based on community. See on this opposition, Menke C. and Pollmann A. (2007), footnote 66.
121. See e.g. Griffin J. (2008), footnote 69; Talbott W. J. (2005), footnote 69; Buchanan A. (2004), footnote 69; Beitz C. R. (2001), footnote 69; Beitz C. R. (2007), footnote 69; Sen A. (1999), footnote 69.
122. See Sen A. (1999), footnote 69; Sen A. (2001), "Democracy as a universal value", Diamond L. and Plattner M. (eds), *The global divergence of democracies*, The John Hopkins Press, Baltimore, p. 3. See also Talbott W. J. (2005), footnote 69; and a discussion of the evidence by Beitz C. R. (2007), footnote 69.
123. See Shue H. (1996), footnote 69, pp. 74-8. Contra: Beitz C. R. (2007), footnote 69, pp. 101-2, who argues there is lack of evidence.
124. See, e.g. Christiano T. (2006), footnote 112, p. 90.

the reverse. Most authors do, however, for the contribution of human rights to democracy is generally acknowledged.[125] When this is the case, the instrumental relationship can be regarded as reciprocal or bidirectional.

2.3. The intrinsic relationship

Alternatively or additionally, human rights and democracy may be said to stand in a relationship of conditionality, necessity, or requirement.[126]

Democracy may be regarded as a requirement of human rights and hence as a condition for the latter. With this approach, being able to determine what affects us, that is, what democracy guarantees, is an essential part of what having human rights is about.[127] It is usually taken as a necessary condition, albeit not a sufficient one.[128] Indeed, other conditions are often regarded as necessary for democracy to be effective and for its impact on human rights to be fully realised. The reverse, that is, the requirement of human rights for democracy, may also be held, though not necessarily. However, it is generally regarded as less contested.[129] One could hardly imagine a functioning democracy without guarantees of free speech, freedom of association, or the right to vote.

Whereas it may be possible for human rights to be intrinsically related to democracy without the reverse being true or vice versa, when both are mutually connected in this way, they are regarded as indivisible.[130] There may, however, be cases in which the relationship between the two is bidirectional and hence mutual, but where it is not intrinsic on both sides, but intrinsic and instrumental; one may argue, for instance, that human rights are necessary for democracy, and that although the realisation of human rights is facilitated by democracy, it does not absolutely depend on it. In such a case, one may speak of a weaker form of interdependence than indivisibility.

The intrinsic relationship between human rights and democracy, when it is mutual, is also sometimes referred to as co-originality.[131] Co-originality implies something stronger than indivisibility: human rights and democracy are not only mutually necessary in their respective realisation, but they are mutually founded. This can be the case per se. Most of the time, however, co-originality stems from the fact that they are founded in or justified by reference to a third value,

125. See Griffin J. (2008) footnote 69; Steiner H. J. (2008), footnote 72, pp. 460-3.
126. The terminology used varies: see Griffin J. (2008), footnote 69, ("requirement"); Gould C. (2004), footnote 67, ("linkage"); Böckenförde E.-W. (1998), footnote 66, ("Forderung"); Shue H. (1996), footnote 69, ("need"); Beetham D. (1999), footnote 69 ("intrinsic relation").
127. See Waldron J. (1999), footnote 65.
128. See, e.g. Shue H. (1996), footnote 69; Gould C. (2004), footnote 67.
129. See Griffin J. (2008), footnote 69; Crawford J. (2000), footnote 68.
130. See Nickel J. (2008), footnote 118, pp. 988-91, mutatis mutandis in the context of a "human right to human right" relationship.
131. See Habermas J. (1998), footnote 65, Ch. 3; Wellmer A. (1998) "Menschenrechte und Demokratie", Gosepath S. and Lohmann G. (eds), *Philosophie der Menschenrechte*, Suhrkamp, Frankfurt am Main, p. 265-91; Beetham D. (1999), footnote 69.

such as moral equality,[132] autonomy, or the most fundamental of moral rights, the right to justification.[133] Their co-originality may even stem from their being founded in two further values that are themselves co-original, private and public autonomy.[134]

3. The human right to democracy

3.1. Justifying the human right to democracy

Many authors derive the existence of a human right to democracy from the instrumental and/or the intrinsic relationship between human rights and democracy.[135] Most of the time, however, they do so without clearly distinguishing having a human right to X from X being intrinsically or instrumentally valuable to the realisation of other human rights.[136] Clearly, something more is needed for a human right to be recognised. The reverse is also true: a human right to democracy may be recognised without there being an instrumental or intrinsic relationship between human rights in general and democracy. Thus, there is a human right to privacy without privacy being in an instrumental or intrinsic relationship to human rights in general.

In what follows, I will assess three kinds of moral arguments for the human right to democracy. I want to examine how one may move, first, from considering democracy as being intrinsically valuable – whether or not it is intrinsically connected to other human rights, to having a right to democracy – and second, from considering it as instrumentally valuable for other human rights: to there being a right to democracy. A third argument I would like to consider is that the human right to democracy is the primary moral right that underlies both human rights and democracy. While assessing each of those arguments, I will also discuss the extent to which they fit the proposed revised interest-based account of human rights presented earlier and how they can as a result help justify a human right to democratic participation in that context.

3.1.1. Human rights and values: the intrinsic justification

The first question one may ask pertains to the relationship between values and human rights. How does a valuable interest or even a value itself justify creating a duty for someone and hence recognising a right? How does the fact that

132. See, e.g. Christiano T. (2006), footnote 112; Buchanan A. (2004), footnote 69; Gosepath S. (2004), *Gleiche Gerechtigkeit. Grundlagen eines liberalen Egalitarismus*, Suhrkamp, Frankfurt-am-Main.
133. See, e.g. Forst R. (2010), footnote 63.
134. See, e.g. Habermas J. (1998), footnote 65, Ch. 3.
135. See, e.g. Griffin J. (2008), footnote 69, p. 242, p. 247; Talbott W. J. (2005), footnote 69; Beitz C. R. (2001), footnote 69; Beitz C. R. (2007), footnote 69; Sen A. (1999), footnote 69.
136. Shue H. (1996), footnote 69, is an exception, as, in his account of the human right to democracy, basic rights are defined as rights whose recognition is necessary (albeit not necessarily sufficient) to respect other human rights.

democracy is a value and that democratic participation a valuable interest help justify the existence of a human right to democracy?

In view of the definition provided above of human rights, it is clear that there cannot be a human right to democracy *stricto sensu*: there cannot be a right to a value and democracy is such a value. A value can justify a right or at least explain why a right exists pertaining to certain interests deemed sufficiently important to ground a duty. However, claiming there is a right to a value would simply get the normative order wrong.

The phrase "human right to democracy" can only be used therefore as shorthand for a human right to a given democratic interest. There could, for instance, be a right to democratic institutions or to democratic participation or governance. This is also how authors writing about the human right to democracy qualify the right,[137] and where they join the vast majority of political theorists in considering democracy as potential content for human rights,[138] as opposed to an instrument or a basis for human rights.[139] This re-qualification of the human right to democracy also makes clear that democracy remains a distinct and autonomous value and principle, which can be used to criticise or provide richer normative guidance in the interpretation of the right to democratic participation.[140]

Even when it is re-qualified as suggested, the human right to democratic participation can only exist *qua* human right if it may be said to protect a fundamental interest sufficient to justify creating a duty for someone else. Not all objective interests justify creating duties. Of course, their ability to do so need not necessarily depend on their being justified by reference to a moral value, however fundamental. However, if they are, this can provide an important justification. This is the case, some authors argue, of the justification of the interest to democratic participation grounded in political equality,[141] or alternatively in autonomy[142] or fairness.[143]

Given the modified interest-based account presented earlier, and the role of political equality as a threshold criterion in that account, but also given third parties' interest in democracy and the social benefits of democracy more generally,[144] it is clear that the interest to democratic participation is among the most fundamental interests one ought to recognise as a human right in a democracy. The human

137. See, e.g. Buchanan A. (2004), footnote 69; Cohen J. L. (2008), footnote 63; Griffin J. (2008), footnote 69, p. 242.
138. See, e.g. Dworkin R. (2000), footnote 66, p. 185.
139. Note that Menke C. and Pollmann A. (2007), footnote 66, identify those three approaches to the relationship between human rights and democracy and see them as competitors, whereas I see the former as a consequence of the latter two.
140. This placates the critique of the "right" to democracy as antithetical to a "principle" of democracy made by Marks S. (2000), footnote 78, p. 109.
141. See, e.g. Buchanan A. (2004), footnote 69, p. 143.
142. See, e.g. Gould C. (2004), footnote 67, ("liberty"). Contra: Griffin J. (2008), footnote 69.
143. Contra Beitz C. R. (2007), footnote 69.
144. See Nickel J. (2005), footnote 85.

right to democratic participation turns individuals into actors and protectors of their own equality, which is the ultimate value of political self-determination.

3.1.2. Human rights and basic rights: the instrumental justification

Since democratic participation can be regarded as instrumentally valuable for the enjoyment of human rights, some authors have argued this makes it a human right, albeit of a special kind: an instrumental kind. So doing, they refer to a quality thought of as constitutive of a specific kind of human right: basic rights. Henry Shue's argument about basic rights is the most well-known version of that argument. He considers basic rights, such as the freedom of political participation, as rights the enjoyment of which is essential to the enjoyment of all other human rights, irrespective of the intrinsic value of their own enjoyment.[145]

This form of instrumental justification of human rights does not fit the account of human rights provided earlier, at least prima facie. The justification of the fundamental interest protected by a human right is not instrumental, but intrinsic. There is a complementary way, however, to justify the human right to democratic participation without referring directly to the fundamental interest that is protected and to its intrinsic justification by reference to political equality. The normative status of an individual in a given community, and in particular his or her basic equality, was invoked earlier as a threshold of justification in the modified interest-based account of human rights. With respect to the human right to democratic participation, basic political equality works as a threshold of justification[146] and builds the contribution to status into the justification of the human right to democracy. If there is a right that contributes to political equality and equal status by excellence and hence indirectly to all human rights, it is the right to democratic participation. An instrumental justification for that right may therefore be provided on top of its intrinsic justification, and one may want to argue, although this is beyond the scope of this paper, that this is what makes it a basic human right. But that instrumental or supporting relationship and the further reasons it provides for the right do not in any case suffice to justify the right to democratic participation in the first place.

3.1.3. Human rights and the right to have rights: the rights-based justification

A third approach one may identify is one that echoes Hannah Arendt's notion of the right to have rights as the only defensible human right.[147] Schematically, rights only make sense for Arendt inside a given polity and *qua* citizen of that polity. The only human right guaranteed outside of such a polity therefore is the right to be a citizen of a polity and hence the right to political membership.

145. Shue H. (1996), footnote 69, p. 67.
146. See also Buchanan A. (2010b), footnote 103, for a similar approach.
147. See Menke C. (2005), footnote 69; Arendt H. (1951), "The Decline of the Nation–State and the End of the Rights of Man", in *The Origins of Totalitarianism*, Penguin, London, pp. 177-8.

Authors such as Rainer Forst and Joshua Cohen have recently revived that idea of a basic right to political membership.[148] Forst clearly founds both democracy and all human rights on one single basic moral right: the right to justification. If the right to justification is regarded as the source of both democracy and human rights, there is no further argument needed to get from that right to the right to democracy that is one of its concretisations. Whereas Forst actually also refers expressly to that basic right to justification as a right to democracy, Cohen is more cautious about the use of the concept of moral rights in this context.[149]

While one may share Arendt's intuition, at least from the point of view of the effective protection of human rights in the national context, that right to political membership may be justified along the lines discussed earlier as any other human right, and in particular on the grounds of political equality, without having to see that right as a basic human right anterior to other rights and as the common moral ground of both human rights and democracy. The real question is whether that right to political membership may imply as much as a right to democratic membership and participation,[150] and this is the question I will turn to now.

3.2. Delineating the human right to democracy

Provided a justification of the human right to democratic participation is given, whether through political equality or autonomy and whether through a justified interest or normative status, it is crucial to distinguish that right carefully from connected but distinct moral considerations and claims. As those distinct moral claims are often used to argue against the human right to democracy, keeping them distinct is essential to the clarity of the argument.

There are at least two such claims I would like to address here: first, the human right to self-determination, and second, the right to the institutionalisation of one's human rights. Both rights are connected to the human right to democracy, but should not be identified with it.

The right to collective self-determination, first of all, is the right to political autonomy. It does not in principle entail the right for a given people to become an independent state, but merely to organise oneself autonomously as a political community within a given state.[151] It therefore differs from the right to democratic participation in two ways: it is a collective right,[152] whereas the right to democratic participation may be exercised individually even if it also protects

148. See Forst R. (2010), footnote 63; Cohen J. L. (2008), footnote 63.
149. This is true of Cohen J. L. (2008), footnote 63, who explicitly adopts a political account of human rights and argues against the right to democracy.
150. Cohen J. L. (2008), footnote 63, sees that right to political membership as the most we can justify universally. As I will argue, mutual justification of the moral right to democracy ought not to be seen as a requirement of its legitimacy, and hence the lack thereof as a challenge to its justification.
151. See Christiano T. (2006), footnote 112.
152. On the existence and justification of those rights, see Buchanan A. (2004), footnote 69, pp. 408-15.

collective interests; it also does not presume the democratic nature of the political regime that is adopted once the people can organise themselves autonomously. True, the right to self-determination may be considered a part of the right to democracy; democracy implies political autonomy.[153] But the reverse does not apply, or at least not necessarily. Of course, as full political autonomy does imply political equality, inclusion, and an equal say, the existence of the right to self-determination has the potential to lead to the development of a right to democratic participation and one may even argue that it has that right as an inbuilt claim.[154]

A second delineation needs to be made, not so much at the level of specificity of the object of the right, but at that of the duties it can trigger. It is important to distinguish the human right to democracy from the positive duties of institutionalisation and proceduralisation that are part of any human right. An actual human right to democratic institutions implies a corresponding duty to provide such institutions. Moreover, there may be positive duties of that kind stemming from the human right to democracy,[155] but those duties are derivative and do not correspond to interests that lie at the core of the justification of that right.[156] Finally, the human right to democratic institutions is a right to have access to democratic institutions and participate in them, not a right that such institutions simply exist. There can be no such human right.

3.3. Defending the human right to democracy

Three important critiques are usually put forward against the existence of a human right to democracy: first, its unjustifiable consequences in terms of enforcement; second, its incompatibility with the principle of equal sovereignty; and finally, its imperviousness to cultural diversity. All three critiques are related, but I will discuss them as putatively separate challenges to the human right to democracy.

3.3.1. Enforcement and the human right to democracy

The right to democratic participation is usually opposed on the basis that it could justify an international (coercive or not) intervention into the national sphere of sovereignty. While authors who make this critique would be ready to see such an intervention as justified in case of violation of the right to political autonomy, they regard it as illegitimate in the case of the mere absence of democracy in a given state.[157] Destabilising a functional albeit authoritarian regime would not only be counterproductive, it would also violate the right to political autonomy. In any case, government for and by the people should be organised by and for that people only and an international intervention in that process would not be

153. See Beitz C. R. (2007), footnote 69, p. 103.
154. See Forst R. (2010), footnote 63.
155. See Buchanan A. (2004), footnote 69, pp. 142 ff.
156. Both elements are somehow conflated in Alexy R. (1998), footnote 66.
157. See Cohen J. L. (2008), footnote 63; Beitz C. R. (2007), footnote 69, pp. 102-4.

justified. Because the human right to democracy cannot be enforced, it cannot, so the critique goes, be justified.

There are many difficulties with this position, difficulties which undermine the plausibility of its critique of the human right to democracy.

The first has to do with its conception of human rights. This conception was first put forward by John Rawls, and has since been developed by Joseph Raz as the political conception of human rights.[158] It defines human rights as external limits on state sovereignty and as justifications for international intervention. Not only does this approach fail to provide more than an empirical criterion for what human rights are,[159] it also excludes a whole range of human rights which do not justify state intervention, either because they apply only within domestic boundaries or because they have other duty bearers.[160] Neither does it account for the fact that the enforcement of human rights is in principle a domestic responsibility and only secondarily an international one. Even in this last instance, means of enforcement entail periodic reporting, interstate and individual complaint mechanisms, judicial review and, only extremely rarely, coercive measures. Coercive measures themselves are rarely military, ranging generally from individual and collective economic sanctions to international criminal justice.

Another difficulty with the critique is that it is based on a skewed approach of human rights enforcement and its relationship to the existence of a human right. Based on the modified interest-based approach presented earlier, the relationship between human rights and corresponding duties is justificatory and dynamic. Specific duties will be generated according to the circumstances and there is nothing one can deduce from the indeterminacy of the duty bearer or the impracticability of certain duties for the existence or non-existence of the right itself.[161] As a result, the lack or difficulty of enforceability of the human right to democracy, whether at the international or at the national level, does not affect the moral existence of the right. This means that the absence of international community and centralised institutions that could be organised democratically and hence of addressees of the right to international democracy[162] cannot be held against the existence of such a right either. It will make the identification of the duty bearers and the attribution of duties more difficult, but it does not undermine the existence or the justification of the right.

158. Rawls J. (1999), footnote 69; Raz J. (2010), footnote 71.
159. Cohen J. L. (2008), footnote 63.
160. Tasioulas J. (2009), footnote 71.
161. Tasioulas J. (2007), footnote 83; Besson S. (2006), footnote 83; contra: Nickel J. (2005), footnote 85.
162. See Nickel J. (2005), footnote 85, for such a critique of the argument for a right to international democracy in Gould C. (2004), footnote 67. The latter cannot be distinguished from national democracy in any case.

3.3.2. Sovereignty and the human right to democracy

Independently of international intervention *qua* mode of enforcement of the human right to democracy, a related critique pertains to the unjustified restriction of the principle of equal sovereignty of states that would result from the enforcement of the right to democracy.[163] Once enforced internationally, this right would undermine its own object and run against the principle of self-determination.

Again, this is a critique based on the political conception of human rights. There are two ways of responding to this critique: the first is to point to the redefinition of the concept of sovereignty in the post-Westphalian era and its relationship to human rights and state responsibility for the respect of those rights; the second is to show how the human right to democracy is intrinsically connected to political sovereignty so redefined.

First of all, and although the scope of this paper precludes a detailed explanation, state sovereignty has been going through a deep process of redefinition through international law and in particular human rights law in the last 50 years or so. From sovereignty *qua* independence, it has gained a new dimension and has also become sovereignty *qua* responsibility. Sovereignty is a normative concept imbued by the value of political autonomy, but also a result bound by it. A state is only sovereign to the extent that its citizens are and their political autonomy constitutes an internal limit to that state's sovereignty.[164] This is also the case of all human rights. In these conditions, the right to democracy that stems from the principle and value of political equality is one of the internal boundaries to democratic authority and state sovereignty.

Second, even when sovereignty is redefined as proposed, the human right to democracy remains problematic from the perspective of the principle of equal sovereignty, which is a cornerstone of the international legal order.[165] Unlike other human rights that constrain state sovereignty in internal affairs, the human right to democracy is a more incisive limitation on the organisation of the state and also extends to external sovereignty. Again, the account of human rights used in this paper enables us to evade that critique which is pointed towards political accounts of human rights which do not derive those rights from moral considerations, and which have to gather sufficient empirical evidence for a specific right or at least sufficiently broad public justification.[166] If I am right about human rights and democracy being intrinsically connected and co-original because of their common foundation in political equality, human rights

163. See, e.g. Cohen J. L. (2008), footnote 63.
164. See, e.g. Cohen J. L. (2006), "Sovereign equality vs. imperial right: the battle over the 'New World Order'", *Constellations* 13:4, pp. 485-505; Cohen J. L. (2008), footnote 63. See also Waldron J. (2006), "The rule of international law", 30:1 *Harvard Journal of Law and Public Policy* 15; Besson S. (2009c), footnote 67.
165. See, e.g. Cohen J. L. (2008), footnote 63, and Cohen J. L. (2006), footnote 164.
166. The argument in Cohen J. L. (2008), footnote 63, is directed mostly at Raz J. (2010), footnote 71, and Cohen J. (2006), footnote 69.

do not only constitute an internal limitation on political authority, but they also actually require political authority. This is especially true of the right to democracy. As a result, contrasting the right to democracy with state sovereignty is the wrong opposition. It is only when political authority no longer exists as such and power annihilates the right to democracy that that right can stand against the principle of equal sovereignty.[167]

3.3.3. Parochialism and the human right to democracy

A third critique that is brought to bear against the human right to democracy is parochialism or, more precisely, the claim that such a right is a parochial right. According to this argument, democracy is a political regime that only exists in a few states in certain wealthy and powerful parts of the world, and recognising the existence of a human right to democracy would contribute to imposing a political model on other weaker and poorer states and peoples. Among human rights, political rights of this kind are the most likely to fall prey to the cultural relativism objection.[168]

Parochialism is a well-known challenge to human rights, and it is based on a brand of moral relativism. In this view, human rights are derived from a parochial set of values unjustifiably imposed on people and societies which do not share it. This has as much to do with the values themselves as with their specific ordering. It need not be based on moral scepticism, however, and it is enough to entertain the claim of parochialism that values are plural and their orderings can be many (without a complete and coherent ranking), and hence that, in circumstances of social and cultural pluralism, those orderings and value systems can vary.[169] Nor should one confuse this critique, a serious critique, with unconvincing versions of the cultural relativism challenge that are based on disagreement and the lack of consensus or of mutual justification;[170] not only may people be mistaken and themselves parochial when they disagree or do not consent, but disagreement and lack of consensus is a widespread and persistent phenomenon within Western societies themselves – the very societies accused of being parochial.[171]

There are two main difficulties facing this critique: first, its moral validity and, second, its defeasibility within its residual ambit.

167. On this minimal and justified infringement of the principle of equal sovereignty, see Cohen J. L. (2008), footnote 63, pp. 595-6.
168. See, e.g. Griffin J. (2008), footnote 69; Beitz C. R. (2007), footnote 69; Cohen J. (2006), footnote 69. For a reaction, see, e.g. Forst R. (2010), footnote 63; Shue H. (1996), footnote 69.
169. See Buchanan A. (2010a), footnote 70. See also Tasioulas J. (2010a), footnote 70, for a discussion of both the pluralism-based and the scepticism-based accounts of the parochialism critique. I agree with him, however, when he considers that the strongest version of the critique is the pluralist one.
170. For a critique of those, see Buchanan A. (2008), footnote 70; Besson S. (2005), footnote 81.
171. See Buchanan A. (2008), footnote 70, on the debunking of alternative accounts of the cultural relativism critique.

First, the moral validity of the parochialism critique can be undermined by reference to an objective albeit pluralist conception of morality and a human rights account that reflects that moral pluralism. Adopting an objective view of morality does not equate with adhering to a monist conception of morality: the background to the following analysis is an objective albeit pluralist account of morality which can accommodate conflicts of values and different orderings among them.[172] The interest-based account of human rights presented earlier fits this pluralist account of morality and can as a result accommodate a plurality of values and orderings thereof, and hence of justifications of the same human right and its corresponding duties.[173] Further, the separation of the recognition of rights through the identification of fundamental interests and the specification of duties allows for a contextualisation of interests and hence for different orderings among them, but also among them and other considerations before duties are specified.[174]

Second, even within its residual ambit, and in particular with respect to the difficulties raised by social and contextual pluralism, the parochialism critique can be defeated. It should be emphasised for a start that holding to moral objectivity does not mean denying the importance of contextualising moral values recognised by international law at the domestic level, nor the possibility of the historical national localisation of objective values recognised by international law and of historical changes in that localisation in the course of time.[175] Further, one may legitimately contend that the intercultural dialogue and mutual adjustment promoted by democratic co-ordination in international lawmaking, and international decision-making generally, pays sufficient attention to the issue of cultural diversity and the need for epistemic inclusion of different cultural perspectives when adopting or applying international law.[176]

It is worth noting, however, that this pluralist counterargument seems available only to an account of human rights which regards them not as underived moral norms, but as grounded in a multiplicity of other, non-rights-based considerations, such as universal human interests. So-called traditional ethical accounts of the justification of human rights face a difficulty here and cannot rebut the parochialism challenge as easily; those that do recognise the right to democracy ground the right in a single moral norm, such as autonomy or liberty, and fail for reasons of cultural diversity.[177] At the other end of the spectrum, political accounts of the kind discussed before face a distinct but daunting difficulty; they

172. See Tasioulas J. (2010a), footnote 70.
173. See Tasioulas J. (2002), footnote 100, and Tasioulas J. (2010b), footnote 103.
174. See Besson S. (2005), footnote 81; and Besson S. (2006), footnote 83.
175. This explains how the fact that a decent life was possible prior to the advent of modern democracy does not affect the universality of the human right to democracy.
176. See Buchanan A. (2008), footnote 70.
177. See Griffin J. (2008), footnote 69, pp. 247-55 and the critique by Tasioulas J. (2010b), footnote 103.

cannot avail themselves of universal moral grounds and have to face social and cultural relativism on empirical or at least justificatory grounds.[178]

As a result, withdrawing into the right to political membership as the most one may require of decent societies in a liberal framework of mutual justification[179] is both too much for that argument to bear and too little to convince proponents of a modified interest-based argument for the human right to democracy. The right to political membership, advocated by liberal authors such as Cohen, is only distinct from the right to democracy in matter of degree. Collective self-determination, as Forst argues, is "a recursive principle with a built-in dynamic that favours those who criticise exclusions and asymmetries"[180] and implies democracy when brought to its maximal breadth.

4. The legalisation of the international human right to democracy

As stated in the introduction, the existence of a moral right to democracy does not necessarily imply or justify that of a legal right to democracy. There is no moral right to a legal right to democracy one may derive from the mere existence of a moral right to democracy. Nor does recognising such a legal right imply the pre-existence of a moral right to democracy. Of course, once a legal right is created, it also generates a moral right except when the other conditions for the recognition of a moral right, and in particular the existence of fundamental interests sufficient to generate duties, are not provided.[181] What we then have is a legal norm that is not a moral right and not accordingly *stricto sensu* a legal right – except in name.

In this section, I would like to assess not so much the additional justifications there may be for recognising a legal right to democracy, such as the legitimacy arguments mentioned in the introduction and in particular the instrumental value of democracy for human rights or that of peaceful consent among democratic states,[182] but the conditions under which the existence of a moral right to democracy may justify the legal recognition of that right. Of course, some of those conditions may also apply to the other reasons to recognise a legal right without a pre-existing moral right. I will proceed in two steps: first, I will assess why there should be a legal right to democracy; second, I will argue that legal right should be an international legal right to democracy.

178. Hence the difficulties faced by Rawls J. (1999), footnote 69, pp. 61 ff.; Beitz C. R. (2007), footnote 69, p. 103; and Cohen J. (2006), footnote 69, as emphasised by Cohen J. L. (2008), footnote 63; Forst R. (2010), footnote 63.
179. See Beitz C. R. (2007), footnote 69; and Cohen J. (2006), footnote 69, trying to correct some of the defects of Rawls J. (1999), footnote 69.
180. Forst R. (2010), footnote 63.
181. See Raz J. (1984a), footnote 81, p. 1; Raz J. (1984b), footnote 81. Note that Buchanan A. (2004), footnote 69, fails to see this in his argument for a legal human right to democracy.
182. See Buchanan A. (2004), footnote 69, pp. 142 ff.

4.1. The legal human right to democracy

One should first ask what the material elements which may provide reasons for the legalisation of a human right are. General reasons put forward for the legal recognition of a moral right are usually the following: security and clarity, intermediary agreement on a contested right or sets of interests, effectiveness, sanctions, or publicity.[183] In some cases, counter-reasons may be put forward, in particular the non-antagonistic quality of social implementation mechanisms or the destructive individualisation of human rights remedies.[184]

In the case of the human right to democracy, the legalisation of the right would enhance its realisation, by both enabling democratic processes through legal directives and protecting such processes against themselves and their own unmaking.[185] Of course, the legalisation of every human right triggers legitimation issues, especially when it functions as a limit on the outcome of democratic decision-making processes.[186] This is even more so when the right that is legalised and needs to be legitimised is the right to participation in those very processes. This is the famous paradox of democratically guaranteeing democracy and "self-determined self-determination" I alluded to in the introduction. The best we can do in view of that paradox is to understand this process as an iterative one that starts from historical and current practices,[187] and the relationship between democratic procedures of legalisation and the legal right to democracy as one of mutual reinforcement and justification.[188]

4.2. The international human right to democracy

The next question to arise is whether the legal recognition of the moral right to democracy should occur through national or international law.

Given the universal scope of the right, an international guarantee (conventional or customary) would seem prima facie to constitute the obvious choice. But considerations of territorial scope should not be a priority. Most international human rights guarantees are considered minimal and subsidiary and give rise to duties of reception and enforcement within domestic law. Both levels of protection are usually regarded as complementary, therefore, rather than as providing

183. See Besson S. (2005), footnote 81; and Besson S. (2006), footnote 83.
184. See Tasioulas J. (2007), footnote 83.
185. See Nino C. (1996), *The constitution of deliberative democracy*, Yale University Press, New Haven, p. 184; Benhabib S. (1996), "Toward a deliberative model of democratic legitimacy", in Benhabib S (ed.), *Democracy and difference: contesting the boundaries of the political*, Princeton University Press, Princeton, p. 67, p. 80 on democratic rights as rules of the game that make the game at all possible.
186. See, e.g. Waldron J. (1999), footnote 65; Besson S. (2005), footnote 81. Note that I am leaving aside the question of the constitutionalisation of human rights.
187. See Buchanan A. (2004), footnote 69, p. 189, for a similar argument in the international legal context.
188. Neither human rights nor democracy on their own can be sufficiently self-reflexive, however; it is their mutual foundation in political equality which makes them constantly seek justification from one another.

competing guarantees. Further, many national constitutions are more advanced than international instruments with respect to their guarantees of certain human rights, including social and economic rights such as the right to health, but also of certain civil and political rights such as the right to protest and, in fact, most political rights. As the experience with the Charter of Fundamental Rights of the European Union and in particular with social and economic rights in the Charter has demonstrated, national guarantees can then fuel later international (or regional, in this case) guarantees of human rights.

Primary reasons for the international legalisation of a moral right relate to various elements in that right such as:[189]

– its personal scope, as international human rights have individuals as rights holders, but also other states and international organisations in the international community (through *erga omnes* duties of the state or through conventional duties based on a human rights treaty), first, and have all individuals residing in a given state and not only citizens as rights holders, second;
– its material scope, as international human rights law may fill gaps in national protection or at least provide a minimal safety net in case of human rights relapse in a given state;
– its territorial scope, as international human rights law protects not only individuals within state boundaries, but also all individuals submitted to its extra-territorial jurisdiction.

Additional reasons may also be found in the international mechanisms available to enforce international human rights duties, whether political or judicial, coercive or non-coercive, or military or non-military. As Buchanan and Russell have noted, further reasons may be identified and grouped into self-regarding reasons and other-regarding or cosmopolitan reasons.[190]

In spite of all these reasons, I would like to submit that national law remains the most legitimate locus for the legalisation of human rights.[191] This has to do as much with human rights and the values underlying them as with democracy itself. First, it follows from my discussion of parochialism and social relativism that fundamental interests need to be concretised and contextualised in a given epistemic community to be recognised as human rights. While a lot of that concretisation may be done at the international level, its key contextualisation can only take place at national level.[192] Further, by reference to the intrinsic relationship and co-originality between human rights and democracy as discussed earlier, and as long as international democracy is not only underdeveloped and has

189. For those and other reasons, see Gardbaum S. (2008), footnote 84, pp. 764-8.
190. See Buchanan A. and Russell R. (2008), footnote 84, pp. 330 ff.
191. On the difference between legislative and constitutional legalisation, see Waldron J. (1999), footnote 65; Besson S. (2005), footnote 81.
192. See Buchanan A. (2008), footnote 70, on the need for inter-cultural dialogue and democratic concretisation of international human rights.

not entirely replaced national democracies as the locus of decision-making,[193] human rights should be incorporated and protected within national legal orders. This is where human rights law can be vested with its democratic legitimacy.[194] This explains why most international human rights guarantees are considered as minimal and subsidiary and give rise to duties of reception and enforcement within domestic law. Both levels of protection are usually regarded as complementary and as serving different functions, therefore, rather than as providing competing guarantees.

All reasons provided for the international legalisation of human rights would seem prima facie to apply to the moral right to democratic participation, at least *qua* minimal and general international human rights, following the understanding I have just articulated. Given the interests protected by that right, and their intrinsic relationship to the principle of political equality, however, it is clear that its primary locus of legitimation and hence of legalisation should be domestic. This has to do as much with the contextualisation of democratic interests discussed earlier, as with the legitimacy of an international legal right to democracy.

Of course, the democratic legitimation of international law abides by criteria and refers to subjects very different from that of domestic law.[195] It would be wrong therefore to look for an international state-like political community that iteratively legitimises a right to democratic participation through democratic practices along the lines discussed. Ultimately the regress will have to be curbed and current and historical democratic practices could be used as a bottom-up starting point, to be gradually legitimised through a self-reinforcing relationship between democratic practices at national and international level and the right to democratic participation.[196]

It is clear, however, that in the current conditions of international lawmaking, the equal inclusion of all those affected and the granting of an equal say even in an iteratively democratic process are simply not guaranteed, whether from a domestic or international perspective. It would be more paradoxical at the international level than at the domestic level, as a result, to protect the right to democracy but not enable the beneficiaries of the right to exercise it, especially when deciding on that very right and membership in the community of rights holders. The whole idea of self-determination through the human right to democratic participation would be defeated. The absence of democratic mechanisms

193. On "*demoi*-cracy" and its relationship to (national and international) lawmaking, see Besson S. (2009a), footnote 67; Besson S. (2009b), footnote 67.
194. As I have argued elsewhere – Besson S. (2009c), footnote 67 – the legitimate authority of international human rights is different from that of other international law norms.
195. See Besson S. (2009c), footnote 67.
196. See Buchanan A. (2004), footnote 69, pp. 188-9.

and institutions to interpret and apply the right at the international level following adoption exacerbates this problem.[197]

It is important to emphasise at this stage that this conclusion should not affect the legal validity of existing guarantees of the right to democracy under current international law.[198] Nor does it affect the moral reasons there may be for states to adopt or recognise international legal guarantees of a given human right in the first place, whether those reasons are self-regarding or cosmopolitan.[199] It only targets their legitimacy, and only one of the main grounds for their legitimacy, that is, democracy. Although democracy is particularly relevant, and one may even argue an inescapable one in the context of the legitimisation of a legal human right to democracy, other justifications for the authority of states may still be available.[200] Furthermore, there may be other reasons for states to actually comply with that legal right, some instrumental (such as democratic peace or democratic state consent) and others related to notions of justice or fairness.[201] While these reasons are not justifications for the authority of the human right to democracy, they are reasons for compliance that co-exist and are important in international law.[202] All the same, the absence of (democratic) legitimacy of the international legal right to democratic participation defeats the potential justification of an intervention in the sphere of national sovereignty, and more generally any state liability and sanctions for not respecting that right.

Of course, the more democratic, or rather the more "*demoi*-cratic" international human rights lawmaking and human rights law enforcement become, the more legitimate the international legal right to democracy will be. In a global community of states and individuals,[203] growing interdependencies imply mutually affected interests and hence generate the interest and claim of states and individuals to decide on these issues together rather than work separately or cooperate very indirectly.[204] In such circumstances, inclusion and participation at all levels, including the national, become a legitimate individual claim and, at the same time, participation in the decision-making process becomes a common interest. If those conditions pertain, the right to democratic participation will no

197. Of course, the legitimacy of international human rights institutions' decisions cannot necessarily be identified with that of the international human rights norms applied, the way it would in the domestic context.
198. As I have explained elsewhere, however (Besson (2009c), footnote 67), the claim to legitimate authority that is connected to legal validity needs to be honoured eventually and there should be a drive towards legitimising international legal norms as a result.
199. See Buchanan A. and Russell R. (2008), footnote 84, pp. 330 ff.
200. See Besson S. (2009c), footnote 67.
201. On such reasons to recognise an international legal right to democracy independently from the democratic legitimacy of that right, see Buchanan A. (2004), footnote 69, pp. 142 ff. and pp. 188-9.
202. See Besson S. (2009c), footnote 67, on international law's *de facto* authority and the other reasons to abide by international law than its justified authority.
203. See Besson S. (2009a), footnote 67, for a discussion of global "*demoi*-cracy" as a middle path between international democracy and the indirect democratisation of international law through national democracies.
204. See Besson S. (2009b), footnote 67, on the "*demoi*-cratic" international community.

longer be an interest over which only national democratic polities can decide, but an interest of the community of communities. It can thus be seen as a right which both states and individuals have to decide on, and which they have to protect together. This also means that that common interest and this new kind of political equality[205] could become the object of an international legal right to democracy, provided this can be achieved "*demoi*-cratically". The argument may appear to be circular, but if the relationship between international "*demoi*-cracy" and the international legal right to democracy is seen as one of mutual reinforcement rather than one of logical sequence, the circle may come to be seen as virtuous.[206]

Conclusion

So, is there a human right to democracy? In this chapter, I have argued for a moral right to democracy *qua* international human right to democratic participation. I have distinguished the moral right to democracy from the legal right to democracy, and assessed various reasons to recognise either form of right.

I first separated the question of the instrumental or intrinsic relationship between human rights and democracy from that of the existence and justification of a right to democracy, developed a revised interest-based argument for such a right to democratic participation, and discussed alternative arguments for that right. I focused on the human right to democratic participation, in relation to connected rights, and responded to the three main critiques raised against that right. In a final section, I argued that such a right should be legalised, but that this should first occur at the national level. I also argued that, provided the "*demoi*-cratic" credentials of international lawmaking are enhanced, the legal right to democracy could be guaranteed legitimately at the international level as a common interest of states and individuals.

In short, the claim has been that there is a universal moral right to democratic participation and that there should be a national legal right to democratic participation. I have also argued, however, that the international legal right to democratic participation that is currently guaranteed by international law can only be vested with democratic legitimacy provided international lawmaking processes and especially human rights-making processes are made both more democratic

205. On political equality in international circumstances, see Roth B. (1999), *Governmental illegitimacy in international law*, Oxford University Press, Oxford; Christiano T. (2006), footnote 112; Christiano T. (2010), footnote 67; Pettit P. (2010), footnote 67; Besson S. (2009b), footnote 67.

206. This is also the conclusion in Nickel J. (2005), footnote 85, albeit for different reasons. His reasons pertain to the absence of a moral right to international democracy before democratic international processes and institutions are in motion and one can assess the existence of an objective individual interest to taking part in those processes and institutions. Because of the mutually reinforcing relationship between the human right to democratic participation and democratic processes, I do not see those reasons as undermining the justification of the moral right to democratic participation, but that of the authority of the legal right to democratic participation.

and context-sensitive. Of course, this is certainly not something a moral right to democratic participation can trigger on its own. This is because there is much more to democracy than human rights.

The democratic constitution

by Richard Bellamy[207]

Does democracy need a constitution? The increasingly dominant view is that it does. Constitutions are said to enshrine and secure the rights central to a democratic society. According to this account, a constitution is a written document, superior to ordinary legislation and entrenched against legislative change, justiciable and constitutive of the legal and political system.[208] It is the constitution, not participation in democratic politics per se, that offers the basis for citizens to be treated in a democratic way as deserving of equal concern and respect.[209] The electorate and politicians may engage in a democratic process, but they do not always embrace democratic values. The defence of these belongs to the constitution and its judicial guardians. This view has been neatly summarised by Cherie Booth, speaking as a distinguished QC rather than as the former Prime Minister's consort. As she puts it:

> In a human rights world … responsibility for a value-based substantive commitment to democracy rests in large part on judges … Judges in constitutional democracies are set aside as the guardians of individual rights … [and] afforded the opportunity and duty to do justice for all citizens by reliance on universal standards of decency and humaneness … in a way that teaches citizens and government about the ethical responsibilities of being participants in a true democracy.[210]

That the wife of a democratically elected political leader should express such a condescending view of democratic politics may be a little surprising, but it all too accurately reflects the prevailing opinion among what I shall call legal constitutionalists. Roberto Unger has remarked how "discomfort with democracy" is one of the "dirty little secrets of contemporary jurisprudence". This unease is manifest in:

> the ceaseless identification of restraints on majority rule … as the overriding responsibility of … jurists; … in the effort to obtain from judges … the advances popular politics fail to deliver; in the abandonment of institutional reconstruction to rare and

---

207. Professor of Political Science, Director of the School of Public Policy, University College London, United Kingdom.
208. Raz J. (1998), "On the authority and interpretation of constitutions", Alexander L. (ed.), *Constitutionalism: Philosophical foundations*, Cambridge University Press, Cambridge, p. 153-4.
209. Dworkin R. (1996), "Introduction: The moral reading and the majoritarian premise", *Freedom's law: the moral reading of the American constitution*, Oxford University Press, Oxford, p. 24, pp. 32-5.
210. C. Booth, "The role of the judge in a human rights world", Speech to the Malaysian Bar Association, 26 July 2005.

> magical moments of national refoundation; in an ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentlemen in an eighteenth-century drawing room … [and] in the … treatment of party government as a subsidiary, last-ditch source of legal evolution, to be tolerated when none of the more refined modes of legal resolution applies.[211]

I believe both the concern over democracy and the proposed remedy to be largely misconceived. The one overlooks the constitutional role and achievements of democratic politics, while the other places an impossible task upon the judiciary. Against the dominant view I want to present an alternative understanding of the relationship between democracy and constitutionalism – one that sees the democratic system itself as the constitution.

1. Legal and political constitutionalism

Many of our current assumptions and, I shall argue, misconceptions about constitutions come from the idealisation of the Constitution of the United States by distinguished American legal and political philosophers, especially those who reached intellectual maturity during the Warren Court era of the 1960s. The US Constitution can make a good claim to be the first modern constitution, and its longevity has turned it into a model for many of the ways we think about the role and very form of a constitution. In particular, it is the source of the view that constitutions provide both the foundation for democracy and necessary constraints upon it. Yet, in certain crucial respects its design and rationale is pre-democratic and of doubtful legitimacy in a democratic age.

There are two elements within most written constitutions, the US constitution included. One element consists of an enumeration of basic rights that are held to constitute the fundamental law of the polity and with which no ordinary pieces of legislation or executive acts must conflict. The second element – often the greater part – is given over to a detailed description of the political and legal system, setting out the electoral rules, enumerating the powers and functions of different levels and agencies of government, and so on. The American constitution initially consisted of this second element alone, with the Bill of Rights added later as a series of amendments. So far as this author is aware, Australia is now the only country to have a constitution consisting solely of this second element. However, as the quotation from Booth indicates, constitutionalism is increasingly identified with the first element – a Bill of Rights – and read as defining the political morality of a democratic society that upholds the necessary requirements for all citizens to be treated with equal concern and respect. Many legal theorists regard the second element of the constitution as "nominal", being of little weight unless read through the first. After all, a dictatorship could have a constitution in the sense of a description of the organs of government. Nevertheless, a school

211. Unger R. (1996), *What should legal analysis become?*, Verso, London, p. 72. See also Waldron J. (1998), "Dirty little secret", *Columbia Law Review* 98, pp. 510-30; and Waldron J. (1999), *Law and disagreement*, Oxford University Press, Oxford, pp. 8-10.

of thought does exist that argues that we should read the first, rights element, merely as a guide to understanding the second, system of politics element. In other words, we should see rights as indicating what a political process that treats citizens with equal concern and respect should be like, rather than as what a democratic legislative outcome should contain. However, the difficulty with this argument is that there will be a tendency to make the perceived fairness of the outcome the guide to the fairness of the process that gave rise to it, so that the two approaches become indistinguishable. Moreover, as with the first, the second also makes the judiciary rather than citizens the guardians of the procedural constitution.

Despite having a certain sympathy with this second position, therefore, I want to reject both of these legal constitutionalist approaches. Instead, I am going to argue that we should see the political system itself, not its legal description in a written constitution but its actual functioning, as the true and effective constitution. This third approach appeals to an older tradition of what I shall call political constitutionalism. Though they departed from it in certain respects, the drafters of the US Constitution also took inspiration from this third approach when designing their system of government. The political constitutionalist tradition took the metaphor of the body politic seriously. Just as a healthy human body depended on a good constitution and a balanced way of life, so it was claimed a healthy polity required its constituent parts to be in balance. The problem was that this view of the constitution also predates the democratic age. Although, slavery aside, the American constitution is premised on the democratic principle of equality, the founders were ignorant of the workings of modern mass democracies and somewhat apprehensive about their emergence. So the system they advocated was largely premised on what they feared would be democracy's chief drawbacks, in particular "majority tyranny" and factionalism. However, in so doing they overlooked the constitutive importance of majority rule as the embodiment of political equality, on the one hand, and the constitutional role of the balance between competing parties, on the other. It is these two qualities of the 22 or so established working democracies that lend them their constitutional quality and form the basis of a contemporary political constitutionalism.

2. Political equality and majority rule

The "constitutive" importance of majority rule can best be understood against the background of certain inherent difficulties with legal constitutionalism. As we have seen, two related claims motivate legal constitutionalism. The first is that we can come to a rational consensus on the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve. These outcomes are best expressed in terms of human rights and should form the fundamental law of a democratic society. The second is that the judicial process is better than the democratic process at identifying these outcomes. Both claims are disputable.

The quest to articulate a coherent and normatively attractive vision of a just and well-ordered society is undoubtedly itself a noble endeavour. It has inspired philosophers and citizens down the ages. But though all who engage in this activity aspire to convince others of the truth of their own position, none has so far come close to succeeding. Rival views by similarly competent theorists continue to proliferate, their disagreements both reflecting and occasionally informing the political disagreements between ordinary citizens over every conceivable issue from tax policy to health care. The fact of disagreement does not indicate that no theories of justice are true. Nor does it mean that a democratic society does not involve a commitment to rights and equality. It does show, though, that there are limitations to our ability to identify a true theory of rights and equality and so to convince others of its truth – that we lack an epistemology able to ground our different ontological positions. John Rawls has associated these limitations with the "burdens of judgment". Even the best-argued case can meet with reasonable dissent due to such factors as the complex nature of much factual information and uncertainty over its bearing on any case, disagreement about the weighting of values, the vagueness of concepts, the diverse backgrounds and experiences of different people, and the variety of normative considerations involved in any issue and the difficulty of making an overall assessment of their relative weight. Such difficulties are likely to be multiplied when it comes to devising policies that will promote our favoured ideal of democratic justice. In part, the problem arises from the complexity of cause and effect in social and economic life, which makes it hard to judge what the consequences of any given measure will be. But as well as the difficulty of specifying what policies will bring about given values, disagreements about the nature of these values also mean it will be difficult to identify those political, social, and economic conditions that best realise them. For example, both types of difficulty are in evidence when philosophers or citizens debate the degree to which market arrangements are just or the modifications that might be necessary to render them so. How far they can or should reflect people's efforts, entitlements, or merits, say, are all deeply disputed for reasons that are both normative and empirical.

These problems with the first claim of legal constitutionalism raise doubts regarding its second claim about the responsibilities of judges. If there are reasonable disagreements about justice and its implications, then it becomes implausible to regard judges as basing their decisions on the "correct" view of what democratic justice demands in particular circumstances. There are no good grounds for believing that they can succeed where political philosophers from Plato to Rawls have failed. At best, the superior position legal constitutionalists accord them must rest on the courts providing a more conscientious and better informed arbitration of the disagreements and conflicts surrounding rights and equality than democratic politics can offer. However, this shift in justification moves attention from outcomes to process and suggests a somewhat different conception of the constitution within a democratic society. Instead of seeing the constitution as enshrining the substance of democratic values, it points towards conceiving it as

a procedure for resolving disagreements about the nature and implications of democratic values in a way that assiduously and impartially weighs the views and interests in dispute, according them equal concern and respect. Rather than a resource providing the fundamental answers to the question of how to organise a democratic society, the constitution represents a fundamental structure for reaching collective decisions about social arrangements in a democratic way – that is, in a manner that treats citizens as entitled to having their concerns equally respected when it comes to deciding the best way to pursue their collective interests.

Political constitutionalism enters at this point and makes two corresponding claims to the legal constitutionalist's. The first is that we reasonably disagree about the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve. The second is that the democratic process is more legitimate and effective than the judicial process at resolving these disagreements. I have already described the sources of our reasonable disagreements about rights. What about the competing merits of the courts and democratically elected legislatures as mechanisms for resolving them? The courts can obviously make a good claim to offer a fair and impartial process for resolving disputes, where all are treated as equals. But when it comes to making decisions about our collective life, as constitutional courts implicitly do when they strike down legislative or executive measures or decide test cases, I believe they lack the intrinsic fairness and impartiality of the democratic process – that of treating each person's views equally. They restrict access and unduly narrow the range of arguments and remedies that may be considered, and are neither accountable nor responsive to citizens in ways that ensure their opinions and interests receive equal concern and respect. Litigation is a time-consuming business, with constitutional courts perforce having to be highly selective as to which cases they hear. When they do so, the case is presented as a dispute between two litigants and the only persons and arguments with standing have to relate to the points of law that have been raised by those concerned. Such legalism is vital in what one might call the "normal" judicial process, being intimately linked to the rule of law in the formal sense of rule by known and consistently interpreted laws. But it is inappropriate for determining the bearing of fundamental political principles on the collective life of the community. In this sort of decision, the limits imposed by the legal process risk excluding important considerations in ways that may be arbitrary so far as the general issues raised by a case are concerned. Restricted access to and standing before the court mean not all potentially relevant concerns have an equally fair chance of being presented. Finally, and most importantly, it is the judges who decide. Moreover, they disagree. They differ over the relevance and interpretation of the law, the weight of different moral values, the empirical evidence – indeed, all the factors that produce principled disagreement among citizens. Meanwhile, they resolve their disputes by the very democratic procedure they claim to supersede – majority vote. We never hear about the potential dangers of a tyrannous judicial majority, yet

it is far more likely than among legislatures or the electorate. Among judges a majority vote is simply a closure device among a haphazard assortment of views. It has none of the intrinsic virtues that attach to it within a democracy as a fair way of showing equal concern and respect to the ideas and interests of every member of the population. Indeed, a single judge's vote can alter a decision dramatically, something that has never happened in an election and is very rare even in a legislature.

Here we come to the nub of what is wrong with constitutional judicial review: its arbitrariness. There is no adequate basis to ground the superiority of a given legal constitution and its interpreters over the rest of the citizen body. Not only may the process itself be inappropriate for obtaining a full and equitable consideration of the rights and interests involved, but also – and most significantly – it does not involve citizens as equals. Citizens are to be "taught" their obligations, to employ Booth's revealing term, rather than to define and enter into them on an equal basis. A key advantage of a democratic vote lies in its overcoming this arbitrary arrangement. Under majority rule each person counts for one and none for more than one. All citizens are treated equally in this respect, including judges and members of the incumbent government. The reason that the legislature favours certain people's views more than others is because more people have voted for a given party's representatives than for those of other parties. Such aggregative accounts of democratic voting are sometimes criticised as mechanical or "statistical". But whatever the supposed failings of democratic decision-making, this very mechanical aspect of democracy has a decided advantage in the context of disagreement. It allows those on the losing side to hold on to their integrity. They can feel their views have been treated with as much respect as those on the winning side, counting equally with theirs in the vote, and that the winners are not thereby "right", so that they are "wrong", but merely the current majority. It has been argued that this position is paradoxical.[212] Yet, any real world, and hence fallible, decision procedure involves accepting some distinction between the legitimacy of the process and one's view of the result. After all, the courts can and do produce results litigants or observers disagree with, but demand their judgments be accepted nonetheless because they satisfy norms of due process. The distinctiveness of the democratic process lies in its fostering precisely the political morality of mutual respect that legal constitutionalists claim they wish to foster. For it involves accepting one's own view as just one among others, even if one feels passionately about it, because others feel just as passionately on the other side. Democratic citizens must step back from their own preferred views and acknowledge that equal concern and respect are owed to their fellows as bearers of alternative views. It is only if we possess some such detachment that we can live on equal terms in circumstances of political disagreement by finding workable ways to agree even though we disagree.

212. Wollheim R. (1969), "A paradox in the theory of democracy", Laslett P. and Runciman W. G. (eds), *Philosophy, politics and society*, Blackwell, Oxford, p. 84.

3. The balance of power and party competition

Now, majority rule may be a legitimate constitutive process – that is, a fair way for making collective decisions – but it is not necessarily a valid constitutional process, meaning one that avoids majority tyranny by upholding individual rights and treating all in relevant ways as equal under the law. Indeed, as noted earlier the constitutional design of political institutions has generally assumed it is not and built in counter-majoritarian checks. Here too, as also noted, the influence of the American constitution casts its long shadow. The classic doctrine of the "mixed constitution" provided the pre-democratic form of the political constitution. This idea assumed the division of society into different classes with distinct interests: namely, the people, the aristocracy, and the monarchy. The crux was to achieve a balance among these three groups. The majority in this context referred to the largest group – that of the common people. Later theorists, prominent among them the authors of the *Federalist Papers*, then attempted to apply this thinking to a formally classless society. However, they continued to fear the propertyless had distinct interests from the rest of the population and in a democracy might use their electoral muscle to redistribute resources from the rich to the poor. A related worry concerned the exploitation by various self-interested factions of populist policies to obtain power and pursue their own ends. They saw counter-majoritarian measures, which mainly reworked the older ways of dispersing power, as necessary to guard against these possibilities.

The separation of power between different branches of government was an adaptation of the "mixed constitution" and an attempt to balance the interests of different social groups. It was supposed to prevent either the majority group in the legislature or a populist executive being in a position to enact laws in its own interest. Bicameralism offered a further check, with the second chamber supposedly representing both longer-term interests and, within a federal system, those of different regions. Yet a prime effect of such mechanisms has been to multiply veto points and produce imbalances that favour vested interests and privileged positions. For they advantage the status quo. As such, they invariably have a regressive impact. For example, in the US it enabled the state and federal courts to strike down some 150 pieces of labour legislation between 1885 and 1935 of an analogous kind to those passed by Western democracies free from such constraints over roughly the same period. Change only came when chronic economic depression and war allowed a hugely popular president with a large legislative majority to overcome judicial and other barriers to social reform.

Of course, opponents of such social legislation rarely argue on self-interested grounds. Rather, they contend they are upholding the property rights necessary for a dynamic economic system that it is in the public interest to keep. Hence the need to give these rights constitutional protection against myopic majoritarian calls for redistribution. However, proponents of social justice mount a similarly principled case that also appeals to arguments for economic efficiency, and seek likewise to constitutionalise social rights. Such debates are a prime source of

"reasonable disagreement" in contemporary politics – indeed, the ideological divide between Left and Right provides the principal political cleavage in most democracies. The enduring character of this division arises to a large degree from genuine difficulties in specifying what a commitment to liberty and equality actually entails in terms either of social arrangements or particular policy recommendations. Views on both tend to be subject to a certain amount of guesswork and constant updating in the light of experience and evolving circumstances. Constitutionalising either position simply biases the debate towards the dominant view of the time, usually that of the then hegemonic groups, by constraining the opportunities for critique and the equal consideration of interests.

By contrast, we have seen how a prime rationale of democracy lies in its enshrining political equality by providing fair procedures whereby such disagreements can be resolved. That this is also a constitutional process arises from the way it embodies the old notion of balance in a new and dynamic form, so that affected individuals are moved to abide by the classical injunction of "hearing the other side" that lies at the heart of procedural accounts of justice. This requirement calls for the weighing of the arguments for and against any policy, and the attempt to balance them in the decision. It also involves opportunities to contest and improve policies should they fail to be implemented correctly, have unanticipated consequences (including failure), or cease to be appropriate due to changed circumstances. Finally, it renders rulers accountable and responsive to the ruled, preventing them from seeing themselves as a class apart with distinct interests of their own. These qualities offer a procedural approach to showing individuals equal concern and respect.

All three senses of balance are present in majority voting in elections among competing parties. This mechanism promotes the equal weighing of arguments in order to show equal respect, produces balanced decisions that demonstrate equal concern, and involves counter-balances that offer possibilities for opposition and review, thereby providing incentives for responsive and improved decision-making on the part of politicians.

Let us take each in turn. I have already remarked how the concept of one person, one vote treats people as equals. As the economist Kenneth May put it, it is anonymous, neutral, and positively responsive as well as decisive. However, notorious problems can arise with three or more options. As economist Kenneth Arrow and his followers have shown, in these circumstances any social ordering of individual preferences, not least majority rule, is likely to be arbitrary. Yet, though logically possible, cycles and the resulting problems of instability, incoherence, or manipulation turn out to be rare. The range of options considered by both the electorate and legislatures is considerably fewer than the multifarious rankings people might offer of the total range of policy issues. Instead, they choose between a small number of party programmes. Parties and the ideological traditions they represent have the effect of socialising voters so that their preferences resemble each other sufficiently for cycles to be unusual and eliminable

by relatively simple decision rules that help voters select the package of policies containing their most favoured options. And though voting systems may produce different results, the choice among them need not be regarded as arbitrary – all the realistic contenders can make legitimate claims to fairness and possess well-known advantages and disadvantages that make them suited to different social circumstances.

It might be objected that these effects result from elites controlling party agendas, making them instruments of domination. Yet party programmes have been shown to alter over time in ways frequently at variance with the interests of entrenched social and economic groups. To a remarkable degree, election campaigns determine policy, with party discipline rendering politicians far more like electoral delegates than trustees. Party competition also plays a key role in the production of balanced decisions. To win elections, parties have to bring together broad coalitions of opinions and interests within a general programme of government. Even under systems of proportional representation, where incentives may exist for parties to appeal to fairly narrow constituencies, they need to render their programmes compatible with that of potential coalition partners to have a chance of entering government. In each of these cases, majorities are built through the search for mutually acceptable compromises that attempt to accommodate a number of different views within a single complex position. Such compromises are sometimes criticised as unprincipled and incoherent, encouraging "pork barrel politics" in which voters are bought off according to their ability to influence the outcome rather than the merits of their case. Despite a system of free and equal votes, some votes can count for more than others if they bring campaigning resources, are "deciding" votes, or can ease the implementation of a given policy. However, different sorts of political resource tend to be distributed around different sections of the community, while their relative importance and who holds them differs according to the policy. Democratic societies are also invariably characterised by at least some cross-cutting divisions, such as religion, that bind different groups together on different issues. Many of these bonds relate not to interests in the narrow economic sense, but shared values. After all, the purely self-interested voter would not bother going to the polls.

These features of democratic politics create inducements to practise reciprocity and so support solidarity and trust among citizens. Aptly described as midway between self-interested bargaining and ethical universalism, reciprocity involves an attempt to accommodate others within some shareable package of policies. This attempt at mutual accommodation does not produce a synthesis or a consensus, since it contains many elements those involved would reject if taken in isolation. Rather, it responds to the different weights voters give to particular policies or dimensions of a problem – either allowing trade-offs to emerge, or obliging those involved to adopt a mutual second best when too many aspects are in conflict. In sum, the best is not made the enemy of the good. So, those opposed

on both public spending and foreign policy, but ranking their importance differently, can accept a package that gives each what they value most. Likewise, civil partnership can offer an acceptable second best to opponents and proponents of gay marriage.

In circumstances of reasonable disagreement, such compromises recognise the rights of others to have their views treated with equal concern as well as respect. They legitimately reflect the balance of opinion within society. Naturally, some groups may still feel excluded or dissatisfied, while the balance among them can alter as interests and ideals evolve with social change. The counterbalances of party competition come in here. The presence of permanent opposition and regular electoral contests means that governments will need to respond to policy failures and alterations in the public mood brought about by new developments. The willingness of parties to alter their policies is often seen as evidence of their unprincipled nature and the basically self-interested motives of politicians and citizens alike. However, this picture of parties cynically changing their spots to court short-term popularity is belied by the reality, not least because they and their core support retain certain key ideological commitments to which changes in policy have to be adapted. Nevertheless, that parties see themselves as holding distinctive rather than diametrically opposed views renders competition effective, producing convergence on the median voter, which is generally the most preferred of all voters, being what is technically known as the Condorcet winner. By contrast, the separation of powers removes (in the case of the courts) or weakens (in the case of elected bodies) such incentives, for the various branches of government can hardly be viewed as competing. The ability of the courts particularly to isolate themselves from public pressure is often seen as an advantage. But it can also lead to blame shifting as responsibility gets divided, with each branch seeking to attribute the political and financial costs of their decisions to one or more of the others. Federal arrangements can often have similar drawbacks.

4. Majority tyranny?

Of course, the more polarised social divisions are, the harder it will be for such mechanisms to work. The danger of majority domination increases in societies deeply divided along ethnic, religious, or linguistic lines. In these conditions, democratic arrangements generally require measures to secure minority influence. Strictly speaking, many of these need not be considered anti-majoritarian. Enhancing proportionality simply represents a fairer way of calculating the majority than plurality systems such as ours, while greater regional autonomy for territorially concentrated minorities merely devolves decision-making over certain policies to a different majority. Where it proves necessary to go beyond proportionality by giving minorities a veto or an equal or inflated role in executive power or federal lawmaking, the danger arises that the checks and balances arising from party competition get eroded. The elites of the different social

segments gain an interest in stressing the particular divisions they reflect over other differences or any shared concerns, with debates about the organisation of government undermining accountability for its conduct. However, a legal constitution is unlikely to counter such tendencies. It will either reproduce them, its legitimacy depending on the degree to which the court and constitution reflect the main political divisions, or it will rightly or wrongly become identified with the dominant elite, which have the greatest interest in preserving unity.

What about "discreet and insular minorities"? As the American jurist Mark Tushnet counsels, "we have to distinguish between *mere* losers and minorities who lose because they cannot protect themselves in politics."[213] Within most democracies, the number of minorities incapable of allying with others to secure a degree of political influence is very small. However, there are undeniably certain groups, such as asylum seekers or the Roma/Gypsy, who have little or no ability to engage in politics. In such cases, the necessity for legal constitutional protection might appear undeniable. Even here, though, such protection will only be necessary if it is assumed that such minorities are at risk from widespread prejudice from a majority of the population and their elected representatives, and the judiciary are free from such prejudices. However, most defenders of legal constitutionalism accept it is unlikely to have much effect unless the rights it enshrines express a common ideology of the population about the way their society should be governed, and make for a "people's law", not just "lawyers' law". As the example of Nazi Germany reveals, widespread popular prejudices against a minority are likely to be shared by a significant proportion of the ruling elite, including the legal establishment and where they are not the judiciary is unlikely to be able to withstand sustained popular and governmental pressure. So judicial review will only afford protection where there is a temporary lapse from commonly acknowledged standards. Such cases – which need to be balanced against those where the judiciary may similarly fall short – do not offer a basis for a general defence of strong judicial review. Yet, it may be difficult to distinguish the exceptional case, where it may be legitimate and beneficial for the judiciary to intervene, from the standard cases where it is not.

Judicial foreclosure can also impair or distort political mobilisation, yet is rarely successful in its absence. The key "liberal" US Supreme Court decisions of the 1960s to which most contemporary legal constitutionalists refer, such as *Roe v. Wade* and *Brown v. Board of Education*, all reflected emerging national majorities. Liberal legislation in most states meant that well before *Roe* some 600 000 lawful abortions were performed a year. The narrow terms in which *Roe* was decided had the negative effect of "privatising" abortion rather than treating it as a social issue requiring public funds. It has also centred political activity on capturing the court rather than engaging with the arguments of others. By contrast, the extensive moral discussion in the British House of Commons

213. Tushnet M. (1999), *Taking the constitution away from the courts,* Princeton University Press, Princeton, p. 159.

of the Medical Termination of Pregnancy Bill, which occupies some 100 pages in Hansard, compares favourably with the couple of paragraphs of principled, as opposed to legal, argument in *Roe*. In particular, it led opponents to acknowledge the respectful hearing given to their views, which went some way to reconciling them to the decision. Indeed, the eventual policy includes numerous forms of principled "compromise" to accommodate a range of moral concerns, including the evolving status of the foetus. Likewise, the civil rights movement had far more impact than *Brown*. Ten years after this landmark decision no more than 1.2% of black children attended desegregated schools in the American South. Desegregation only truly gained momentum following the passage by large majorities in Congress of the Civil Rights Act and the Voting Rights Act in 1964 and 1965.

Do we not need the courts, though, to protect individual rights from exceptional exercises of executive discretion – most notably to protect national security in states of emergency? Once again, the belief that the courts offer a calmer setting that is more attentive to rights considerations than legislatures proves misplaced. On the one hand, in both the US and the UK courts have overwhelmingly upheld such measures. Indeed, in general the US courts have proved more likely to curtail rights and civil liberties during such crises than when peace prevails. Notwithstanding the questionable justifiability of such measures as the internment of Japanese Americans during the Second World War or the ban on the Communist Party during the Cold War, the judiciary deferred to executive authority. Yet in many respects it would be hard for them to do otherwise, as they neither have access to the intelligence nor the responsibility for assessing such risks. By and large they have concentrated on the procedural propriety of such measures. On the other hand, though, elected legislatures have not been as unquestioning as is often assumed. Party loyalty frequently breaks down in such cases precisely because representatives acknowledge issues of constitutional principle may be at stake. For example, as with counter-terrorism measures in Northern Ireland, the UK parliament imposed a sunset clause on the Anti-terrorism, Crime and Security Act 2001 and the even more draconian measures introduced by the Terrorism Bill following the London bombings of 7 July 2005 led to Tony Blair's first defeat in the Commons since he came to power in 1997. Far from these measures attracting populist support, there is every indication that this policy has become an electoral liability.

Conclusion

This article has defended "actually existing democracy" as an effective constitutive and constitutional mechanism. Yet, even a sympathetic listener might wonder if this defence of modern democratic politics against 18th-century constitutionalism comes a little late, when the "owl of Minerva" has well and truly flown by. Though vibrant in the 19th and 20th centuries, party politics is now in a sorry state. Trust in politicians and parties is at an all-time low in most advanced

democracies, with party membership and voter turnout in steady decline, albeit haltingly and with variations among countries. Quite apart from the shortcomings of the actors involved, these mechanisms are also felt to be ill-suited to securing effective and equitable government in today's complex and globalising societies. The electorate is too vast and diverse, the problems too technical, the scale of government too large for citizens to be able effectively to relate to each other, the tasks of politics, or the institutions and persons assigned to tackle them.

I have two observations to make of this pessimistic scenario. First, even constitutionalised "guardianship" has the potential to be dominating. Professionalism and technical expertise are inherent to government in the modern world and politicians, themselves professionals, have either to acquire such specialised knowledge or learn to rely on those who have done. However, though the ship of state may require a skilled captain and a trained crew, the citizen passengers are entitled to dictate its course and can judge by results when they are failing to perform well. A system that does not provide citizens equal political resources to influence the direction and complexion of policy, or offer incentives to the rulers to track the interests and concerns of the ruled in as balanced and efficient a manner as possible, will be arbitrary. There are no clear, commonly recognisable guidelines for how to get to the good society or any infallibly great and good persons able to take us there. Second, the constitutionality of competitive party democracy lies precisely in its providing realistic mechanisms to overcome such arbitrariness: fostering an equal input, on the one hand, and a control over politicians and their output, on the other, which encourages a balanced government that shows citizens equal concern and respect. Perhaps if we praised its normative qualities more it would prove more popular. If its days are indeed numbered, though, the weaknesses of the alternatives proffered by its detractors still stand. The case for remaking the democratic constitution in a way that preserves its necessary virtues remains as compelling as ever.

"From above" or "from the bottom up"? The protection of human rights between descending and ascending interpretations

by Sergio Dellavalle[214]

The history of human rights is not the story of popular sovereignty. Rather, the idea that there are rights which every human being possesses for the very reason of being a human[215] arose only after the ancient forms of popular participation in the government of the polity fell into a fatal crisis. Furthermore, the conception that rights characterise eminently the status of the citizens as an effect of their belonging to the political community and as a precondition for their involvement in political life always stood as a menace to the universality of human rights. The rejection of an abstract understanding of rights as existing merely in an ethereal space situated above democratic participation – a rejection which is the implicit consequence of their foundation on popular sovereignty – provides otherwise precisely for that radication of rights in political processes "from the bottom up", which we miss in many forms of universalism.[216]

Looking at the question from the point of view of the history of ideas, the foundation of human rights is therefore situated between two poles. The first interpretation sees rights coming "from above", which guarantees that they are not depending on exclusive procedures of popular participation, but runs also the risk of entrusting them to opaque instances claiming to possess ethical truth. The second interpretation situates rights within social and political processes and presupposes participation in order to specify the form and content of the entitlements,[217] at the

214. Professor of State Theory at the Faculty of Law of the University of Turin, Italy, Senior Research Fellow at the Max Planck Institute of Comparative Public Law and International Law in Heidelberg, Germany.

215. Human rights are defined here as those rights to which every human is entitled for the very reason of belonging to the universal community of human beings. In contrast, citizens' rights are those rights that belong only to the citizens of a specific polity. Turning from philosophical principles or general legal norms to constitutional norms binding the institutions of concrete polities, human rights take the form of fundamental rights. At this level they meet the citizens' rights guaranteed by those concrete polities, sometimes causing confusion. To avoid misunderstandings, two elements are therefore always to be distinguished in the concept of fundamental rights: on the one hand the contents of universal human rights, on the other the exclusive entitlements of citizens.

216. Maus I. (1999), "Menschenrechte als Ermächtigungsnormen internationaler Politik oder: der zerstörte Zusammenhang von Menschenrechten und Demokratie", Brunckhorst H., Köhler W. R. and Lutz-Bachmann M. (eds), *Recht auf Menschenrechte*, Suhrkamp, Frankfurt-am-Main, p. 276; Maus I. (1992), *Zur Aufklärung der Demokratietheorie*, Suhrkamp, Frankfurt-am-Main; Maus I. (1995-1996) "Liberties and popular sovereignty: on Jürgen Habermas's reconstruction of the system of rights", *Cardozo Law Review* 17, p. 825.

217. Haller G. (2008), "Menschenrechte und Volkssouveränität: Mögliche Antworten auf eine 200 Jahre alte offene Frage", Bammer A. et al. (eds), *Rechtsschutz gestern – heute – morgen*, NWV, Wien, p. 541.

cost, however, of a limited inclusion. A sound conception of human rights needs both universal inclusion and democratic radication. However, it has to avoid the dangers contained therein: an abstract and sometimes even quasi-authoritarian definition of substantive rights on the one hand, and the tendency to particularism on the other. For that reason, an understanding of human rights able to cope with the challenges of the 21st century should overcome the mutual rejection of the two traditions and incorporate some elements deriving from both legacies, while avoiding their shortcomings. The challenge will thus consist in finding a theoretical solution capable of drawing a picture of a system of rights containing at the same time universality and social radication in democratic processes, both within a multi-level model of social interaction.

The inquiry is articulated in three steps. The first section will concentrate on the origin of the foundation of human rights "from above" beginning with the decline of ancient republicanism. While pointing out the novelty of the approach, deficits will also be outlined, such as the difficulty in determining the contents of entitlements without the direct involvement of rights holders, or the danger that arises from instances where individuals and groups appoint themselves as "guardians" of an alleged ethical truth embedded in society.

The second section will begin with a change of paradigm: collocating the individuals at the centre of society, Thomas Hobbes' political philosophy paved the way for a "bottom-up" conception of human rights, now put in the hands of their very holders. In fact, in Hobbes' view individuals waive almost all their rights, alienating them to a monarch vested with absolute sovereignty. Nevertheless, the seed had been sown: in the following developments of the contract theory – in particular in the works of John Locke and Jean-Jacques Rousseau – the centrality of individuals in the conception of political community is intertwined with a specific sensibility for the inalienability of their rights. Yet even the "bottom-up" conception of human rights of modern philosophy is characterised by two significant problems: first, the exclusive concentration on human rights protection within the borders of a single nation, reducing them to mere rights of citizens and missing therefore a supranational dimension; and second, the danger of projecting individual rights into the sphere of an unrestrained popular sovereignty, namely into a *volonté générale*, which can easily degenerate into tyranny. Immanuel Kant indicated the way to overcome both problems, on the one hand by limiting the risks of popular sovereignty through an adequate division of powers, on the other by postulating a multi-level conception of public law including for the first time in the history of philosophical thought a cosmopolitan public law grounded in the premises of modern individualism. Nonetheless, Kant's proposal remained unclear, due to the ambiguity of his individualistic paradigm.

Moving from his suggestions, but going beyond his paradigmatic horizon, the third section will propose a new approach, based on the communicative understanding of social interaction.

1. The descending interpretation of human rights: the foundation "from above"

1.1. From the *nomoi* of the single polities to the idea of a universal *nomos*

Following the understanding of classic antiquity the universality of human beings consisted only in their physical constitution and ethical dispositions. As social and political beings, on the contrary, they were members of communities of limited range. Neither Plato's concept of "justice" (*dikaiosynē*),[218] nor Aristotle's theory of the natural sociability of humans[219] were thought to surpass the border of the single *poleis*. At the same time the idea of "isonomy" (*isonomia*), namely the "equality within the range of the law" on which the praxis of political freedom in ancient Greece was based,[220] was applied only to the free citizens of the polity, making clear that the notion of *nomos* had – to begin with, at least – no universal scope. Thus, the accentuation of the equality of all humans under an all-encompassing *nomos*, against the particularity of their belonging to a specific community, remained an absolute exception in ancient Greece as well as in the Roman Republic, with no influence on the political praxis or philosophical thought.[221]

To conceive the idea of an unlimited belonging of all humans to a global community, the notion of a universal *nomos* was first needed. Only from the submission of the *nomoi* of the single polities to a higher law could arise the attribution of rights not merely to citizens, but to all humans. This paradigmatic revolution was introduced by the Stoic philosophy after the end of classic isonomy and the transition to broader cosmopolitan polities characterised by a strong centralised authority and a structural inequality in front of the law, such as Alexander's Macedonian Empire or the Roman Empire. In the Stoic view not merely the physical, but also the social world is ruled by only one fundamental functional principle, the *logos*.[222] From this principle a general law is derived, the *nomos*, which in its universality was considered to build the benchmark of validity for all positive laws of the single polities. On the basis of the Stoic understanding of metaphysics and ethics evolved the idea of a "natural reason" common to all rational beings – and to all humans in particular – and eventually the theory of "natural law", as it was expressed by Cicero:

> There is a true law, a right reason, conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from

218. Plato, *Republic* (1980 edn), Harvard University Press, Cambridge, Mass., Book II, 367e ff., Book IV, 432b ff., Book V, 469b ff.
219. Aristotle, *Politics* (1967 edn), Harvard University Press, Cambridge, Mass., I, 2, 1252a ff.
220. Arendt H. (1963), *On revolution*, Viking, New York, p. 23.
221. Höffe O. (2002), *Demokratie im Zeitalter der Globalisierung*, Beck, München, p. 234. In fact, the only significant exception can be found in a sentence of Heraclitus: Diels H. and Kranz W. (eds) (1957), *Die Fragmente der Vorsokratiker*, Rowohlt, Hamburg, p. 22 (B 14). See also Böckenförde E.-W. (2002), *Geschichte der Rechts- und Staatsphilosophie. Antike und Mittelalter*, Mohr Siebeck, Tübingen, p. 40.
222. Arnim J. v. (1905), *Stoicorum veterum fragmenta*.

> evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice.[223]

1.2. Universal normativity, human dignity, and individual-based *jus* as conceptual preconditions for the idea of a cosmopolitan human rights protection

According to the concept of natural law, the validity criterion of positive law does not consist – as was the case in the ancient republics – in the correct application of the rules of political participation, but is situated at a suprapositive level. In other words, the legitimacy of legal norms does not "ascend" from popular sovereignty, but "descends" from purely rational abstract principles. A first condition for the establishment of a human rights theory – namely the overcoming of the restraining identification of the *nomos* with the law in force within single and limited communities – was thus fulfilled. The horizon of social and legal rules had been amplified and made able to sustain universality and, therefore, to encompass all humans. In order to claim that the "descending" principles of natural law can actually serve as a convincing foundation of human rights, however, two further elements were required: first, natural law had to be centred on the ideal of human dignity; second, a *jus* had to be conceived as a description not only of an "objective" law or of a set of legal rules, but also – and rather – as the definition of an entitlement (or a number of entitlements) possessed by all humans.

Neither of these elements was central to the Stoic vision, which was a *Weltanschauung* moving from an interest in discovering the essence of world order, more than from an articulation of the existential condition of humans. Yet, some of the most relevant components of the Stoic philosophy – among these the conception of natural law – were transfused into Christianity. In Christian thought, significantly more than before, the idea of human dignity came to the fore.[224] This happened particularly by describing man as *imago Dei*:[225] being "images of God", humans could be seen as holders of those rights immediately deriving from the contents of natural law. A second step in establishing a human rights theory had been therefore undertaken. In the most sophisticated presentation of the Christian Catholic understanding of the legal system, namely in Francisco Suarez's *De legibus*,[226] laws are structured on four levels, descending from the *lex divina* or *lex aeterna* to the *lex naturalis*, the *jus gentium*, and the *lex civilis*. Though maintaining its own specificity, each level down from the *lex aeterna* is

223. Marcus Tullius Cicero, "The treatise on the Republic", in: Cicero, *The political works* (1841 edn), Spettigue, London, p. 123.
224. On the resort to the concept of "human dignity" in legal discourse, see: McCrudden C. (2008), "Human dignity and judicial interpretation of human rights", *The European Journal of International Law* 19, pp. 655-724.
225. Aquinas T., *Summa theologica* (1980 edn), W. Benton-Encyclopedia Britannica, Chicago, I, XXXV.
226. Suarez F. (1612), *De legibus, ac Deo legislatore* in: Milford H. (ed.) (1944), *Selections from three works of Francisco Suarez*, Clarendon Press, Oxford, p. 1.

derived from the level above, in the sense that its content, if it has to be accepted as "law", cannot contradict the substance of the higher law. Rather, it has to be seen as the partial application of the contents of the superior level to a different ontological context. So the *lex naturalis* is that dimension of the *lex aeterna* which is accessible to any rational being;[227] the *jus gentium* is that part of *lex naturalis* which, laid down by humans in customs or treaties, gives order to their general interaction beyond the laws of the single polities;[228] and the civil law (*lex civilis*), finally, is that law which, according to the general principles of the *jus gentium*, organises social and political life within the specific contexts of single polities.[229] As a consequence of the deductive structure of the legal system,[230] no civil law, if it claims to be respected, can contradict the eternal law. Furthermore, since the latter is characterised by the paramount importance of human dignity, civil law has to be considered as legitimate only if it respects the fundamental conditions of human dignity, therefore human rights.

If the condition of the centrality of human dignity in natural law, albeit through the hardly convincing metaphysical assumption of the direct primacy of divine law, can be seen as accomplished already at this early stage of development of the "descending" conception of human rights, substantially insufficient is here the fulfilment of the further condition mentioned above. In fact, the idea of a *jus* conceived not only as an "objective" law, but rather as an entitlement ascribed to all humans remains, in the most favourable interpretation, a marginal product of the Christian tradition, although some anticipation can be found in the works of the School of Salamanca.[231] This result is hardly surprising in a conceptual legacy in which not the individuals, but the community conceived as a *holon* is at the centre of the philosophical understanding of society, politics, and law. During the following centuries, as a consequence of contamination with modern individualism, the "descending" theory of human rights amended this deficit by giving more prominence to the individual character of entitlements.[232] On the other hand, further shortcomings of the "descending" understanding, which had already emerged in the early stages of its formulation, can still be found in the later developments, giving therefore good reasons to assume that they were inherent from the outset.

227. Ibid., II, V ff., p. 178 ff.
228. Ibid., II, XVII ff., p. 325 ff.
229. Ibid., III, p. 361 ff.
230. Ibid., II, IV, p. 171.
231. Francisco de Vitoria, *Comentarios a la Secunda secundae de Santo Tomás*, Vicente Beltrán de Heredia (ed.), Salamanca, 1932 ff., II-II, qu. 62, art. 1, no. 5; Suarez, *De legibus*, footnote 226, I, II, 5, p. 30; Böckenförde E.-W., *Geschichte der Rechts- und Staatsphilosophie*, footnote 221, p. 326 ff.
232. Nonetheless, the ontological priority of individual entitlements in the discourse on human rights is still largely missing in one of the most significant and influential strands of the "descending" conception, namely in the doctrine of the Catholic Church. The most advanced position expressed by the Catholic Church on this issue can be found in the encyclical *Pacem in terris*, promulgated by Joannes XXIII in 1963. Later documents seem to retrieve, however, from the more far-reaching assumptions, contained in that encyclical, on the link between human rights, individual entitlements, and natural reason; see: *Redemptoris Missio*, promulgated by Joannes Paulus II in 1990, and *Dominus Jesus*, written by Joseph Ratzinger and Tarcisio Bertone in 2000.

1.3. Deficits of the human rights conception "from above"

1.3.1. Prejudice and discrimination

The first deficit that can be traced back to the very essence of the foundation of human rights "from above" is related to the postulation of the divine law as the origin of natural law and, therefore, of human rights. This postulation has characterised the Christian Catholic doctrine of human rights from its very beginning up to the present. Yet if the message of salvation, according to the Christian belief, forms the basis of the content of human rights as well as of their relevance, the problem arises of what will happen to those who do not believe in that message. In principle, the Christian Gospel is addressed to all human beings; in reality, peoples who do not belong to the Christian tradition and, as a consequence of the postulation of rights "from above" or even "from Heaven's grace", are not involved in any deliberative formulation of their content, tend to be harshly disadvantaged. Hence, the metaphysical assertion that the *lex aeterna* is the source of human rights involves a high risk of discrimination embedded in philosophical and legal thought. Even the most cautious and original thinkers who shaped the early Christian Catholic discourse on international law and human rights could hardly escape the trap of double-dealing.[233]

If discrimination, in the "descending" conception, is primarily rooted in the postulated origin of human rights from the doctrine and dogmas of one specific religion, the first step on the way to the resolution of the problem consists in dissociating the ontological basis of human rights from religious beliefs. This step was undertaken very early in the history of the discourse on human rights, specifically when legal philosophers influenced by the Reformation between the end of the 16th century and the beginning of the 17th century proposed to decouple the *lex naturalis* from the *lex aeterna*.

According to the Protestant theology, the law of God is only – partially – accessible through the faith and completely inscrutable for the natural reason.[234] Thus the natural law, being prevented from relying upon the divine law, had to search for a new, purely secular foundation. Resorting once again to an element of the Stoic philosophy, international lawyers inspired by the Protestant approach collocated the ontological basis of what they saw as the essential principles of the universal interaction among humans in an ontological postulation on human nature, in particular on an alleged natural and universal disposition of human

233. See, in particular: Francisco de Vitoria, "Relectio prior de Indis recenter inventis" (1538-1539), in: Francisco de Vitoria, *De Indis recenter inventis et de jure belli Hispanorum in Barbaros*, Walter Schätzel (ed.), Mohr Siebeck, Tübingen 1952, p. 1.

234. Böckenförde, *Geschichte der Rechts- und Staatsphilosophie*, footnote 221, p. 385 ff. Martin Luther's condemnation of reason as the "Devil's greatest whore" is well known, Luther M., *Werke. Kritische Gesamtausgabe* (1914 edn), Boehlaus, Weimar, Vol. 51, p. 126, line 7 ff. But also in the Calvinist tradition, which was in general less adverse or even well-disposed to rationalism, God is approachable exclusively through grace and faith. See Calvin J. (1559), *Institutio christianae religionis*, Genevae. Being excluded from the religious context, reason could otherwise be amended from control by the Church and improve with less restraint in its application to secular matters.

beings to sociability.[235] As a consequence of this attitude, human rights could be understood as the universal rules governing interactions within the global human society. The ontological assumption of a universal sociability of man was however, in its essence, not less discriminatory than the derivation of the universal rules of interaction from the law of the Christian God. The substance of the entitlements resulting from that sociability was understood, indeed, not as the effect of inclusive processes of deliberation, but as the outcome of the Western legal and philosophical legacy leading to a postulation about the ontology of human society. Regardless of its supposed purely rational nature, this postulation was – coming itself "from above" and this "above" being nothing else but Western culture – structurally biased.[236]

1.3.2. The epistemological shortfall

The assumption of a universal community of humankind, on which human rights as the fundamental rules of general interaction had to be based, runs not just the risk of being characterised by Western prejudice. It is also afflicted – and we come herewith to the second shortcoming of the "descending" understanding – with a severe epistemological deficit. Indeed, the existence of a universal community of humankind from which the contents of human rights are to be deduced, here presented as a *factum brutum*,[237] can hardly be proved. Rather, it could be seen as a perspective that can be constructed by dialogue, but this is precisely what the foundation of human rights "from above" does not mean: the basis for human rights pretends here to be a given fact in its very substance, not a mere transcendental principle for a dialogic approach. For that reason, the supporters of the "descending" approach to human rights have always had difficulties when it came to a specification of which entitlements ought to be universally guaranteed, or to the justification of why precisely these had to be included while others were excluded from the universal safeguard. With this shaky epistemological basis, they are forced to resort alternately to a kind of

235. Gentili A. (1612), *De jure belli libri tres* (1933 edn), Clarendon Press, Oxford, I, I, p. 10, and I, XV, p. 107; Grotius H. (1646), *De Jure Belli ac Pacis* (1995 edn), William S. Hein & Co., Buffalo, New York, "Prolegomina", No. 6, 16, and 17.

236. On the bias structurally embedded from the outset in international law, see Anghie A. (2005), *Imperialism, sovereignty and the making of international law*, Cambridge University Press. The Western prejudice has been emphasised particularly within the so-called Third-World approach to international law; see: Anand R. P. (2004), *Studies in international law and history*, Nijhoff, Leiden; Chimni B. S. (2006), "Third World approaches to international law", *International Community Law Review* 8, pp. 3-27.

237. The assumption of a universal community of humankind has characterised the approach to international law usually known as the "theory of the international community". For an overview of its history, see Paulus A. L. (2001), *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Beck, München. The contents of the theory in its contemporary version are presented in: Tomuschat C. (1999), "International law: ensuring the survival of mankind on the eve of a new century", *Collected courses of The Hague Academy of international law* Vol. 281, Nijhoff, The Hague.

hypostatised *opinio gentium*,[238] metaphysics,[239] or even to divine authority.[240] In this way, the "descending" conception eventually returns, in a cyclic process, to the main deficiency of its origins within the Scholastic tradition. However, while this deficiency was then embedded in a general context of courageous innovation, it now seems like a backward-looking attitude.

1.3.3. Quis custodiet ipsos custodes? – who should protect us from the protectors?

The third and last structural weakness of the "descending" conception of human rights can be briefly described with a question: who can actually safeguard the entitlements of individuals if these are excluded from the process of their formulation, in other words if the individuals are merely the addressees of rights and not also their authors? The danger of abuse by the powers in force is evident. If we follow the principle that only *volenti non fit iniuria*, no solution can be really satisfying. In the history of the "descending" theory we find many attempts to settle the problem; not one is free from the risk of manipulation. In the Christian tradition of the Middle Ages and then in its Catholic continuation the custodian of the highest law of God is the Church, in particular the Pope as Christ's representative on earth.[241] According to this principle, Francisco de Vitoria asserted that a civil law can be cancelled by the Pope if it is against the divine law.[242]

238. Remarkably, Hugo Grotius gave up eventually in his seminal work *De Jure Belli ac Pacis* the deductive way to found the contents of international law, due to the insuperable difficulties of this kind of argumentation, and switched over to a descriptive presentation of the shared principles of legal and philosophical thought. See: Grotius, *De Jure Belli ac Pacis*, footnote 235, I, I, XII, and I, I, XIV.

239. See, for example, the argumentative strategy of Alfred Verdross, who, searching for a not only formal, but substantial and therefore – in his eyes – more consistent content for the Kelsenian concept of the *Grundnorm*, seeks remedy in Plato's and Hegel's metaphysics: Verdross A. (1926), *Die Verfassung der Völkerrechtsgemeinschaft*, Springer, Wien/Berlin, I, I, § 1, I, p. 2 ff.; I, II, § 7 ff., p. 22 ff.; I, II, § 9, p. 32.

240. We find such a recourse already in Grotius' work (see Grotius, footnote 235, "Prolegomena"), as well as in the Grisez School, one of the most recent attempts to revitalise the doctrine of natural law; see: Finnis J. (1980), *Natural law and natural rights,* Clarendon Press, London, p. 376, 386 ff.; Grisez G., Boyle J., and Finnis J. (1987), "Practical principles, moral truth, and ultimate ends", Finnis J. (ed.) (1991), *Natural law*, Dartmouth/Aldershot, Vol. I, 237-89, p. 279.

241. The most radical version of the theory which asserts that the Pope is the holder of all sovereignty, spiritual as well as secular, has been formulated by Henry Hostiensis (*Summa Aurea*, 1250-1261, Servanius, Lugduni 1556). The theory, however, was surely not conceived, at the time of its formulation, with the aim of improving universal rights, but rather of extending the range of political power of Christianity by challenging the legitimacy of non-Christian rulers or even the right to exist of non-Christian communities. Following a more moderate interpretation, a mainly spiritual, albeit still universal power was attributed to the Church by Hostiensis' antagonist, Sinibaldo Fieschi, who combined a universal aspiration to sovereignty by the Church with the recognition of the real legitimacy of non-Christian *regna* (1243-1254, *Apparatus super quinque lib[ris] decr[etalium] et super decretalibus* (1st edn) 1477, Lugduni 1535). Fieschi's relatively temperate understanding of the power of the Pope was then further limited to the exclusively spiritual authority over only Christians by the most influential authors of the School of Salamanca. On the limitation of the spiritual power of the Pope only to Christians, see Francisco de Vitoria, footnote 233, II, 3. In the School of Salamanca, the theory was actually connected with an attempt to address the question of the safeguard of universal rights, although these were yet defined from an inacceptable unilateralist perspective.

242. Vitoria F. de, "Relectio de potestate ecclesiae prior", Padgen A. and Lawrence J. (eds) (1991), Vitoria, *Political Writings*, Cambridge University Press, p. 45.

Similarly, Suarez stated that the Pope has the "jurisdiction for the correction of kings" and thus also the power of deposing them. The intervention of the Pope is justified both when the faults of the monarchs concern spiritual matters, as well as when their severe errors or tyrannical actions, albeit regarding secular matters, "constitute sins" and therefore a violation of the highest law of nature.[243]

In Suarez's interpretation, however, we find also the elements for a second solution of the problem of who should safeguard fundamental rights. In his understanding, the political power is not given by God directly to the monarch, but to the community.[244] As a consequence, the community as the original holder of the political power has also the right – in the face of severe abuse – to depose the tyrannical king, "acting as a whole, and in accordance with the public and general deliberations of its communities and leading men".[245] These are the fundaments of the idea of popular power. In Suarez's vision, however, this popular power is thwarted by the reference to the superior authority of Christ's representative on earth. This constraint had been overcome – already before Suarez's works were published – in Calvinist political theology. According to the approach of the Monarchomachs, the community is vested with supreme power, unchallenged by any ecclesiastic authority, since "not the peoples are created for the magistrates, but, on the contrary, the magistrates for the peoples".[246] Supporting largely the same conception, Althusius stated, a few years later, that "the people, or the associated members of the realm, have the power (*potestas*) of establishing this right of the realm and of binding themselves to it".[247] This right "has as its purpose good order, proper discipline, and the supplying of provisions in the universal association".[248] The control over the respect of human rights seems thus to have been put in the hands of their addressees again. Yet this is not completely true, at least not with regard to political theology during the transition from the 16th to the 17th century. In the view of the Monarchomachs, there is a social order which is objectively just, thought to derive its superiority from its inherent quality and therefore independently of the will of those who are subject to it.[249] Similarly, Althusius' defence of popular sovereignty is based on a holistic social philosophy, in which hierarchy is considered as one of the most essential laws of nature.[250] In this understanding, the consent by the people is always based on an idea of substantial truth. As a consequence, the autonomy of the citizens is significantly limited and their involvement in the government of the polity, albeit necessary, is not seen as a sufficient condition for legitimacy. Justification and the contents of the fundamental rights still come "from above",

243. Suarez F. (1613), "Defensio fidei catholicae et apostolicae adversus Anglicanae sectae errores" in: Suarez, *Selections*, footnote 226, VI, IV, 16.
244. Suarez, *De legibus*, footnote 226, III, I, 4; III, III, 2; III, III, 6; III, IV, 2.
245. Suarez, *Defensio fidei*, footnote 243, VI, IV, 15.
246. Bèze T. de (1575), *Du droit des magistrats sur leur subjects*, EDHIS, Paris, 1977, p. 13.
247. Althusius J. (1614), *Politica methodice digesta* (1932 edn) Harvard University Press, IX.
248. Ibid.
249. Bèze T. de (1575), footnote 246, p. 3 ff.
250. Althusius J. (1614), footnote 247, p. I.

namely "from Heaven's grace", and their custodians, in so far as they have to apply principles which are thought to be inherently true, cannot be considered to be bound by deliberative procedures.

A third solution to the question of identity of the guardians of rights was developed concurrently with the elaboration of the modern theory of sovereignty. In his *Six livres de la République* Jean Bodin asserted that "sovereignty is that absolute and perpetual power vested in a commonwealth".[251] Therefore, a sovereign prince is not bound by laws (*legibus solutus*), and the civil norms promulgated by him, "even when founded on truth and right reason, proceed simply from his own free will".[252] Bodin concedes that the power of the sovereign may be limited by the Estates as well as by divine and natural law.[253] Nonetheless, both limitations are very modest: on the one hand because of the marginal competences and the strict hierarchical submission of the Estates;[254] on the other – more important for the question addressed in this contribution – because the sovereign prince, being the secular *imago* of the Almighty, has the right to interpret freely, that is, without any secular or ecclesiastic control, the suprapositive norms. Furthermore, no effective remedy against violation is given. Put in the hands of a sovereign power, the protection of human rights is thus at the mercy of its arbitrary will.

The fourth and last solution has finally evolved from the processes which brought about a "domestication" of sovereignty. This happened in the domestic institutional architecture, through the division of powers, and at the international level, through the transfer of sovereign competences with a specific impact on universal rights to international organisations. With regard to the domestic dimension, the safeguard of fundamental rights was first attributed directly to the parliamentary assembly,[255] which paved the way for the institutional application of those principles of a "bottom-up" foundation of human rights (to be discussed in the next section). In order to avoid leaving fundamental rights at the disposal of the "tyranny of the majority" a second answer was elaborated, consisting in the fixation of the fundamental elements of social order in a constitutional document, accompanied by the establishment of a specific constitutional jurisdiction. This solution had been anticipated, to a certain extent, in the Constitution of the United States and, with even more limitations, in Switzerland.[256] It came then to full application, after the end of the Second World War, with the establishment of constitutional courts in Germany, Italy, Austria,[257] France,[258]

251. Bodin J. (1576), *Six livres de la république* (1579 edn), Imprimerie de Jean de Tournes, Lyon, I, VIII, p. 85.
252. Ibid. p. 92.
253. Ibid. p. 91 ff.
254. Ibid. p. 98 ff.
255. This solution characterises the English tradition from the Bill of Rights of 1689 up to the present.
256. The Federal Supreme Court has no competence to review acts of the Federal Parliament.
257. In Austria the Constitutional Court (*Verfassungsgerichtshof*) was re-established in 1946, resuming and extending the competences of the *Verfassungsgerichtshof* created in 1920.
258. The French Conseil constitutionnel was established in 1958. Its organisation and functions are, however, only partially comparable with constitutional courts *stricto sensu*.

Spain and Portugal, as well as, after the fall of the Iron Curtain, in several other countries, many of them in Europe.[259]

As a matter of principle, the idea that the essential elements of social order need increased and qualified protection does not pose any deep conceptual problems.[260] Difficulties arise, however, when it comes to specifying what these elements should contain and mean as well as what the competences of the constitutional courts are and how they are justified.[261] The idea that the concept of "essential elements of social order" should mean more than the guarantee of the conditions of social and political participation,[262] and should constitute substantial foundation of society, rooted in history[263] or in an incontrovertible ethical truth, is hardly convincing.[264] From this point of view, constitutional adjudication cannot limit itself to the safeguard of the framework of deliberation; rather, it has the task and responsibility "to protect the republican state",[265] or to interpret the authentic will of the people as *pouvoir constituant*, which laid down the ethical fundaments of the community, even against the deliberations of its representatives.[266] Paternalistic outcomes from this attitude are more likely to occur in the state-centred and natural-law-influenced European continental tradition than in the mainly dialogic and citizenship-oriented American republicanism.[267] Nevertheless, in both cases constitutional courts may see themselves as the guardians of a fundamental truth – an alleged truth, however, which reminds us more of metaphysics than of democracy.

Similar, but even deeper problems result from the "domestication" of sovereignty at the international level. In order to prevent the violation of human rights by single states, these have been bound progressively by international law. Thus

259. Böckenförde E.-W. (1999), *Verfassungsgerichtsbarkeit. Strukturfragen, Organisation, Legitimation*, 52 Neue Juristische Wochenschrift 9-17, p. 9.
260. However, the guarantee of the fundamental elements of social order can also be achieved without any particular judicial protection, that is without a specific constitutional court, as for example in the United Kingdom, Denmark, Sweden and the Netherlands.
261. For a radical criticism of the principle of constitutional review, see: Bellamy R. (2007), *Political constitutionalism*, Cambridge University Press, Cambridge. For a defence: Walen A. (2009), "Judicial review in review: a four-part defense of legal constitutionalism", *International Journal of Constitutional Law* 7, pp. 329-54.
262. Habermas J. (1992), *Faktizität und Geltung*, Suhrkamp, Frankfurt-am-Main, p. 320.
263. See, as an example, Michelman F. (1988), "Law's Republic", *The Yale Law Journal* 97, pp. 1493-537.
264. On the independence of the specification of human rights from deliberation, see Böckenförde E.-W. (1998), "Ist Demokratie eine notwendige Forderung der Menschenrechte?", Gosepath S. and Lohmann G. (eds), *Philosophie der Menschenrechte*, Suhrkamp, Frankfurt-am-Main, p. 233. On the metapolitic origins of the concept of "human dignity", see Böckenförde E.-W. (2008), "Menschenwürde und Lebensrecht am Anfang und Ende del Lebens", *Stimmen der Zeit*, p. 245-58. Furthermore: Böckenförde E.-W. (1991), *Staat, Verfassung, Demokratie*, Suhrkamp, Frankfurt-am-Main.
265. Michelman, *Law's Republic*, footnote 263, p. 1532.
266. Böckenförde, *Verfassungsgerichtsbarkeit*, footnote 259, p. 11 ff.
267. On the tendency to judicialisation of political processes in the United States and Germany – and on the dangers that can arise from it – see Miller R. A. (2004), "Lords of democracy: the judicialization of 'pure politics' in the United States and Germany", *Washington and Lee Law Review* 61, pp. 587-662.

fulfilling one of the essential constitutional tasks, international law has also been interpreted as a "constitution for mankind".[268] However, given the modest standards of legitimacy in international organisation, every executive decision taken by supra-state institutions in order to maintain or enforce peace and the respect of human rights always runs the risk of being understood as – or even of being in reality – at the service of the most powerful actors in the international arena. Otherwise, although the role played by international courts in guaranteeing an acceptable benchmark for the safeguard of human rights can hardly be overestimated, the judiciary cannot be a substitute for a consistent legitimation-chain in defining what human rights are expected to be.

2. The ascending interpretation of human rights: the foundation "from the bottom up"

2.1. "Objective" justice and individual rights

According to the "descending" understanding of human rights the acknowledgement of individual rights was always conceived as a concession made within the scope of a social order, the ontological and ethical quality of which pretended to go far beyond the will, interests, and reason of individuals. From this perspective, society was not seen as founded to protect the rights of the individuals, but rather to realise the ideal of an objective, that is, supra-individual justice. In the "descending" interpretation of human rights the protection of certain individual entitlements was therefore an important and even inescapable element of the implementation of an objectively just social order, but it was never the centre of gravity of the conceptual construction of society. Due to the holistic horizons of their conception, the first legal documents asserting individual rights – such as the *Magna carta libertatum* (1215), the *Agreement of the people* (1647),[269] and the *Instrument of government* (1653)[270] adopted by the Commonwealth of England, Scotland and Ireland, and the constitutional documents of the New England Colonies[271] – always understood subjective rights in the light of the superior interests of a society seen as a whole endowed with a higher ethical truth. Analogously, the earliest philosophical foundations of subjective rights in

268. Kadelbach S. and Kleinlein T. (2008), "International law – a constitution for mankind?", *German Yearbook of International Law* 50 pp. 303-47. On the constitutional function of the Charter of the United Nations, see: Crawford J. (1997), "The Charter of the United Nations as a constitution, Hazel Fox (ed.), *The changing constitution of the United Nations*, British Institute of International and Comparative Law, London, p. 3; Fassbender B. (1998), *UN Security Council Reform and the right of veto. A constitutional perspective*, Kluwer, The Hague.
269. "Agreement of the people", Gardiner S. R. (1906), *The constitutional documents of the Puritan Revolution 1625-1660* (1979 edn), Clarendon, Oxford, p. 359.
270. "Instrument of government", Gardiner S. R., ibid., p. 405.
271. "Massachusetts Body of Liberties" (1641), Whitmore W.H. (ed.), *The colonial laws of Massachusetts* (1890 edn), Rockwell and Churchill, Boston; *Fundamental Orders of Connecticut* (1637), Rock A. (ed.), *Dokumente der amerikanischen Demokratie* (1947 edn), Limes, Wiesbaden.

the late Middle Ages[272] and in early modernity[273] never challenged the organic interpretation of social life.

The turnabout came as a consequence of the transition from the holistic to the individualistic paradigm of social order and was introduced by Hobbes in the middle of the 17th century.[274] Hobbes overturned for the first time in history the traditional hierarchy between individual and community, placing individuals, as the holders of fundamental rights and the starting point of any legitimation of authority, at the centre stage of political life. The starting point of his political philosophy was, in fact, not society as a *factum brutum*, based on the natural sociability of humans and organised in an organic hierarchical structure,[275] but individuals endowed with their rights, interests, and reason.[276] In this original state of nature – a fictional condition, presented by Hobbes in order to focus attention not on the historic beginning of society, but on the ontological foundation as well as on the conceptual preconditions of a just order – individuals are free and equal.[277] However, they are also constantly in danger of being assaulted and harmed by fellow humans in search – as every individual always is in the state of nature – of more resources in order to improve their life conditions.[278] Therefore, natural reason commands humans to leave the state of nature and build a society (*societas civilis*), in which life, security, and property are safeguarded.[279] In Hobbes' view the Commonwealth is thus not the original and axiologically highest entity in the ethical world any more, but rather a tool that humans give to themselves in order to achieve social stability.

Hobbes' understanding of a social order based on the free will of individuals endowed with essential entitlements lays down the conceptual fundaments for an "ascending" interpretation of human rights. These are not seen any more as the expression of an organic community relying on the laws of God or of nature. Rather they are entrusted to concrete single subjects as their bearers and preservers. From this perspective, social and political institutions are established by rights holders in order to guarantee, on the basis of a legitimacy coming from the bottom up, adequate protection of subjective entitlements. Institutions are

272. William of Ockham, *Dialogus* (1332-1348), Kilcullen J. et al. (eds), 3.2, Book 2, ch. 25 ff., www.britac.ac.uk/pubs/dialogus/ockdial.html, accessed 1 July 2011.
273. See footnote 231. On the organic understanding, within the School of Salamanca, of social and political hierarchy as quasi-natural and given by God, see: Vitoria F. (1528), *Relectio de potestate civili* (1992 edn), Akademie Verlag, Berlin, p. 8, 58 ff.; Suarez, F., *Defensio fidei*, footnote 243, VI, IV, 17, p. 719.
274. A partial anticipation of the individualistic turn, albeit in a conceptual horizon yet deeply influenced by the philosophical and political approach of the scholasticism, can be found in the works of Bartolomé de Las Casas, in particular in Bartolomé de Las Casas (1571), *De imperatoria seu regia potestate* (1984 edn), Consejo Superior de Investigationes Cientificas, Madrid, p. 17 ff.
275. Hobbes T. (1642), *De Cive* (1651 edn), Royston, London, I, I, II.
276. Ibid., I, I, I.
277. Ibid., I, I, III.
278. Ibid., I, I, X ff.; Hobbes T. (1651), *Leviathan, or the matter, form, and power of a commonwealth ecclesiastical and civil*, Crooke, London, XIII.
279. Ibid., footnote 275, XIV; Hobbes T., *De Cive,* footnote 275, I, II, II.

legitimate only if they safeguard fundamental rights and are founded on a freely and explicitly expressed people's consent – in the strand of political thought initiated by Hobbes, in particular, by means of a contract (*pactum unionis*).

2.2. Insufficiencies in the ascending conception of human rights

2.2.1. The transfer of rights

Despite outlining the pivotal importance of the individualistic turn in political philosophy for the formulation of a human rights theory centred on concrete rights bearers, two problems remain: the first concerns the forms and extent of the transfer of rights to the institutions established through the *pactum unionis*; the second concerns the question of whether rights protection should involve only the citizens of the polity or all human beings – in other words the question of particularism or universalism in the safeguard of rights. Starting with the first problem, the shortcoming of a fundamental rights theory relying on the individualistic paradigm founded by Hobbes seems to arise from his assumption that, by establishing a public power endowed with sufficient authority, the citizens have to renounce almost completely their original rights. The only entitlements maintained by them in Hobbes' Commonwealth are actually the right to life protection and – very partially – the right to negative liberty, that is, to pursue economic activities in order to achieve "happiness", yet just in so far as this does not jeopardise the guarantee of social peace and order.[280]

Hobbes' radical solution as regards the renouncement by individuals entering into the state of society of most of their original rights is, however, the exception rather than the rule among contractualism theorists. In most proposals made by other political philosophers the individuals become citizens after having given their assent to the *pactum unionis*, and maintain far more entitlements than in Hobbes' Commonwealth.[281] The more citizen-friendly approach of the contractualism that arose from Hobbes' seminal intuition, nevertheless, does not solve the question. This can be clearly seen in Rousseau's theory of the "social contract". The result of the contract is here in many senses precisely the opposite of Hobbes' idea of a quasi-absolutistic Leviathan: within the *état civil* the goal of establishing a political community consists in the realisation of the positive freedom of citizens as autonomy.[282] Yet the political freedom outlined in Rousseau's social contract is also implemented by means of an alienation of rights – an alienation which is, at least at first glance, even more intransigent than in Hobbes' view. Rousseau's social contract provides for an alienation of all natural

280. Hobbes T., *Leviathan*, footnote 278, XVII; Hobbes T., *De Cive,* footnote 275, II, XIII, II ff.
281. For a comparison of the different proposals see: Bobbio N. (1979), "Il modello giusnaturalistico", in Bobbio N. and Bovero M., *Società e stato nella filosofia politica moderna*, Il Saggiatore, Milano, p. 68.
282. Rousseau J.-J. (1762), *Du contract social, ou principes du droit politique* (1966 edn), Garnier-Flammarion, Paris, I, 8, p. 55.

rights, without any exception.[283] The difference, which characterises the more citizen-friendly attitude of the French philosopher, lies in the fact that, while in Hobbes' construction citizens alienate their rights to a monarch, thereby becoming subjects again, in Rousseau the citizens alienate their rights to themselves, now constituted as a sovereign political community, as a *volonté générale*.[284] Nonetheless, since the body politic created by Rousseau's social contract is a collective entity – itself an individual, says Rousseau[285] – characterised by high domestic unity and insufficient internal institutional articulation,[286] and the sovereign power is not obliged to provide any guarantee to its "subjects", who may even be "forced to be free",[287] the protection of fundamental rights by the *volonté générale* stands on ground as shaky as that of Hobbes' Leviathan.

2.2.2. Citizens' rights or human rights?

The second question which remains unresolved in the "ascending" understanding of human rights based on the individualistic paradigm consists in the limitation of rights protection to single polities. The political philosophy of contractualism was conceived as a theoretical way to re-found legitimacy within the scope of the single body politic. For that reason contract theory, for one and a half centuries after its first formulation, showed little interest in the question of order beyond national borders and, in so far as the problem was addressed, the most important exponents of contractualism were rather sceptical about the possibility of guaranteeing peaceful interaction on a global scale through a cosmopolitan legal order.[288] Yet without some kind of cosmopolitan legal order no safeguard of human rights on a global level is possible. Thus, for a long time the individualistic approach to social and political philosophy seemed to be able to substantiate only an "ascending" theory of citizens' rights, established on the basis of the legitimacy people granted to public power, but not a universalistic theory of human rights at a cosmopolitan level. Yet no conceptual reason stood against the possibility of applying contractualism to a system of global protection of rights. Indeed, supporters of the individualistic paradigm of political philosophy and of the "ascending" interpretation of rights asserted from the very outset that the centre of gravity of any social order has to be found in single individuals, each endowed with essential rights and faculties, in particular the capacity to act according to the principles of reason. Therefore, no insurmountable obstacle, at least not in theory, would stand in the way of the construction of a cosmopolitan legal order aiming to safeguard those essential rights which

283. Ibid., I, 6, p. 51.
284. Ibid.
285. Ibid., I, 7, p. 53.
286. Ibid., I, 6, p. 52.
287. Ibid., I, 7, p. 54.
288. Hobbes T., *De Cive*, footnote 275, XXX; Spinoza B. de (1677), "Tractatus politicus", Spinoza, *Opera* (1924 edn), Winters, Heidelberg, Vol. 3, III; Spinoza B. (1670), "Tractatus theologico-politicus", ibid., Vol. 3, XVI; Locke J. (1690), *Two treatises of government* (1698 edition), Awnsham-Churchill, London, II, 2, § 14; II, 12, § 145; II, 16, § 183.

belong to all human beings, and to guarantee that humans interact peacefully with each other. In order to achieve this goal, however, far-reaching conceptual adjustments were needed.

3. Perspectives for a theoretical foundation of the protection of human rights "from the bottom up" within a multi-level legal system

The individualistic paradigm of political philosophy put for the first time in history human rights in the hands of their very holders, namely concrete individuals, laying down the conditions for direct rights protection by the rights beneficiaries themselves, without any appeal to supra-individual instances allegedly entrusted with higher ethical truth. Nevertheless, the solution proposed by the founders of the individualistic understanding of rights was yet burdened with relevant shortcomings, which made difficult in particular its application to a universal theory of human rights. In order to overcome these deficits, two corrections had to be introduced.

First, individuals should remain the rights holders, in the sense that their entry into civil society does not imply an alienation of rights and a consequent loss of control as regards their application. In so far as the individuals transfer their rights to a public power, this is entrusted with the primary task to protect and improve them. The limitation of a right is only acceptable if it can be proven to be indispensable for the essential protection of another right and exclusively to the extent that is needed for this purpose. In order to guarantee that public authorities do not abuse their power for the realisation of selfish goals, the institutions exercising public power need to be adequately controlled by parliamentary assemblies, proper institutional safeguards for social, political, religious, and ethnic minorities, and a sound system of checks and balances.

Second, fundamental rights have to be understood not only as citizens' rights, but also – in so far as their contents apply to the scope of the guarantee of a peaceful and just universal interaction between humans – in their dimension of human rights in a cosmopolitan sense.

3.1. Kant's proposal and its (partial) inadequacy

The means to these two corrections were laid out in the works of Kant.[289] Considering the first adjustment, Kant maintains Rousseau's ideal of autonomy as the aim of moral[290] and political life.[291] Yet he avoids the dangers to liberty implied

289. As regards the first "correction", we find an anticipation even before, namely in the political philosophy of John Locke, in particular in his limitation of the rights alienation as well as in the competences attributed to the parliamentary assembly. See Locke J. (1690), ibid., II, 7, § 90; II, 11, § 134; II, 12, § 143 ; II, 13, § 150.

290. Kant I. (1785), *Grundlegung zur Metaphysik der Sitten*, Kant I.(1977), *Werkausgabe*, Suhrkamp, Frankfurt-am-Main, Vol. VII, p. 65.

291. Kant I. (1795), *Zum ewigen Frieden. Ein philosophischer Entwurf*, Kant, *Werkausgabe*, footnote 290, Vol. XI, p. 204; Kant I. (1798), *Der Streit der Fakultäten*, Kant I., *Werkausgabe*, footnote 290, Vol. XI, p. 364.

by Rousseau's ontological hypostasis of the *volonté générale* by postulating the necessity of a constitution (*Verfassung*) as the warranty of the rule of law for all citizens,[292] by introducing a rigorous division of powers,[293] and by assigning central competences to the representative assembly as the unchallenged holder of legislative power.[294] The solutions proposed by Kant can be considered up to the present as the fundamental pillars of a domestic institutional architecture properly respecting the rights of individuals.

More problems are posed by the proposals made by Kant as regards the second shortcoming of the original individualistic theory of rights, namely the restriction of the entitlements only – or at least primarily – to the domestic realm.[295] Doubtless, credit is due to Kant for introducing for the first time a three-level construction of public law – domestic, international, and cosmopolitan[296] – which explicitly comprehends, at its third level, a *corpus juris* addressed to the specification of rights belonging to all human beings beyond their affiliation as citizens and regardless of it. In other words, while domestic public law defines the rules of interaction within the single polity and international law gives order to the relations between states, cosmopolitan law – which has to be, in Kant's view, positive and not only natural law – specifies the entitlements of every human being vis-à-vis any state of which he or she is not a citizen, or vis-à-vis any other human who is not a citizen of the same polity. The problem arises when it comes to the question of what contents this cosmopolitan law should have, and what institutional shape concrete implementation of cosmopolitan law should find expression through.

In fact, it is surprising, at least at first glance, and somehow disturbing to notice how "thin" are the rights that should be guaranteed by the cosmopolitan law. They comprehend, in Kant's proposal, only the "conditions of universal hospitality", namely "the rights of a stranger not to be treated as an enemy when he arrives in the land of another".[297] Kant's cosmopolitan law thus anticipates merely in its concept the idea of a universal human rights law regulating the global interactions among humans, but is – if we focus on the concrete provisions contained in it – hardly comparable with a universal catalogue of human rights in our common understanding.

---

292. Kant I. (1797), *Die Metaphysik der Sitten,* Kant I., *Werkausgabe,* footnote 290, Vol. VIII, § 43, p. 429; Kant I., *Zum ewigen Frieden*, footnote 291, p. 204.
293. Kant I., *Die Metaphysik der Sitten*, footnote 292, § 45, p. 431; Kant I., *Zum ewigen Frieden*, footnote 291, p. 206.
294. Kant I., *Die Metaphysik der Sitten,* footnote 292, § 46, p. 432; Kant I. (1793), *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis,* Kant I., *Werkausgabe*, footnote 290, Vol. XI, II, p. 150.
295. For a reconstruction of the cosmopolitan approach in the philosophy of the Enlightenment, see: Cheneval F. (2002), *Philosophie in weltbürgerlicher Absicht. Über die Entstehung und die philosophischen Grundlagen des supranationalen und kosmopolitischen Denkens der Moderne*, Schwabe, Basel.
296. Kant I., *Zum ewigen Frieden*, footnote 291, p. 203.
297. Ibid., p. 213; Kant I., *Die Metaphysik der Sitten*, footnote 292, § 62, p. 475.

Concerning the specifications of the institutions entrusted with implementation of the cosmopolitan dimension of order, in particular with safeguarding peace, we find in Kant's work two solutions for an institution accomplishing world order. He suggests a "world republic" *(Weltrepublik)* as a kind of global super-state;[298] he also proposes, in contrast, the rather unpretentious idea of a "league of nations" *(Völkerbund)*.[299] The *Weltrepublik* is presented as the best perspective since it would be the only structure capable of guaranteeing equal rights and binding rules for all actors concerned with the world organisation.[300] However, Kant admits that the solution favoured in principle is actually unfeasible, while underlining nonetheless that the practicable hypothesis of a "league of nations" cannot really accomplish the task of establishing a worldwide binding system of peace, security, and protection of human rights.

Going beyond mere considerations on the cultural climate of Kant's time to search for conceptual reasons behind the shortcomings of his proposals, it may be useful to address the question of whether both deficits – the "thin" contents of cosmopolitan law as well as the indeterminacy of the institutional framework – can be traced back to the very "heart" of Kant's political philosophy, namely to the paradigm on which he founded his analysis and proposals. As mentioned above, Kant based his idea of social and political order – and therefore also his conception of cosmopolitan law – on the individualistic paradigm of modernity. According to this understanding, knowledge and society are conceived as founded on a unitary conception of subjectivity: only the assumption of the uniformity and internal coherence of the mental processes performed by each individual can guarantee, from the point of view of modern Western thinking, that the use of theoretical reason leads to truth, the implementation of practical reason to justice, and finally that the social, political, and legal world is well ordered.

Western modernity, however, achieved these important results at high cost. The first problem consisted in the solipsistic understanding of individuals, due to the claim that the theoretical and practical processes necessary could be performed by each individual for himself, independent of any social contextualisation. The second problem is the rigidity of the system: just as individuals can be seen as well-shaped personalities only if their theoretical assertions and practical behaviour are coherent, that is non-contradictory, so can knowledge, ethics, society, and law be considered true, just, well organised, or normatively solid only if they are structured in a unitary and pyramidal way. One of the most negative consequences of the modern Western idea of knowledge and action, as well as of society and law, is thus the lack of flexibility. In so far as theory and praxis are based on the monologic integrity of a subjectivity conceived as a coherent and hierarchically constructed monad, no place can be given to horizontal

298. Kant I., *Zum ewigen Frieden*, footnote 291, p. 212.
299. Ibid., p. 213; Kant I., *Die Metaphysik der Sitten*, footnote 292, § 54, at 467, § 61, p. 475.
300. Kant I., *Zum ewigen Frieden*, footnote 291, p. 212.

plurality. Just as single subjectivity is understood as unitary in itself, so also are the political institutions that are established by an agreement among individuals conceived as unitary. As a consequence, sovereignty cannot be shared.[301] States are seen as impermeable "billiard balls" and the organisation responsible for global order would have to be shaped, in order to be effective, as a kind of "world state" endowed with sovereignty. The political and legal structure created in order to implement social order and to guarantee the respect of fundamental rights has to possess, following Kant's individualistic approach, a sovereign unity: either within single states – which may be able to guarantee fundamental rights at the domestic level but with the consequence that a *Völkerbund* of sovereign states can scarcely implement an effective universal protection of human rights – or the rather unrealisable and somehow threatening *Weltrepublik*.

On the contrary, only a multi-level legal and political system, which overcomes the traditional idea of unshared sovereignty, can create the conditions for a legitimate and feasible protection of fundamental rights both at the domestic level, as citizens' rights, as well as within the global arena. The domestic level guarantees the procedures of popular participation so as to specify via deliberation the contents of fundamental rights, which would be difficult to realise on a global scale. On the other hand, the cosmopolitan level defines universal rights establishing adequate institutions entrusted with their protection.

3.2. Towards a multi-level rights system on the basis of the communicative paradigm

To substantiate conceptually this construction a new paradigm of social order is needed which, going beyond the shortcomings of modern individualism, articulates the idea of subjects characterised by plural belongings. Such subjects are at the same time part of a single polity and of the global community, and hold rights which derive from either social situation. This task can be accomplished by the "communicative" paradigm, as developed by Karl-Otto Apel[302] and Jürgen Habermas.[303]

---

301. Habermas J. (2005), "Eine politische Verfassung für die pluralistische Weltgesellschaft?", *Kritische Justiz* 38, pp. 222-247, 224.

302. Apel K.-O. (1973), *Transformation der Philosophie*, Suhrkamp, Frankfurt-am-Main; Apel K.-O. (1990), *Diskurs und Verantwortung. Das Problem des Übergangs zur postkonventionellen Moral*, Suhrkamp, Frankfurt-am-Main; Apel K.-O. (1993), "Das Anliegen des anglo-amerikanischen 'Kommunitarismus' der Sicht der Diskursethik. Worin liegen die "kommunitären" Bedingungen der Möglichkeit einer post-konventionellen Identität der Vernunftperson?", Brumlik M. and Brunkhorst H. (eds), *Gemeinschaft und Gerechtigkeit*, Fischer, Frankfurt-am-Main, p. 149-172; Apel K.-O. (2007), "Discourse Ethics, Democracy, and International Law. Toward a Globalization of Practical Reason", *American Journal of Economics and Sociology* 66, p. 49-70.

303. Habermas J. (1981), *Theorie des kommunikativen Handelns*, Suhrkamp, Frankfurt-am-Main; Habermas J. (1983), *Moralbewußtsein und kommunikatives Handeln*, Suhrkamp, Frankfurt-am-Main; Habermas J. (1985), *Der philosophische Diskurs der Moderne*, Suhrkamp, Frankfurt-am-Main; Habermas J. (1992), *Faktizität und Geltung*, footnote 262; Habermas J. (1996), *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Suhrkamp, Frankfurt-am-Main; Habermas J. (1998), *Die postnationale Konstellation*, Suhrkamp, Frankfurt-am-Main; Habermas J. (2004), *Der gespaltene Westen*, Suhrkamp, Frankfurt-am-Main; Habermas J. (2005), "Eine politische Verfassung für die pluralistische Weltgesellschaft?", footnote 301.

The architects of the communicative paradigm[304] cope with the problems of modern subjectivity (in singular) not by de-structuring and cutting it "into little pieces" – as postmodern thinkers do – but, so to say, by multiplying it into a plurality of subjectivities (in plural). The preservation of an encompassing idea of theoretical and practical reason is achieved by conceiving several kinds of logics of interaction, each distinguished by a specific context of implementation. The dialectic is guaranteed by the common substrate of communicative reason, shared by any interaction. From the idea of a single but universally valid subjectivity, the legacy of Western modernity is thus moving to a plurality of individuals, interacting with each other and constituting a new and more flexible fundament for theoretical and practical reason. Amplifying subjectivity into a plurality of concrete individuals communicating with each other, knowledge[305] and ethics can avoid formalism by maintaining the claim to truth and universality on the other hand, and personal and social responsibility on the other. Moreover, individuals are thus regarded as those who set the standards of legitimacy.

According to the communicative paradigm, individuals are citizens of a single polity as well as human beings involved in interactions affecting them in their sheer and essential dimension as humans, regardless of their belonging to a political community and often within a scope going beyond this sphere.[306] Incidentally, it has to be pointed out that this double-belonging – to a political community and to the global community of humans – the awareness of which is to date rather weak, should be addressed in an adequate political, cultural, even pedagogical effort carried out both by governments and international organisations. Both kinds of interaction – within the single polity as well as in the context of a potentially worldwide interaction of humans – need rules in order to work properly. If expressed in legal forms, these rules correspond in the first case to what we define as "citizens' rights", in the second to more general and universally valid human rights.

In the communicative understanding, all kind of rights – that is, not only citizens' rights, but also human rights – being centred on individuals, are seen as coming "from the bottom up", namely as the result of inclusive processes of deliberation. Different as regards normative density are, however, the legal forms in which the principles guaranteeing interaction are laid down at the distinct levels. On the one hand we have constitutions or analogous documents of constitutional

304. As regards the different approaches to the communicative paradigm, in particular the distinction between the rather transcendental interpretation by Apel and the politically and sociologically more substantiated understanding by Habermas, I will rely in the following primarily on the latter.
305. On the epistemological implications of the communicative paradigm, see: Habermas J. (1984), *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns*, Suhrkamp, Frankfurt-am-Main; Habermas J. (1999), *Wahrheit und Rechtfertigung*, Suhrkamp, Frankfurt-am-Main.
306. "Citizens continue to have deep connections with their own governments and they also have relationships that transcend state borders. Increasingly, citizens are entitled to expect more from their governments than simply keeping order at home and managing threats beyond the border": Stacy H. M. (2009), *Human rights for the 21st century: sovereignty, civil society, culture*, Stanford University Press, p. 31.

relevance as the texts specifying the fundamental rules which protect interaction among citizens within a single polity;[307] on the other hand we have those parts of international law claiming general relevance and universal validity as the nucleus of what can be interpreted as the "common law of mankind".[308] Different in structure and competences are also the jurisdictional institutions entrusted, respectively at the level of citizenry and at the cosmopolitan level, with the task of safeguarding fundamental rules as the essential conditions of interaction as well as of participation in social and political processes. The latter include constitutional courts within the national range and international courts of human rights beyond it.

Two main questions arise from this construction, in particular with regard to cosmopolitan human rights law. The first concerns the shape that institutions committed to protecting human rights at the cosmopolitan level should take; the second concerns how popular participation in the procedures determining global rules should take place in a context which seems to be prima facie simply too distant from individuals to make influence and control possible. Considering the institutional forms of human rights protection, supporters of the communicative paradigm generally deny the hypothesis that only a federal "world state", a *Weltrepublik*, could successfully assume this task as part of a broader commitment to world governance.[309] The rejection of "hard" political solutions does not imply, however, a withdrawal of the communicative theory to an ivory tower grounded on the sterile – as regards practical consequences – equalisation between human rights norms and a merely moral "ought" (*Sollen*). An exit from the impasse can be sought by means of a "soft" institutional architecture combining political and jurisdictional elements.[310] Within this balance between political institutions and international courts, the political dimension, in so far as it can be characterised by higher democratic legitimacy achieved by inclusive deliberation procedures, remains yet the most important from the point of view of the communicative paradigm. The institutional "supra-state" architecture – that is, the political dimension of a global institutional architecture – would take, basically, the form of a world organisation endowed with competences drawn from the transferral of sovereignty by nation-states for the limited but effective accomplishment of two functions: the protection of peace and global security, and the

307. In this regard, it has to be kept in mind that the constitutional protection of fundamental rights within the single polities – as already mentioned above (footnote 215) – safeguards not only the rules of interaction among the citizens of the polity but, in so far as fundamental rights are understood as the codification of human rights by the individual states as well, also those inclusive rules of interaction that the citizens of the individual polity share with all human beings because of their humanity.
308. Bluntschli J. C. (1878), *Das moderne Völkerrecht der civilisirten Staten*, Beck, Nördlingen, 56, No. 7; Tomuschat C. (1995), "Die internationale Gemeinschaft", *Archiv des Völkerrechts* 33, p. 1; Tomuschat C., *International law: ensuring the survival of mankind*, footnote 237.
309. For a plea in favour of a *Weltrepublik* see: Höffe O., *Demokratie im Zeitalter der Globalisierung*, footnote 221. For a discussion of Höffe's proposal see: Gosepath S. and J.-C. Merle (eds) (2002), *Weltrepublik. Globalisierung und Demokratie*, Beck, Munich.
310. On the balance between the protection of human rights by political institutions and the role played by international courts, see: Stacy H. M. (2009), *Human rights for the 21st century*, footnote 306.

safeguard of fundamental human rights.[311] Fundamentally, this would require a United Nations with a substantially reformed Security Council.[312]

The idea of the normative inescapability and also of the concrete possibility of the participation of individuals – even at the cosmopolitan level – in the deliberative processes intended to specify the contents of their essential rights rely on the concept of a "universal community of communication".[313] Since political participation, nevertheless, takes place primarily within single political communities, democratic legitimacy has to arise, also as regards the specification of universal human rights, mainly from deliberative processes inside the states as the principal actors in the international arena.[314] Yet this source of legitimacy, though essential, is not sufficient. Provided that human rights, from a communicative perspective, have to be defined and protected in an "ascending" way, that is "from the bottom up", their formulation and protection, in so far as they claim validity and are applied beyond state borders, must also involve a dimension which articulates itself outside the borders of single polities. In other words, if the supra-state level of public law – that is, norms and institutions of public international law concerned with the protection of peace and human rights – has to be endowed with autonomous normative power,[315] then this level also needs, at least partially, its own source of legitimacy. In a world of Kantian republics this normative requirement would not pose any problem: an uninterrupted chain would transfer legitimacy from the democratic processes within the single polities to the supra-state arena.[316] In such a world, even the perspective of a

311. Such a cosmopolitan world organisation has to be as inclusive as possible, which – in a world in which democracies live together with autocratic states or even tyrannies – poses significant problems nevertheless. On the question, see the controversial Rawls, J. (1999), *The Law of Peoples*, Cambridge University Press, Cambridge. For a criticism: Apel K.-O. (2007), "Discourse ethics, democracy, and international law. Toward a globalization of practical reason", footnote 302.

312. Habermas J. (2004), *Der gespaltene Westen*, footnote 303, p. 133; Habermas J. (2005), "Eine politische Verfassung für die pluralistische Weltgesellschaft?", footnote 301, p. 228. For a discussion of Habermas' proposal, see: Niesen P. and Herborth B. (eds) (2007), *Anarchie der kommunikativen Freiheit*, Suhrkamp, Frankfurt-am-Main.

313. Apel K.-O. (1976), *Transformation der Philosophie*, footnote 303, Vol. II, p. 358; Apel K.-O. (1990), *Diskurs und Verantwortung*, footnote 302; Apel K.-O. (2007), "Discourse Ethics, Democracy, and International Law", footnote 302, p. 50. A way to spell out the concept within the theory of international relations can be found in the idea of a global "political community"; see: Linklater A. (1998), *The transformation of political community*, Polity, Cambridge. See also: Held D. (2004), *Global covenant*, Polity, Cambridge. Elements of a "dialogic" understanding of international law and relations can be found, however, also in the work of authors who do not share the theoretical premises of the discourse theory; see, for example: Carty A. (2007), *Philosophy of international law*, Edinburgh University Press, Edinburgh; Hurrell A. (2007), *On global order. Power, values, and the constitution of international society*, Oxford University Press, Oxford.

314. Habermas J. (1998), *Die postnationale Konstellation*, footnote 303, p. 161; Habermas J. (2004), *Der gespaltene Westen*, footnote 303, p. 137; Habermas J. (2005), "Eine politische Verfassung für die pluralistische Weltgesellschaft?", footnote 301, p. 229.

315. The endowment of the institutions of supra-state public law with autonomous power, or even with a higher normative competence, does not imply that they would possess, like in the case of the institutions of a world state, also a kind of federal sovereign authority.

316. Sellers M. N. S. (2006), *Republican principles in international law. The fundamental requirements of a just world order*, Palgrave, New York.

global parliamentary assembly of members of national parliaments would not be chimerical.[317] Alas, we do not live (yet, let me say) in a world of Kantian republics. So we have to settle, as a putative substitute to the global parliamentary assembly, for an adequate role to be attributed to a steady representation of non-governmental organisations at the UN, in order to give a voice – at least a feeble one – to international civil society, namely to the society of world citizens.[318]

317. Habermas J. (2008), *Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft*, Brugger W., Neumann U. and Kirste S. (eds), *Rechtsphilosophie im 21. Jahrhundert*, Suhrkamp, Frankfurt-am-Main, p. 360. On global democracy, see also: Held D. (1995), *Democracy and the global order*, Stanford University Press, Stanford; Archibugi D. (2008), *The global commonwealth of citizens*, Princeton University Press, Princeton.

318. Habermas J. (1998), *Die postnationale Konstellation*, footnote 303, p. 165; Habermas J. (2004), *Der gespaltene Westen*, footnote 303, p. 141; Habermas J. (2005), "Eine politische Verfassung für die pluralistische Weltgesellschaft?", footnote 301, p. 228.

Gloomy prospects – seven theories on the future of democracy within a world society

by Hauke Brunkhorst[319]

Of my seven theories the first hesitantly sings the praises of the now elderly figure of the nation-state; the second views the modern law of the "Western legal tradition" as simultaneously repressive and liberating; the third considers the nation-state to be overshadowed by its imperialism; the fourth asserts the groundbreaking, standard-setting advances of the 20th century; the fifth sees the (purely liberal) constitutionalisation of a world society not as a solution, but as part of the problem of undemocratic world governance; the sixth paints a gloomy picture of the globalisation of the market, power, and religion; and the seventh also holds out no promises of a happy ending, merely a feeble hope in democratic legal formalism, which is, at least, more often than not a satisfaction for jurists.

1. The subjective spirit of the great constitutional revolutions of the 18th century first took objective form in the modern nation-state. To date this has remained a paradigm of the democratic rule of law. This state, democratic or not, was from the outset an administrative monster, a bureaucratic, supervisory, controlling state, a state founded on unbridled executive power.[320] However, in the course of its democratisation, ultimately wrested from it and its then ruling classes through constant social struggle, revolutions and wars, this state did not merely bring under control the unchecked chain reactions which were triggered by the fission of the major forces shaping modern life, whereby desocialised religion (Max Weber) split away from the clerical universal state; free labour, money, and property markets (Karl Polanyi) from the social stratification system; and political executive power (Karl Marx) from personal domination.[321] The nation-state, according to my first theory, not only developed the administrative authority to control the unleashed productive force of communication, but also successfully used this authority so as to – at least within its borders – bar inequality, translate into public policy the guarantee of the same individual rights for all, make possible participation on an equal footing, and guarantee equal access to economic and educational opportunities and to minimum standards of welfare and care.[322]

319. Professor of Sociology, Head of Study, University of Flensburg, Germany.
320. Reinhard W. (1999), *Geschichte der Staatsgewalt*, Beck, Munich.
321. On the metaphor of nuclear fission, see Brown P. (1975), "Society and the supernatural: a medieval change", *Daedalus*, pp. 133-51.
322. Marshall T. H. and Bottomore T. B. (1992), "Citizenship and social class", Pluto, 33 ff.; Stichweh R. (2000), "Die Weltgesellschaft", Suhrkamp, Frankfurt-am-Main, p. 52.

My first theory is as follows. In the course of the (not solely totalitarian) 20th century the democratised, juridified nation-state finally succeeded:

– in establishing freedom of religion, as unleashed by the Protestant crises of motivation and revolutions of the 16th and 17th centuries, together with freedom from religion in the sphere of political participatory rights,[323] and hence also was able to develop both education and religion as sources of national solidarity;

– in reconciling freedom of public life with growth of public authority, and therefore free participation in politics with freedom from political life, through a democratic right of state organisation, which, even more than human rights, was the real innovation of the 18th century's crises of legitimacy and constitutional revolutions;

– in achieving and guaranteeing, during the second half of the 20th century, freedom of markets and freedom from their negative externalities, through social revolutions and reforms, political planning, and regulated capitalism – all consequences of and reactions to the economic and social crises engendered by unbridled capitalism.

This made it possible for not only the technical-instrumental potential for rationality, which had triggered the emergence of modern society in the form of very fast-growing productive forces (Marx), but also the rationality of strategic-communicative action (Thomas Hobbes) – hugely enhanced and perfected through political accumulation of power – and, above all, since the Protestant revolution, the liberated communicative-co-operative potential for the rationality of the world religions (Weber) to be combined and updated in the institutional context of the democratic law-based state, in this sense becoming a form of "reason in history" (G.W.F. Hegel), a now dated concept.[324]

All the objectively perceptible progress to date is owed to the "inclusion of the other" (Jürgen Habermas), not least all the advances of international law and the constitutionalisation it has brought about of the huge and menacing powers of the modern nation-state, which through juridification and the separation of powers have not become less threatening but have first and foremost grown exponentially.[325] The ultimately perhaps too high cost of this simultaneously functional and standard-setting progress within the nation-state nonetheless lies not only in the scarcely annullable ambivalence of reflexive power, but also in the far-reaching, but in practice reversible, sacrifice of the originally universalist,

323. On the political nature of these rights in the American and French revolutionary constitutional tradition (and the difference between the German church-focused and state-centred special approach to religious freedom), see also Lepsius, O, "Die Religionsfreiheit als Minderheitenrecht in Deutschland, Frankreich und den USA" in *Leviathan* 3/2006, pp. 321-49.
324. On the typology of rationality, reference can naturally be made not to Hegel but to Habermas J. (1981), *The Theory of communicative action*, vol. 2.
325. "Absolute power is weak" (Luhmann (1979), "Trust and power", John Wiley and Sons, New York).

cosmopolitan demands of the great constitutional revolutions, which gave birth to the nation-state and set it into motion.

Initially, on the great day when they were declared in August 1789, the rights of man and the citizen indeed had no kind of legal binding force, but were so stringently universal that the distinction clearly drawn in the text between man and citizen and between human and civil rights came down to the fact that "man" referred to a population in the natural state and "citizen" to the same population in a state of society, in which natural rights merely became positive rights and their number increased since it was now a matter of their autonomous organisation within a political association. The wording excluded no one from any fundamental right, even if the additional, superfluous sanctification of property in the last article was already a bad sign.[326] However, over the 19th and 20th centuries the programmatic binding force of the subjective rights grew and they even in the end became legally enforceable basic rights. As the legislative, executive, and judicial branches gave them positive, tangible form, soft law was transformed into hard law, but their universal nature remained of the status of soft law, and the tangible emergence of rights for some made clear the lack of rights of others: of strangers and foreigners, women and children, black and coloured people, and prisoners and excluded populations (such as the Favellas). Subsequently this outcome was, to begin with, so stable that it was scarcely possible to change it without vast reforms, huge social struggles, or even revolutions. The more the nation-state succeeded in fulfilling its standard-setting promise and in barring inequality, the clearer became the lack of rights inherent in a "bourgeois" law-based state, not only in its increasingly far-flung colonies, but also in the home "civilisation".

2. The success of the nation-state can be explained by the functional efficiency and the standard-setting force of democratic constitutions, a revolutionary idea which, at the outset, was not yet attributed to this powerful state. The French declaration of 1789 makes no mention of the "state", preferring the terms "political association", "civil society", or "nation". Even in the writings of Immanuel Kant the "state" is mostly synonymous with a machine and with absolutism, while the republic is still, or yet again and pre-Hegel, a "civil society". In the United States there were not only democratic state constitutions but also a democratic constitution of the Union. A democratic constitution, as even the most recent German authors of constitutional theory (Christoph Möllers) teach us, does not presuppose any tangible state. (To this extent the duality of state and society was not only the most momentous, but also the most fateful innovation of Hegelian legal philosophy.)

My second theory is that a crucial feature of modern, in particular democratically enacted, law is that it is not simply an aid, like old Roman law, to co-ordinating ruling interests and repressing the ruled. Nor does it amount to nothing more

326. Hofmann H. (1988), "Zur Herkunft der Menschenrechtserklärungen", in: *JuS* 11.

than a stabilisation of expectations; it is not just, to cite Niklas Luhmann, society's immune system, but is also simultaneously a means of actually changing the world. It is aimed not only at repression but also (as Kant and Hegel pointed out) at emancipation (the existence of freedom). This is why Habermas (in the idealist tradition) talks about the simultaneous facticity and validity inherent in positive law. The classic concept of the *pouvoir constituant* (constituent power) is already imbued with a dynamic of barrier-breaking self-transcendence, which led John Dewey to coin such terms as "democratic experimentalism" and "democratic expansionism".[327] As was the case with the well-known Monroe doctrine, gestures of imperialist subjugation (US hegemony over both the Americas) are also here mixed with anti-imperialist emancipation (from all the claims to power of European monarchs).

The US Declaration of Independence itself offers a very telling example of modern law's dynamic duality – repression and emancipation, and both imperialist and democratic expansionism. As a vehicle for emancipation it proclaimed "all men are created equal" and, against the will of the King of England, underlined that all would-be immigrants to America were welcome there. John Rawls quite rightly points out that the 18th-century revolutions initiated a process of learning to include formerly excluded voices, classes, races, sexes, countries, regions and so on: "The same equality of the Declaration of Independence which Lincoln invoked to condemn slavery can be invoked to condemn the inequality and oppression of women."[328] Nonetheless, although it contains the beautiful phrase on equality, the Declaration is at the same time a document of brutal subjugation, legitimising the war of extermination of the Native Americans by accusing the British Crown of being a secret ally of those enemies of all "civilised nations": the "merciless Indian savages".

However, even the rightly derided concept of the civilised nation remains ambiguous when human rights defenders before the US Supreme Court today refer to the "standards of civilized nations" of the Declaration of Independence in order to denounce the tortures perpetrated in Guantanamo and other US prison camps and to bring international law within the compass of the US Constitution, while at the same time fundamentalist nationalists such as Antonin Scalia emphasise the dualism of national and international law (as did the German Federal Constitutional Court in the Treaty of Lisbon case) so as to justify huge departures from those standards (for the time being unlike the Federal Constitutional Court).[329]

327. Brunkhorst H. (ed.) (1998), *Demokratischer Experimentalismus*, Suhrkamp, Frankfurt-am-Main; see also Möllers C. (2008), "Expressive vs. repräsentative Demokratie", Kreide R. and Niederberger A. (eds), *Transnationale Verrechtlichung. Nationale Demokratien im Kontext globaler Politik*, Campus-Verlag, Frankfurt-am-Main.
328. Rawls J. (1993), *Political liberalism*, New York, Columbia University Press, p. 29
329. Nickel R. (2009), "Transnational borrowing among judges: towards a common core of European and global constitutional law?", Nickel R. (ed.), *Conflicts of law and laws of conflict in Europe and beyond*, Arena, Oslo, pp. 281-306.

Only by paradoxically combining repressive stabilisation efforts with emancipatory forces was the democratic constitution able to "institutionalise" the antagonistic interests and class conflicts and the colliding beliefs and social value systems which clashed irreconcilably during the bloody revolutions, in such a way that, once the revolutions were over, they remained in opposition so that the communicative productivity of their antagonism was preserved and the fight about rights could henceforth be continued as a fight for rights, including those of slaves, women, or "merciless Indian savages". Like Chantal Mouffe we might describe the transition from lawless revolution to the condition of "permanent legal revolution" (Justus Fröbel) as one from antagonism to agonism,[330] if (unlike Mouffe) we bear in mind that this transformation of deadly conflicts of values and interests was solely due to the juridification of politics (so hated by both left-wing and right-wing Schmittians).[331] Only when institutions are so paralysed that policy is eclipsed by law or, conversely, only when the law has become so flexible, in the best class interests of the elite (or the key players as they are called today), that it is scarcely distinguishable from the execution of policy decisions, does the fight for law within law become hopeless, making insurrection and civil war inevitable, where permitted by the balance of powers or dictated by despair. Communicative power is then forced to fall back on its physical reserve, the "symbiotic mechanism" (Luhmann) of "vengeful violence" (Hegel), which, like all forms of direct force (including legal ones), explodes the limits of democratic legitimacy.[332]

3. From the early 19th century to the last quarter of the 20th century the modern state was confined to the regional societies of Europe, America and Japan, which themselves transformed huge swathes of the rest of the world into their own vast imperial domains, initially from a territorial standpoint and subsequently (since the English Revolution, whose Calvinist leaders devised the modern nation and modern nationalism)[333] as dominions of the nation-state. This was initially European, and subsequently north-Western, world governance, but not yet any normatively integrated world society.

330. Mouffe C. (2005), *On the political*, Routledge, London, p. 20: "We could say that the task of democracy is to transform antagonism into agonism." One source of this thinking is Niccolò Machiovelli's *Discourses* (Book I, 4): "all legislation and measures favourable to liberty are brought about by discord". See also Bankowski (1991), *Revolutions in law and legal thought*, Mercat Press, 29 ff.

331. Fried J. (1970), *Die Entstehung des Juristenstandes*.

332. The term communicative power coined by Habermas goes back to Arendt. However, Arendt wrongly contrasts it with force, since power is only ever power if, in the event of doubt, it can fall back on force, "the movement of bodies" (Luhmann). From this standpoint, there is no difference between communicative and bureaucratic or administrative power. The relationship between power and force delineates the boundary of democratic legitimacy. Only norms and all the stages whereby they come into existence are capable of democratic legitimation and require such legitimation in a democratic law-based state. Use of physical force is, however, in principle (without Hegel-like additional metaphysical assumptions) not synonymous with the achievement of self-determination or self-legislation. Even a law threatening imposition of the death penalty can be democratically legitimate (albeit at the same time being borderline), but its legal enforcement is not. The same applies to prison sentences and to deployment of the police.

333. Berman H. J., Law and Revolution II, The impact of the Protestant reformations on the Western legal tradition.

Imperialism was in no way foreign to the sovereign European state, but rather part of its inner self. The long history of the imperial state – henceforth aiming to rule the world – and of its international law stretched from 7 June 1494, when the newly discovered lands were divided between Spain and Portugal in Tordesillas, to the unconditional capitulation of the German Reich on 2 May 1945. The Treaty of Tordesillas already split the world in two. On one side, or at least in the centre and in the brilliant vanguard, were the "civilised" Christian royal houses of Europe, which would later give rise to the system of European nation-states and in which the Jus Publicum Europaeum, European public law, prevailed. On the other side of the world lay "disaster triumphant" (Max Horkheimer/ Theodor Adorno). The vast "uncivilised", pagan regions external to Europe lay in the "heart of darkness" (Joseph Conrad). The Congo was where Europe's public affairs ended and the gloomy realm of its private obsessions began. Even the genocide perpetrated by Belgium in the late 19th century was justified by certain humanist European jurists, gathered together in 1873 in the name of freedom, equality, humanity, world peace, parliamentarianism, and progress at the Geneva "Institute of international law", by the argument that only the European acts of King Leopold of Belgium fell within the scope of European public international law, whereas his acts in the Congo came under the private law of property, whereby Leopold as owner was free to do as he wished. The bitter consolation is that a global atrocity such as the genocide of black Africans was not yet at the time a danger to world peace. According to my third theory, the fundamental distinction drawn by European public law was between equal rights for European states and unequal rights for "the other heading" (Jacques Derrida). The Berlin Conference on the future of Africa of 1884/85 offered the colonised and freely colonisable peoples authoritarian rule instead of a legal system (Article 35 of the final General Act), special measures instead of statute law, the first global Dual State, or to cite the most famous words of Conrad's *Heart of Darkness*, "The horror! The horror!"[334]

4. The horror remained, but the law at least was to undergo radical changes in the second half of the 20th century. The 20th century has been described as the "age of extremes" (Eric Hobsbawm), and every attempt to erase the chasm between the extremes was "reconciliation under duress" (Adorno). This most recent of centuries was a catastrophic one that did incurable "damage" to life (Adorno). However, according to my fourth theory, it was also a century in which law underwent a major revolution and groundbreaking, standard-setting advances were made, whereby:

– democracy became universalised;

– national law was transformed into global law;

– national human rights were transformed into global citizens' rights;

334. Conrad J. (1902), *Heart of darkness*, Blackwood's Magazine, London.

– the constitutional rule of law was transformed into the democratic, social rule of law.

Until the mid-20th century the dark reverse side of the exclusion of inequality by nation-states, which was regionally limited and confined to their own citizens' equality by law, consisted in inequality, also enshrined in law, for those individuals, organisations, and political regimes that did not belong to the north-West focused world of states; until the mid-20th century there was no legally binding entitlement to the global exclusion of inequalities. This situation changed dramatically at least after the Second World War, which was fought not just against Hitler and not only in the interests of national self-preservation, but also for democracy and human rights and for a new world, whether this consisted of socialism or Franklin Roosevelt's "one world", in which "equality in the pursuit of happiness" was secured not solely for his own nation (Roosevelt's Second Bill of Rights 1944), but also for all nations (already with the Atlantic Charter of 1941). Huge violations of human rights, the social exclusion of whole regions of the world, and outrageous forms of discrimination of course did not disappear. But now breaches of human rights, lawlessness, and political and social inequalities are perceived as our own problem, a problem concerning all stakeholders in the world society, and now there are serious, legally binding entitlements (*jus cogens*) to the global exclusion of inequality. For this and similar reasons Talcott Parsons, who was certainly no enthusiastic Utopian nor an orthodox German jurist, referred, as early as 1961, to the emerging constitutionalisation of the global system.[335]

5. Although the 1920s proponents of the concept of *civitas maxima*, of the League of Nations, global law, and democracy, such as Hans Kelsen or Georges Scelle, ultimately prevailed over Carl Schmitt and Hans Morgenthau, the *civitas maxima* in and with which we have to live today is still far from being in good shape. Juridification, constitutionalisation, and the rule of law do not in themselves lead to democracy, but always strengthen the existing dominant power. The device and the motto of the globally active (as a kind of international *pouvoir constituant)*[336] and on the very issue of eastward expansion highly influential Venice Commission of the Council of Europe – "democracy through law" – is at best an empty euphemism, or at worst the ideology of the most recent hegemonic power.[337] The converse – law through democracy – would be better. There is no stable, functioning dictatorship without rule through law (and therefore at least a minimum of rule of law). It is above all through law that the power of both democratic and undemocratic rulers becomes stable, effective and, first and foremost, enhanceable, as the senators and emperors of ancient Rome already

335. Parsons, Order and Community 1926.
336. Philip Dann.
337. Nickel R. (2009), "Transnational borrowing among judges: Towards a common core of European and global constitutional law?", Nickel R. (ed.), *Conflicts of law and laws of conflict in Europe and beyond*, Arena, Oslo.

knew only too well.[338] The constitutionalisation of global law, global politics, and the global economy is hence – so my fifth theory goes – not a solution to the problem of eradicating undemocratic governance (in, between, and over states) but is itself part of the problem.

The current constitution of the world society is a network of rights and organisational norms which reproduces the contradiction between democratic solidarity and hegemonic world governance that pervades this society. This contradiction shapes not only international and European law, but also, increasingly, national legal orders. The contradiction between egalitarian legal entitlements and the inegalitarian standards governing their implementation is not the contradiction between an empty normative ideal and a harsh legal reality, but is part and parcel of the harsh reality itself. It can therefore also be used as a political lever by both sides, by those who govern and those who are governed as well as by those who are part of the glittering inner circle and those relegated to the wretched outer fringes. No matter how hard it may be for the latter to activate this lever, and no matter how far they are still prevented from doing so, they can utilise the lever of the law (and thereby possibly launch a democratisation process) at least for as long as the applicable law still has some remaining standard-setting force. The latest example could be observed in Iran, where, at least until recently, there was still a constitutional theocracy (quite similar to the 19th-century constitutional monarchy that has to date been idolised[339] by German constitutional law) with, admittedly restricted but nonetheless genuine, presidential and parliamentary elections. It is true that in Iran the first attempt to mobilise the communicative power of the streets, following a huge electoral fraud, failed, but in suppressing the revolt the regime seems to have exhausted its last sources of legitimacy. Even a minimum of juridification and constitutionalisation (as exists even in the post-national world society) achieves this for democracy and in its interests. If genuinely free elections take place, the ruling classes cannot tamper with them on a huge scale and reverse the presumed results without having to accept correspondingly huge losses of legitimacy.

Undemocratic constitutionalism nonetheless has its own drawbacks in that the hegemonic power which it tames via the constitution can be stabilised and enhanced through juridification, and because it makes possible the development of new forms of governance involving a democratic deficit or even lacking any kind of legitimacy. New systems of governance, as are to be observed today in the world society, are developing above all in response to the fact that global law

338. According to Wesel (1997:156) "Roman law was the law of the elite. Classic indeed means 'model', and this was the name given to Roman law from the end of the 18th century. But classic law was also the law of a class, the law governing relations between members of the propertied class, and accordingly civil law. Other people were dealt with summarily, outside the law."

339. In the light of the German Constitutional Court's decision in the Treaty of Lisbon case, Stefan Oeter aptly talks of a return of the 19th century "undead"; see also Bogdandy A. v. (2009), "Prinzipien der Rechtsfortbildung im Europäischen Rechtsraum. Überlegungen zum Lissabon-Urteil des Bundesverfassungsgerichts und gegen den methodischen Nationalismus", conference paper.

is simultaneously undergoing a juridification and a deformalisation, a standardisation, and a fragmentation. This results in a flexible and elastic (one of Schmitt's favourite terms in the 1930s) but deterritorialised (a concept not employed by Schmitt) legal order, which is perfectly suited to the hegemonic outlook of the day.[340] In future the (with constitutionalisation) growing capability of the multicultural, highly individualised, and increasingly specialised world society to maintain its cohesion in the face of increasing diversity[341] will go hand in hand with increasingly unbearable differences between capital and labour, the included and the excluded, the powerful and the powerless, the believers and the unbelievers, the knowledgeable and the unknowledgeable, and those with and those without rights.[342] The world's division into people with good and people with bad passports is mirrored in the constitutional structure of the world society, which regularly lets egalitarian *jus cogens* rights and democratic lip-service shatter and become silent in the face of the hard law of undemocratic constitutional norms of checks and balances.[343]

The basic contradiction between democratic rights and undemocratic organisational norms, which is a core feature of all constitutionalist regimes, makes possible the development of new forms of class rule. One means of dominance is gubernative human rights policies (see paper by Klaus Günther). No matter how correct their implementation in a given case may be, human rights then degenerate into empowering norms (Ingeborg Maus) of hegemonic policy. With the establishment of "global state" and "global law" structures the capability of the nation-state effectively to exclude inequality is waning, without any form of post-national counterbalance foreseeable or a retreat into the nation-state (recently vested with political symbolism by the German Federal Constitutional Court) still possible. Anyone who seriously takes the latter step routinely ends up not with democracy but with fascism. On pronouncing its decision in the Treaty of Lisbon case the Federal Constitutional Court must in fact have been aware of this when it presumed to dismiss (hinwegzujudizieren, as Möllers puts it) the European Parliament in a legal act and thereby to weaken European democracy to the benefit of the prevailing constitutionalism (at least symbolically).

One comment on the judgment: its weakness from the standpoint of democratic theory is clear from the entirely baseless denial of the cosmopolitan implications already inherent in democratic state constitutions. All democratic constitutions indeed combine universal norms of exclusion of unequal freedom, which range well beyond all existing frontiers (not just the state's), with a procedural right of self-organisation (or right to legislate), which in Germany is characteristically termed a "right of state-organisation" *(Staatsorganisationsrecht)*. This

340. The sole interesting observation made by M. Hardt and A. Negri (2000) in *Empire*, Harvard University Press, Harvard.
341. Luhmann 1992, 25.
342. See also Cristina Lafont and Regina Kreide.
343. Brunkhorst 2002; Brunkhorst 2005. See also Craig Calhoun.

implies that the democratic self-determination of the people, the population, or the nation with regard to democracy cannot be linked to a specific historical form of government or form of law (not to the territorial nation-state nor to the generality of law). The categorial confusion of the "nation", as a self-determined subject of legitimation, with the "state" merely repeats the old errors of the 19th-century concept of the statutory positivism. The "revolutionary tradition reduced to state form" of democratic constitutions reveals – as Möllers pointed out years before the judgment – a profound misunderstanding of the "radical democratic substance of the tenet of the *pouvoir constituant*".[344] The latter must in point of fact be understood not as a substantive concept, as Schmitt believed, but as a normative and procedural concept in the revolutionary tradition and in line with the thinking of Kelsen, Maus, or Habermas (for Kelsen one involving a production method), a concept which, beyond its prevailing form, points to a democratic cosmopolitanism that, in no way by chance (see theories 1 and 2 above), was given its strongest impetus so far (Pauline Kleingeld) by the great constitutional revolutions of the 18th century.

6. What is particularly striking is the dwindling capability of the nation-state effectively to exclude inequality, confronting it with three major structural problems, which modern society already had to combat when it was still confined to Europe. According to my sixth theory, these are the environmentally blind autonomisation of markets, leading to economic and social systemic problems and crises; the environmentally blind autonomisation of executive power to problems and crises of legitimation; and the no longer environmentally blind autonomisation of religious spheres of value to problems and crises of motivation.[345]

The globalisation of the autonomised markets, powers, and belief systems means that the state-embedded markets of national late capitalism are transformed into the market-embedded states of global turbo-capitalism.[346] The new capitalism, which has emerged very rapidly since the 1970s and 1980s, has traded the narrow, rigid framework of democratic constitutional law for the light garb of a flexible, elastic global law and is plunging the half-democratic, half-bureaucratic Western welfare state into a deep-seated crisis at a time when it is still gleefully triumphing over the dictatorial Eastern social state. Freedom of the markets has been unleashed again at the cost of freedom from their negative externalities, the bubble is bursting, and the competitive rivalry for markets and fossil energy sources is causing ever greater damage: *There Will be Blood*.[347]

344. Maus I., Enlightenment of democratic theory: Möllers C. (2005), "Pouvoir Constituant-Constitution-Constitutionalisation", Bogdandy A. v. and Bast J. (eds), *Principles of European constitutional law*.
345. For a typology of crises see Habermas J. (1976) *Legitimation crisis*, Heinemann Educational Books, London.
346. Streek W. (2005), "Sectoral specialization: Politics and the nation state in a global economy", paper presented at the *37th World Congress of the International Institute of Sociology*, Scharpf F., Stockholm.
347. *There Will Be Blood*, USA 2007, dir. Paul Thomas Anderson.

What's sauce for capitalism is sauce for religion. The fundamentalist sect and network religions and the Catholic Church, which for almost 1 000 years has been experimenting with organisational forms reminiscent of the global state, are one of the major winners of globalisation, and the Protestant state churches the losers.[348] The second great transformation has made state-embedded religions into religion-embedded states.[349] The thereby newly won anarchistic freedom of religion is already spreading ominously at the cost of freedom from religion and is creating ubiquitous crises of motivation and of identity which in the 1960s could still be counterbalanced with educational reforms and (under authoritarian regimes) could be restricted at a national level through police-state measures. Endlessly prolonged youth and the life-long persistence of crises of learning, meaning, adolescence, and conversion can no longer be contained through national programmes, with the result that religious fundamentalism can erupt at any time anywhere and in any given social group or stratum, and religion can repeatedly come up with something new. In any case the instruments at the disposal of state and supranational organs seem no longer sufficient, even when combined, to recivilise the unleashed destructive potential of the world religions: *There Will be Blood*.

However, it is not just capitalism and religion but also public executive powers that have become inter-, cross-, and supranationally linked and have broken away from their state-organising anchorage in law.[350] The third major transformation is that of state-embedded public powers into power-embedded states. The globalisation movement's winners everywhere are the fast and free-moving executive powers, which through novel private-public partnerships are expanding worldwide to become a transnational ruling class. They have established loosely coupled soft-law regimes operating at the regional and global levels, which have de facto binding effect and thereby free themselves from oversight

348. Brunkhorst H. (2005).
349. Brunkhorst H. (2008), "Democratic solidarity under pressure of global forces: religion, capitalism and public power", *Distinktion. Scandinavian Journal of Social Theory*, No. 17, pp. 167-88.
350. Reference need simply be made to the unobtrusive but significant boom of the entirely new sub-discipline of transnational administrative law, which is followed neither by transnational governments nor by transnational parliaments (but by the inter-, trans- and supranational courts, if it is followed at all): Tietje C. (2003), "Die Staatsrechtslehre und die Veränderung ihres Gegenstandes", *Deutsches Verwaltungsblatt* 17, pp. 1081-164; Möllers C. (2005), "Transnationale Behördenkooperation", *ZaöRV* 65, pp. 351-89; Krisch N. and Kingsbury B. (2006), "Symposium: Global governance", *EJIL* 1; Kingsbury B., Krisch N. and Steward R. B. (2007), "The emergence of global administrative law", http://law.duke.edu/journals/lcp Möllers C., Voßkuhle A., and Walter C. (Hrsg.) , Internationalisierung des Verwaltungsrecht; Bernstorff J. v. (2008), "Procedures of decision-making and the role of law in international organisations", *German Law Journal* 9, p. 22; Möllers C., Transnationale Behördenkooperation; Fischer-Lescano A., (2008) "Transnationales Verwaltungsecht", *Juristen-Zeitung* 8, pp. 373-83; On the globalisation of executive power: Wolf K. D. (2000), *Die neue Staatsräson – Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft*, Nomos, Baden-Baden; Dobner P., "Did the state fail? Zur Transnationalisierung und Privatisierung der öffentlichen Daseinsvorsorge: Die Reform der globalen Trinkwasserpolitik", at the following link: www.dvpw.de/dummy/fileadmin/docs/2006xDobner.pdf; Lübbe-Wolf G. (2008), "Die Internationalisierung der Politik und der Machtverlust der Parlamente", Brunkhorst H. (Hg.), *Demokratie in der Weltgesellschaft, Sonderheft der Sozialen Welt.*

by democratic parliaments and laws. In future here too freedom of public authority should grow at the cost of freedom from public authority. New global legitimation problems are being added to the old, nationally embedded ones and could plunge the fragile multi-level system of global governance without (democratic) government, hailed by many political scientists as the solution to all global conundrums, into a grave crisis, which should be every bit as terrifying as that of global financial capitalism. This then means, more than ever: soft Bonapartist governance for us in the North-West of the globe, or at least those who do not sink into the ever-broader outer fringe of the excluded, and the full rigour of the "Massnahmestaat" (a state under a system of rule in which normal legal procedures are replaced by special measures) for the others in the South-East, those with the wrong passports: *There Will be Blood*.

7. The 20th-century revolution of law was successful but remains incomplete. Constitutionalism in the place of democracy impedes the concrete implementation of human rights and of solemn democratic declarations. However – according to my seventh theory – even human rights and democratic constitutional rhetoric that can be implemented only in a distorted way from the standpoint of constitutional law of checks and balances are, to cite Kant, not philanthropy but rights,[351] and therefore cannot with impunity be included in legal and constitutional instruments. They can backfire.[352] Even the hegemonically juridified and constitutionalised world society has in common with 18th-century constitutional law and the Western legal tradition the fact that it possesses a dual structure, being simultaneously the immune system of society and the medium of its transformation, and at the same time serving the dominant interests and allowing scope for the formation of emancipatory interests (theory 2). For as long as the constitution of the world society (and all state constitutions are partly constitutions of the world society) is not democratically organised, its particular structure combining juridification and deformalisation, and equal rights and inegalitarian organisational norms, indeed leads to the rapid development and stabilisation of informal governance.[353] However, the same law that establishes the new, transnational class rule on a stable footing and enhances its power, also makes possible a counter-hegemonic policy of global protest[354] and a reform based on principles,[355] which pushes for the formalisation of undemocratic constitutional law of checks and balances, so that global law ultimately is transformed into a law that in legally protected areas[356] enables democratic politics.[357]

351. Kant 1977b, 213 f.
352. Müller 1997, 56.
353. Nickel 2007.
354. Brunkhorst H., (2002a), 184ff; Buckel 2007; Buckel/Fischer-Lescano 2007.
355. Subsequent to Kant: Langer 1986; Brunkhorst 2008, 32 ff. On the link between protest and reform see also: Prien 2008. Papers presented by Bogdandy and Koskenniemi in Zürich, May 2009.
356. Maus 1994.
357. Möllers C. 2003.

A faint hope, and moreover one that is perhaps a little too flattering to jurists, since they invariably believe they already know that only binding law brings freedom from informal governance.[358] There is some truth in the assertion that without the rule of formal law there is no egalitarian democracy, corresponding not merely to (inegalitarian) rule of the majority over the minority but to self-determination or "governance by the governed".[359] However, this possibility can only be realised if the law itself is democratically enacted law. The issue is not how to get out of this circle of law and politics (described in different ways by Luhmann, Kelsen, Habermas and Maus), whereby there is no political action that is not either legal or illegal, and no legal norm that is divorced from political change, but how properly to get into it (Martin Heidegger) and above all if one has fallen out of it, how to get back into it, that is with the equal inclusion of all those subject to the law.

Barack Obama's election campaign, which led to a turnout of over 90% of black voters, only 25% of whom would otherwise have voted, shows that it is possible. However, the difficulties he encountered in obtaining a majority within his own Democratic Party in favour of a health care reform which, for the first time, includes a large part of the lawfully resident under-classes (and thereby recognises them as democratic subjects), shows how hard things are in a country, which is indeed democratically constituted, but where 80 to 100 million people are excluded (as a provisional estimate) including 40 million illegal aliens, and in which the President constantly underlines that those present illegally, but legally working, will receive not a single cent. This is the situation, and not just in the US. It is not made any easier by the fact that any reverse move back to the nation-state would amount to a catastrophe. The coming democracy – or to use Derrida's less forceful term the "democracy to come" – will be cosmopolitan, or it will not exist at all.

358. Möllers C.
359. Möllers C., Brunkhorst, Maus.

The Council of Europe

Human rights between sovereign will and international standards: a comment

by Jarna Petman[360]

Let me, as a very general comment, reflect on the nature of the tension I believe exists between international standards and respect for sovereign will. The European Convention on Human Rights (ECHR), set up as a bulwark for democracy, naturally assumes an inherent compatibility between protecting human rights and promoting popular sovereignty.[361] And yet, as the European Court of Human Rights started applying the ECHR in practice, it soon had to note that "some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention".[362] The Court thus had to conclude that there was in fact an inherent tension between the two, between respect for popular sovereignty and the defence of rights.

No wonder, for this is the tension that characterises liberal democracy itself. Liberal democracy is a very specific form of organising human co-existence. It results from the joining together of two different traditions: on one side, the tradition of political liberalism with the rule of law, separation of powers, and individual rights; on the other, the democratic tradition of popular sovereignty and the rule of the majority.[363] Constitutive to this political form of society is the acceptance of pluralism. With the plurality of equal voices the markers of certainty dissolve and a substantive idea of the good life comes to an end.[364] Instead, various conceptions of the good life prevail. This has important consequences for the way in which relations within liberal democratic societies are constituted, and governed. Within such societies, there is a constant need to limit the scope of the collective's power so as to respect individual difference. For this, the liberal state is required to adopt a position of apolitical neutrality with regard to the various conceptions of the good life so as to ensure equal respect and concern for its citizens. But, at the same time, the state is also expected to

360. Professor of International Law, University of Helsinki, Member of the European Committee of Social Rights, Council of Europe, Strasbourg, France.
361. For many of the founders, the very purpose of the Convention mechanism was to "ensure that the States of the Members of the Council of Europe are democratic, and remain democratic"; Council of Europe (1975), *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* 2, p. 60, also, p. 4, p. 50 and p. 157.
362. *Klass and others v. Federal Republic of Germany*, ECHR Series A (1978) No. 28, para. 59.
363. Mouffe C. (1995), "Democracy and pluralism: a critique of the rationalist approach", *Cardozo Law Review* 16, p. 1533-34.
364. Lefort C. (1986), *The political forms of modern society: bureaucracy, democracy, totalitarianism*, Polity Press, Cambridge, pp. 303-5.

protect and control the cultural and moral environment of the community. It is tasked with both individual and societal rights – with both group difference and homogenisation. And here is the dilemma of liberal democracies: in managing the line between individual and societal rights, the state has no automatic way to choose between the two.[365] Without a general recipe for the solution of rights conflicts, the state can go wrong, at times terribly wrong.

It was in fact precisely because of this, because the state could fail, and prior to and during the Second World War did fail in its role as the custodian of rights and become an instrument of oppression, that the Court was created. "Never again" was the motto of post-war political integration in Europe. In the campaign for political union, human rights soon became an important priority. When the various organisations promoting integration met at The Hague in May 1948 for the Congress of the International Committee of the Movements for European Unity, the delegates proclaimed their "desire" for "a Charter of Human Rights" and "a Court of Justice with adequate sanctions for the implementation of this Charter".[366] As the sovereign will of the people had proved to be not only the protector, but also the gravedigger of rights, it was felt necessary to give independent international bodies a brief to watch over state behaviour:

> We can now unanimously confront "reasons of State" with the only sovereignty worth dying for, worthy in all circumstances of being defended, respected and safeguarded – the sovereignty of justice and of law.[367]

The hope seemed to be that international human rights law could simply, automatically solve the tension between homogenisation and group difference once and for all. This is a hope I recognise, for this is the hope that we international lawyers are educated in.[368]

There is nothing simple and automatic about human rights, however. As legislative constructions, their creation, application, and adjudication is about struggle and compromise, power and ideology.[369] Indeed, there is no authoritative catalogue of rights that would be politically innocent.[370] Think of the ECHR; it too came about as a deeply political document. In a classical international negotiation process, drafts were prepared, discussed, redrafted, accepted or rejected, points argued and bargained, deals struck, compromises made, issues

365. Petman J. (2008), "Egoism or altruism? The politics of the great balancing act", *No Foundations: Journal of Extreme Legal Positivism* 5, pp. 113-33.
366. 1 *Travaux Préparatoires* at xxii.
367. 1 *Travaux Préparatoires* at 48-50.
368. Kennedy D. (2004), *The dark sides of virtue: reassessing international humanitarianism,* Princeton University Press, New Jersey.
369. Schauer F. (1991), "Playing by the rules: a philosophical examination of rule-based decision-making in law and in life", *Clarendon Law Series*, Clarendon Press, Oxford.
370. See e.g. Mutua M. W. (2002), *Human rights: a political and a cultural critique,* University of Pennsylvania Press, Philadelphia.

dropped.[371] Only those rights that were successfully formulated in political bargaining were included into the ECHR's catalogue; only certain aspects of reality came to be recognised as a "human right" and were afforded protection under the ECHR.

As time has gone by and the values of European societies have changed, the conception of what might qualify as a "right" has also changed: additional aspects of life have become characterised in terms of human rights as the ECHR's catalogue of rights has been enriched by additional protocols. In this process too, only selected problems have been characterised in the language of "rights". As before, such selectivity has not been dictated by any essential nature of those problems. Rather, it has been a matter of political preference.

What in the end is called a human right is the outcome of the contextual balancing of different priorities and alternative notions of the good life. Quite the same applies to the notion of who the "human" is whose rights the ECHR protects. Should asylum seekers be included? What about divorcees? Or transsexuals? Should homosexuals have the right to marry and found a family? In different times we have had different answers to the above questions. Our conception of rights does not hold for all times and all places.[372]

In a sense, we are aware of that already when we legislate rights into being. We know, there and then, that like all legal rules, human rights will cover cases we did not wish to cover and leave uncovered cases that we think should have been covered had we only thought of them when formulating the rules.[373] This is because we only have our past as the basis on which to legislate. As the future remains unknown and the experience of the past is insufficient to grasp it, we cannot know what the application of a rule will include or exclude. So we need exceptions to govern this uncertain future; accordingly, rights are always supplemented with exceptions. While the scheme of right/derogation is inevitable, it is at the same time also insufferable, for there is no definite rule or standard that sets out when the right should apply, and when the derogation.[374] Rights are, to be sure, a product of a political community.

So the human rights that the Europeans set about creating in 1948 could only be created through negotiations, as legislative/political compromises. As such, they came to reflect the interests and values of the liberal democratic societies

371. See e.g. Simpson A. W. B. (2001), *Human rights and the end of empire: Britain and the genesis of the European Convention*, Oxford University Press, Oxford; Bates E. (2010), *The evolution of the European Convention on Human Rights: from its inception to the creation of a permanent Court of Human Rights,* Oxford University Press, Oxford.

372. See Petman J. "Egoism or altruism", footnote 365 at 113.

373. Schauer F. (1993), *Playing by the rules*, Oxford University Press, Oxford, footnote 369 at 31-34; Koskenniemi M. (2005), *From apology to utopia: the structure of international legal argument,* Cambridge University Press, Cambridge, pp. 589-92.

374. See Koskenniemi M. (2001), "Human rights, politics and love", *Mennesker & Rettigheter,* pp. 33-45; see also Koskenniemi M. (1999) "The effect of rights on political culture" in Alston P. et al. (eds), *The EU and human rights,* Oxford University Press, Oxford, pp. 99-116.

that negotiated them into being – as did the Court. The Court was to adopt a position of apolitical neutrality with regard to the various conceptions of the good life so as to ensure equal respect and concern for the various European states; at the same time, it was to protect and control the cultural and moral environment of Europe. It would guarantee both group difference and homogenisation, both sovereign will and international standards. Soon enough it would find out that "some compromise between the requirements for defending democratic society and individual rights" was needed.[375] And it would have no automatic means of deciding between the two.

The Court is therefore now in a paradoxical situation as regards its role as a bulwark of democracy. It must be prepared, at times, to subordinate the sovereign will as expressed in referenda, or the values of pluralism, tolerance, and broadmindedness (that it has defined as the core of a democratic society[376]), to the protection of other, more important, more "European" values.[377] It must be able to conceive democracy merely as an instrument of such superior values – whatever they are.

Indeed, when the Court sets out to evaluate whether a state has violated human rights because that was "necessary in a democratic society", it must first choose which contested conception of democracy to uphold. Here, it has two alternatives. It can either look into the jurisprudence and practice of the member states and try in an empirical or aesthetic fashion to sketch the contours of an emerging Euro-consensus, a European community in aggregate. Or it can rely on rational choice and simply assume that it knows what Europeans think or should think of matters. Consider the notion of "margin of appreciation", for example. It is a fundamentally aesthetic metaphor,[378] as such signalling the kind of rationality we can expect to encounter in this domain – a rationality of truisms that relies on shared understandings, on people thinking in broadly similar ways about matters social and political regarding that particular context. It is only after the Court has chosen a notion of democracy that it can determine whether that is best served by the right enshrined in the ECHR or the given state's derogation from it, by the international standard of the sovereign will of the people.[379]

Whether the judges sketch "democracy" through empirical or rational moves, they rely on their own experience, on their own European self-understanding.

375. See footnote 362 and the accompanying text.
376. See e.g. *Handyside v. United Kingdom*, ECHR Series A (1976) No. 24, para. 49; and *Lehideux & Isorni v. France*, ECHR Series A (1998-VII) No. 2864, para. 55.
377. See e.g. *Open Door and Dublin Well Woman v. Ireland*, ECHR Series A (1992) No. 246-A, paras 28-35 and 64-80; *Otto-Preminger-Institute v. Austria*, ECHR Series A (1995) No. 295-A, 19 EHRR 34, paras 49 and 56; *Wingrove v. United Kingdom*, 24 EHRR (1997) 1, para. 60; *Refah Partisi (Welfare Party) and others v. Turkey* (GC) ECHR (2003-II) paras 107-136; *Leyla Şahin v. Turkey* (GC) ECHR (2005) paras 100-123.
378. Marks S. (1995), "The European Convention on human rights and its 'democratic society'", *British Year Book of International Law* 66, 209 at 216.
379. See Petman J. (2006), "Human rights, democracy and the left", 2 *Unbound: Harvard Journal of the Legal Left* 73-90.

There is no one notion of "democracy". Different groups in the international community of Europe understand that notion differently. When the Court uses the notion of "democracy", it participates in the societal debate over the meaning of the term and over the hierarchies of values through which it should be understood. In deciding upon conflicting understandings, it necessarily becomes a political actor, taking the side of some groups against other groups and values. And when it does so, it is not in bad faith: none of the judges, not one of us, has an authentic connection to universal truths as no one lives in an abstraction, cut off from history and context. Judges are also fully aware that they need substantive choices between contested political practices to realise the rights enshrined in the ECHR: the authority and the power of the Court is dependent on the legitimacy that the member states bestow upon it. It must ensure its power through political manoeuvres.

In liberal democracies rights are defined and applied in a pluralist cacophony in which equal but different claims compete against each other. Sometimes the claims cancel each other out; other times, most of the time, the claims are such that with the limited resources at our disposal only one of them can be met. With pluralism, there is no general solution to such conflicts, for there is no single vision of the good life that rights could express. How then to administer the conflicting claims emanating, say, from popular sovereignty and international standards? The response, as we have seen, hinges on the appreciation of the context. This does not mean that conflicts should be resolved any which way. In all institutional contexts there is, there must be, a constellation of forces that relies on some shared understanding of what the relevant values and rights are and how they should be applied.[380] There is such a structural bias at work within the Court, too. While the existence of the bias as such is not an outrage, its workings can sometimes be exactly that. To be sure, in sketching "democracy" the judges of the Court have, at times, opted for lethargy or reproduced societal structures in an uncomfortably conservative and unreflective manner: as if the way some groups – perhaps the majority – used to think about society and the good life was to be taken to be the way we should always think. But what if that majority opinion was based on ignorance or superstition or misunderstanding? This is why it is essential to be aware of the bias and its consequences. What does it do? How does it affect the distribution of benefits and values? Who does it privilege?

The choice between international standards and the sovereign will is exactly that, a choice. Accordingly, the question we must keep asking is not whether a choice is to be made, but who is empowered to make the choice: "who will decide?" Importantly, without a single vision of the good life, without a general recipe for conflict resolution, those who do decide are completely at a loss, completely perplexed – and, accordingly, completely responsible. This in itself is a wonderful thing.

380. Kennedy D. (1997), *A critique of adjudication: fin de siècle,* Harvard University Press, Cambridge, Mass.

Definition and development of human rights in the international context and popular sovereignty

by Inge Lorange Backer[381]

Introduction

Speaking about national sovereignty and international human rights, I think there is still truth in the saying that "the proof of the pudding lies in the eating". My observations will, therefore, be linked to legal practice rather than legal theory and take the form of a supplement to Professor Brunkhorst's paper, while also serving as a follow-up to some of the previous papers.

I shall limit myself to discussing the European Convention on Human Rights (ECHR) and the European Court of Human Rights, which may be regarded as perhaps the greatest achievements of the Council of Europe. They serve as a guarantee for the rule of law and human dignity within Europe and provide a bulwark against a possible return to regimes and living conditions of past times.

Let us also bear in mind that the Council of Europe is an organisation of independent nation-states co-operating, above all, to secure certain fundamental values which have been severely threatened in the past. It is not a kind of union replacing the nation-states and their governments.

Thus, it is another prime objective of the Council of Europe to support and sustain democratic rule in its member states – government "of the people, by the people and for the people". This calls for a wide acceptance of majority decisions and of compromises that may find favour with, as the case may be, a large majority in a given member state. From this perspective, it is a paradox that important value judgments are made and issues affecting democratic governance are decided by international judges acting independently in their personal capacity, with limited democratic legitimacy.

A number of European judicial systems are faced with heavy backlogs and unacceptable handling times that create situations where "justice delayed becomes justice denied".[382] Against this background, it is much to be regretted that the handling time in the Court frequently equals that in national jurisdictions violating ECHR rights.

---

381. Professor, Department of Public and International Law, University of Oslo, Norway.
382. Quoted from Abraham Lincoln's well-known speech in Gettysburg, 19 November 1863.

The backlog of the Court jeopardises its proper functioning. A steady increase has brought the number of pending applications to more than 100 000, although only a fraction of these materialise for actual consideration by the Court.[383] There seems to be widespread agreement that the measures agreed in Protocol No. 14 will not be sufficient to remedy the situation and at present it is even doubtful if the protocol will enter into force.[384] The success of the Court risks proving fatal to the Court.

My proposition is that this state of affairs does not necessarily reflect the actual state of human rights in many Council of Europe member states. In part, it is the result of the Court's willingness to expand the rules of the ECHR and its substantive protocols. Ever more legal questions are decided in terms of human rights under the ECHR's broad and vague rules. The more willing the Court is to expand and to extend the rules, the more complaints are likely to be generated. This expansion is a threat to the European human rights system itself, to legal certainty in member states, and to national sovereignty and democratic rule alike.

1. Legal practice – three examples from the European Court of Human Rights

I shall provide you with four examples from the Court's recent practice to illustrate and discuss my proposition.

(1) My first example concerns naming traditions and practices, which vary throughout Europe. In *Johansson v. Finland* (6 September 2007) the parents wished to name their son "Axl Mick", apparently after the rock stars Axl Rose and Mick Jagger – Axl, accordingly, without the letter "e". The exclusion of said letter differed from Finnish naming traditions where Axel, spelt with an "e", is a traditional and commonly used forename. Since the alternate spelling departed from Finnish practice the authorities refused to accept it and the decision was upheld by the Finnish administrative courts. The Court, however, found a violation of ECHR Article 8 and added that, indeed, some five other boys had been registered in Finland with the forename of Axl without an "e".

One may agree or disagree with the substance of the matter – the spelling of Ax(e)l. But can the dropping of the letter "e" with any justification be regarded as a human right? Surely, it is far from apparent that it infringes the right to respect for private and family life laid down in Article 8.

383. By the end of 2008, 973 000 applications were pending before a judicial formation of the Court. Another 21 450 applications were at the pre-judicial stage, under preliminary consideration by the Registry as further information was required from the applicants in order to allow for processing. In the course of 2008, 49 850 applications were allocated to a Committee/Chamber, an increase of 20% from 2007. See the Court's Annual Report 2008, Ch. 12.

384. Some help will now be provided by the coming into force (as from 1 October 2009) of Protocol No. 14bis (opened for signature on 27 May 2009), which makes some of the provisions of Protocol No. 14 binding in respect of Convention states ratifying No. 14bis.

Whether unlawful discrimination had taken place is a matter that, in this case at least, would have been better left to national courts to decide – for one thing, the wrong might consist in a wrongful acceptance of the five spellings without an "e", and nobody can claim as a human right that national authorities persist in their wrongful decisions. In short, this is a case where the Court would have acted wisely by leaving the decision and the discretion involved to the national authorities and courts.

(2) I now switch from personal life to transnational business activities, as illustrated by the Grand Chamber judgment in *Anheuser-Busch Inc. v. Portugal* (11 January 2007, GC).[385] The Portuguese Supreme Court had refused an application from a US company to register a beer under the trademark of Budweiser. Registration was denied because it would have contravened a bilateral treaty between Portugal and the Czech Republic, where Budweiser is a traditional brand name for a Czech beer. The majority found no violation of the ECHR in the actual case, but the Court accepted that registered trademarks as well as other intellectual property rights enjoy the protection given to property rights granted by Article 1 of the first Protocol to the ECHR and a large majority even extended this protection to an application for trademark registration.

This opens up a vast new battlefield for companies to pursue their business interests and adds the ECHR to the numerous legal remedies already exploited by affluent firms for their commercial purposes. The Court boldly resisted any temptation to restrain the interpretation of the conventional rule in question. Since the case backlog is heavy and the resources of the Court system are after all limited, this invitation to business may be at the expense of individuals suffering a breach of a fundamental right and in need of relief.

(3) My third example deals with democratic infrastructure as illustrated by *TV Vest As and Rogaland Pensjonistparti v. Norway* (11 December 2008). Here, the question was whether a general ban on political TV advertising violated freedom of expression as protected by Article 10. Political advertising on television has never been permitted in Norway although advocated by some political parties. However, prior to a local and regional election, a regional branch of the small Pensioners Party managed to purchase advertising time from a local television chain. The administrative fine which the media authorities subsequently imposed on the TV company was upheld by the national courts under the Constitution of Norway as well as under Article 10 in the light of the margin of appreciation.[386] The Court, however, unanimously found a violation of Article 10.

385. It is settled law, however, that companies and other legal persons, at least in some respects, are protected by the ECHR, see e.g., Emberland M. (2006), *The human rights of companies,* Oxford. It follows from the wording of Protocol No. 1, Article 1 that companies enjoy protection under this Article, but the actual scope of the protection remains to be determined.

386. See the judgment by the Supreme Court of Norway in NRt. [Norsk Retstidende, Norwegian Law Gazette] 2004 p. 1737, quoted in part in the judgment of the Court.

Clearly, it is a prerequisite for democratic elections that the various parties have a right to make their views known to the electorate, but it is still open to question whether this should apply to all media. Surely, there is evidence to suggest that political advertising on TV may have an impact on the quality of public debate and give political parties that have large budgets an advantage over other parties. The Court seemed to accept that TV advertising may have undesirable effects in a democratic perspective. It nevertheless found that a blanket ban was disproportionate with respect to the applicant, but failed to consider the general ban in the light of what other means of access to the public were available to a political party.

According to the Court, a prohibition on political TV advertising cannot be applied to a small political party which receives little or no mention in the edited TV media, depending on the form and content of the specific advertising. It is difficult to see how such an exception can be carried out without an assessment on a case-by-case basis which may engender legal uncertainty and arbitrariness as well as unnecessary bureaucracy. The judgment illustrates, I think, how the Court may make an effort to accommodate an applicant at the expense of general and uniform rules that are simple to administer and leave no room for arbitrary individual decisions. It is worth noting that general uniform rules used to be regarded as a prominent feature of the rule of law.

It must be added that political advertising on TV is a controversial matter where rules vary greatly between different Council of Europe member states. Apparently, that did not affect the Court. One may ask if the judgment can be explained in terms of the composition of the Court. Indeed, it is a problem if judges coming from states with no tradition of a diversified free press and where new political parties meet various suppressive measures from the established leadership apply their experience and outlook indiscriminately to states with democratic traditions of longer standing.

(4) The last example concerns prisoners' right to artificial insemination, the Grand Chamber judgment *Dickson v. United Kingdom* (4 December 2007, GC). Mr Dickson, born in 1972, was convicted of murder in 1994 and sentenced to life imprisonment with a possible release only after 15 years, that is, not until 2009. In 1999, while in prison, he met his future wife through a prison pen pal network. She too was in prison then but was later released. She was born in 1958 and had three children from earlier relationships, whilst Mr Dickson had no children. They married in 2001 and wished to have a child. Their application for facilities for artificial insemination was, however, refused by the Secretary of State, and his refusal was upheld by the British courts.

The Grand Chamber found under dissent (12-5) that this refusal breached the couple's right to family life under Article 8 of the ECHR. The right to beget a child was regarded as an essential part of the right to respect for private and family life and applied to prisoners as much as to anyone else. In any

case, a prisoner could not be refused artificial insemination facilities for the sole reason that it would be offensive to the public at large. The majority made the point that artificial insemination would be the only practical means for the applicants to conceive a child, since Mrs Dickson would be 51 years old at Mr Dickson's earliest release and the British prison regime does not allow for unguarded conjugal visits. The fact that Mr Dickson for a good many years would be unable to take part in the upbringing was of no importance since Mrs Dickson could take care of the child. The majority found that in these circumstances the British policy in the field did not allow for a fair balance between the competing interests and fell outside any acceptable margin of appreciation.

This judgment goes a long way towards making artificial insemination a human right for couples who would otherwise be prevented from conceiving a child. Prison rules vary between Council of Europe member states, and in other judgments the Court has not considered unguarded conjugal visits in prison as a human right. Accordingly, it is no wonder that the minority of the Grand Chamber found a lack of coherence in the majority's ruling that a prisoner nonetheless is entitled to artificial insemination facilities as a matter of human rights. The weight accorded to the adults' wish to become parents, compared to the lack of importance attached to the information on social environment awaiting the prospective child, is also striking.

The Dickson judgment is an example showing how the concept of human rights may be stretched and extended in fields that are linked to value judgments and public services in the states parties to the ECHR where the relevant national laws differ.

2. General features of the Court's reasoning

There are certain features in the reasoning of the Court which create an inherent risk of causing legal uncertainty as well as infringing national sovereignty. The impact on sovereignty affects national legislatures in particular, but also national judiciaries, especially the supreme courts.

This risk might have been more limited if the effect of each single judgment, including its value as a precedent, was confined to the factual situation that gave rise to the application. However, the rulings are often based on general statements that lend themselves to application to other circumstances, and the Court often does so by reiterating them in new cases, perhaps encouraged by legal scholars. The Court seldom retreats from its previous decisions in the direction of a more restrained application of the ECHR. In this sense, one can speak of a doctrine of precedent, but it does not prevent various sections of the Court from making judgments that are hard to reconcile (*Orr v. Norway*, 15 May 2008,

versus previous judgments).[387] The court tends to state its reasons in a manner which leaves the door open for a further step. For example, when the Court found in *Taxquet v. Belgium* (13 January 2009) that the jury verdict contravened the right to a fair trial for want of reasons, it gave rise to doubts as to whether the jury system can be maintained at all under the ECHR.[388] The doctrine of precedent – to the extent it does exist – is hardly applied so as to prevent the Court from taking a further step to enhance the rights of defendants and other individuals if it sees fit to do so.

The crucial point here is the perception of the ECHR as "a living instrument"[389] and the corresponding doctrine of dynamic or evolutive interpretation.

The ECHR must of course be applied to new factual situations and conflicts as they arise in our societies and in this context the Court should take account of new value judgments in the convention states. But it does not follow that the Court is free to create ever more far-reaching rights on the basis of the ECHR's rules.[390] The ECHR will not become "theoretical and illusory" and cease to be a living instrument once the number of violations diminishes – quite the contrary, it would be a proof of its success. Even if states should fully comply so that no violations are found, there would be no cause to increase the obligations through Court practice. National legislatures have, on the basis of public debates and general elections, a much stronger democratic mandate to do this, particularly as individual rights may often have repercussions on others, individually or taken together. Subsidiarity should be applied: national legislatures and courts are often much better placed than the Court to assess how the values enshrined in the ECHR can be applied in the national legal system. In my view, it is unfounded to assume that "a failure by the Court to maintain a dynamic and evolutive approach would ... risk rendering it a bar to reform or improvement" (*Christine Goodwin v. the United Kingdom*, 11 July 2002, GC, paragraph 74). Such an assumption overlooks the fact that legal reform, even in the field of civil liberties and human rights, can come about by national legislation as well as by new international conventions and protocols.

387. *Orr v. Norway* (15 May 2008) deals with the question of to what extent the presumption of innocence according to ECHR Article 6 para. 2 prevents a court from holding a defendant liable to pay compensation to the victim after acquitting him of criminal liability. The prosecution for rape makes the question particularly relevant, as indeed it did in the *Orr* case. The Norwegian request for referral to the Grand Chamber was refused by the panel of five judges acting under ECHR Article 43.
388. The Supreme Court of Norway unanimously held in a plenary judgment of 12 June 2009 that the Norwegian jury system is compatible with the right to a fair trial under the ECHR in the light of other procedural rules (*inter alia* on the judge's summing up, setting aside of jury verdicts and motivation of the penal sanction) that are capable of fulfilling broadly similar functions as a reasoned verdict would do.
389. See, originally, *Tyrer v. United Kingdom*, ECHR Series A (1978) No. 26, holding that birching of schoolchildren ran contrary to ECHR Article 3.
390. The Court does recognise, however, that it cannot create a new right without support in the text of the Convention, see *Johnston v. Ireland*, ECHR Series A (1986) No. 112, concerning an alleged right to divorce.

Neither the doctrine of "the states' margin of appreciation" nor that of "fourth instance" provide adequate safeguards in this respect. For example, the principle of "fourth instance" has not prevented the Court from making an independent assessment, different from that of the national supreme court, of the meaning of certain terms or words in the national language.[391] Even less has the Court felt constrained from diving into the details of the case, as illustrated by *Johansson v. Finland* and by *Walston v. Norway* (3 June 2003). One can get the impression that Strasbourg judges behave, and reason, as if they were justices of national supreme courts, not judges of an international court whose task is to see that the goals and values enshrined in the ECHR's rights are duly taken into account in national decision-making processes. If the acclaimed judicial dialogue between the Court and national supreme courts is to be taken seriously, it requires judicial restraint from Strasbourg in particular where the national supreme court has thoroughly considered the application of the conventional rules.[392]

Conclusion

To sum up, the present practices of the Court are unsustainable in the long run, with respect to national and democratic sovereignty as well as legal certainty, let alone the Court's own function as a last resort against violations of fundamental human rights. In order to rectify the situation, the Court needs both to reconsider its traditional canons of interpretation and to take a more detached view of applications alleging violations that do not go to the core of the rights contained in the ECHR.

391. In *Orr v. Norway* (15 May 2008) the majority seemed to accept that the concept of "violence" (*vold*) was not exclusively criminal in nature, but it nevertheless considered that the Court of Appeal's use of the concept when deciding the compensation claim did confer criminal law features on its reasoning, overstepping the bounds of the civil forum (para. 51).

392. Maybe judicial dialogue from the Court's point of view is primarily aimed at other international courts and not so much at the supreme courts of the Convention states. In *Zolothukin v. Russian Federation* (10 February 2009, GC) concerning the prohibition against double jeopardy (ECHR Protocol No. 7 Article 4), reference is made to various international conventions and judgments by international courts as well as the US Supreme Court, but to no judgments from supreme courts in the Convention states. (The Supreme Court of Norway has had to consider this article in some 50 judgments, some of which are plenary judgments.) See more generally on the use by the Court of other international instruments and decisions *Demira and Baykara v. Turkey* (12 November 2008, GC). The judicial dialogue organised by the Court includes since 2005 the annual seminars "Dialogue between judges"; the seminar reports are accessible on the Court's website, www.echr.coe.int/echr/, accessed 1 July 2011.

Human rights and popular sovereignty in the perspective of the Venice Commission

by Jan Helgesen

These papers, presented at the UniDem seminar entitled "Human rights and popular sovereignty" link the two main concepts by the conjunction "and". That may indicate that the organisers perceive them as complementary concepts.

What if the title instead were "Human rights or popular sovereignty"? Would such a title indicate that the two concepts are not complementary, but rather, conflicting concepts?

This little semantic game reveals the dilemma of this UniDem seminar. Actually, the two words – and/or – set the paradigm for our discussions: are human rights supporting the effective implementation of popular sovereignty, or are human rights a threat to popular sovereignty?

We have been discussing these basic problems at the Cluster of Excellence at the Goethe University in Frankfurt. This discussion does not belong exclusively to the first decade of the 21st century, but takes us back in history. It seems that every generation of lawyers, philosophers, and political scientists needs to conduct its own debate. Of course, the circumstances will differ each time, but the basic problems are the same.

We have heard opposing views during the seminar, even diametrical views. Perhaps they only appear to be diametrical.

Very few would really go to the extreme of declaring their complete loyalty to one value and deny the legitimacy of the other. We would all defend democracy, as we would all defend human rights.

In order to advance our analysis, the concept of "human rights" must be further elaborated.

First, "human rights" are contained in legal norms. The concept "human rights" could, in our analysis, be replaced by the concept "law".

Second, we must distinguish between human rights norms as *lex superior* for the legislator and as *lex superior* for the tribunals. The crucial difference lies in which body is to control the implementation of human rights norms. The first situation, where the popular representatives control themselves, is less threatening to "popular sovereignty" than the latter, where independent judges – accountable to no one, as it is normally phrased – control the popular representatives.

Third, since the Second World War, human rights are protected at two levels, national and international. The first situation, where the limits are at the national level, is less threatening to "popular sovereignty" than the latter, where the limits are at the international level.

Consequently, the two conjunctions "and/or" do not help us to analyse the dilemma of this UniDem seminar. They create a picture which is too simplistic. There is no absolute harmony between "human rights" and "popular sovereignty"; that is why the word "and" is misleading. On the other hand, there is no complete disharmony, no dichotomy, between "human rights" and "popular sovereignty"; that is why the word "or" is misleading. These two words leave us with a black and white picture. What we should look for, however, is a picture composed of the many grey tones between white and black.

May I suggest replacing "and/or" by a third word: "through"? The link between the concepts democracy and law is not "and/or". The operative link is "through". The goal, the object, the aim is to struggle to refine and develop a sustainable democracy. The tool, the instrument we shall use to fulfil this noble goal is law. Law – in this context human rights – is our weapon in struggling for the perfect democracy. In short: our challenge is to build democracy through law.

Above, I referred to this as playing with words. That was somewhat superficial. Actually, I find this analysis of the operative link between two basic values in our society to be helpful. Such an exercise will allow us to ask the correct questions, which again will increase the likelihood of finding the correct answers.

In my view, the "correct answer" is the balance between democracy and the rule of law. It is of paramount importance to create conditions which will nourish and stimulate a living, sustainable democracy. This can be done, however, in ways which also protect the "rule of law". To find this balance, one must discuss the different questions raised above. What techniques should one develop in order to reach this goal? In a given state, should the human rights norms be *lex superior* for parliament? Should these norms also be *lex superior* for the courts? Should the courts have the competence to exercise constitutional review? What should be the criteria for such control? How intense should this control be, should the courts be very active in this role, or should they be more cautious and intervene in politics only if an act of parliament fundamentally breaches the constitution? The answer to these questions will differ from one society to another.

Then one must discuss the relationship between the norms at the national and international level. The international bodies which are meant to supervise and control the implementation of human rights conventions in domestic law – courts or committees – must see themselves as tools or instruments to support and strengthen "popular sovereignty" in the member countries. The international bodies must see themselves as servants, not as masters, of national democracies. From different quarters, we hear the alarm being raised by those who claim that "popular sovereignty" at the national level is now threatened by these

international legal bodies. These voices sound more clearly now than a decade ago. This development must be taken most seriously.

In my view, our challenge is to fill the word "through" with the appropriate content. That is to design adequate "legal" instruments or techniques which will foster, not hinder "popular sovereignty".

May I recall the fact that the official title of the Venice Commission is the "European Commission for Democracy through Law". The Venice Commission has elaborated the concept "through" for two decades. It will continue to do so in the decades to come.

The European Union

Human rights and transfers of sovereignty in the European Union: consequences for the definition and development of human rights

by Catherine Schneider[393]

Introduction

What human rights regimes are to be discussed?

When we talk about human rights in the European Union we must draw a distinction between the internal aspect of these human rights, that is to say, the principles and rules which are binding on the institutions and the member states in the field of Community law, and the external aspect of human rights, namely the action of the EU in that sphere in its relations with non-member states. These two aspects of human rights raise quite separate issues in their relationship with sovereignty and are subject to very different legal regimes. Emphasis will also be given, in that regard, to the paradox linked to the fact that, while human rights are expressly stated to be an objective of the EU's foreign and security policy, or of its development co-operation and technical and financial assistance policy, the same cannot be said of the action developed by the Community and the Union vis-à-vis their member states. The absence of any express reference to the idea that human rights may constitute an objective or an object of closer union between member states makes it impossible to conclude that the EU has a general competence in matters relating to human rights.

Beyond the guarantee of human rights afforded by Community law, there is clearly the guarantee of human rights ensured by the member states' human rights protection systems. This guarantee, which concerns what is called the "autonomous action" of the member states, subsists insofar as the guarantee afforded by Community law concerns only the action of the states in relation to the implementation of Community law.

The expression "transfer of sovereignty" should be abandoned

Rather than "transfer of sovereignty", it seems more desirable to refer to the concept of "transfer of competence", and even that of integration.

Transfer of sovereignty cannot be satisfactory, since sovereignty is indivisible (even if it is possible to envisage limitations of sovereignty or transfers of

393. Professor, Centre of Studies on International Security and European Co-operations, Faculty of Law, Pierre Mendès-France University, Faculty of Law, St Martin d'Hères, France.

sovereign rights) and because, of course, the "political object" which the EU constitutes, even if it is not identified, cannot be sovereign, either at an internal or international level, within the sense normally understood by lawyers, whether specialists in internal or international law. The former will prefer, rather, the argument that the EU is not competent to determine its own competence, while the latter will argue that there is no monopoly of constraint over territories and populations in international relations.

Although it is frequently used in Community law, the concept of transfer of competence is scarcely more satisfactory, a point which has been perfectly demonstrated by certain authors.[394] The transfer of competence, insofar as it is characterised by a strict identity of the competence transferred and at the same time by the relinquishing of competence by the state, cannot in itself sum up the details of the division of competences between the EU and its member states. The division of competences, as we know, conforms to a polymorphous and complex "distributive system of competence" where the competences attributed to the organisation are not necessarily reflected in the relinquishing of competence by the member states. The latter forms part of a particular "background", that of the ever-closer union of the member states which calls, in particular,[395] for the method of integration.

The substitution of the idea of integration for that of transfer of sovereignty

If we refer instead to the concept of integration, understood in the broad sense, that is to say, dissociated from exclusive recourse to the integrated method, and understood rather from the aspect of ever-closer union, by virtue of a highly refined system of division of competences, it is still necessary to define its outlines.

What closer union are we talking about: is it economic or political? In fact, the problem of the definition and the development of fundamental rights seems to be remarkably different, depending on whether it is placed under the auspices of the Community or under those of the Union.

What division of powers are we referring to? Is it the so-called vertical separation between the organisation and the member states? Is it the so-called horizontal separation between the institutions, in which several legitimacies co-exist: the legitimacy of the governments of the member states within the Council of the European Union, the legitimacy of the peoples within the European Parliament, or indeed the legitimacy of the European Commission, which is much more difficult to characterise? So many players exist, who may well not have the same

394. See Michel V. (2003), *Recherches sur les compétences de la Communauté,* l'Harmattan, Paris; Constantinesco V. (1974), *Compétences et pouvoirs dans les Communautés européennes, contribution à la nature juridique des Communautés,* LJDJ, Paris, p. 249.

395. It is important here to bear in mind that this method is certainly not exclusive, for a number of reasons: first, because it is not absolute in the Treaty of Rome, which claims to have its roots in the method, and, second, because it is deliberately omitted from the Treaty of Maastricht.

vision with respect to the definition and development of human rights from both the internal and the external aspect.

Thus, the European Parliament, which must not be overlooked in a discussion of the sovereignty of the peoples, sometimes struggles to find its place in the definition and the development, in the Community legal order, of the legal corpus of human rights. At the internal level, it is not a real player in the definition of primary law, except in what is known to be the marginal situation in which the convention method is employed in the revision of the founding treaties.[396] In the framework of the legal corpus proper to secondary law its "maximum efficiency" should be confined to the hypotheses of co-decision. Nonetheless, as specialised authors have observed, accession to the status of co-legislature is undoubtedly less comfortable than that of a "mobiliser" of public opinion, and leading organiser of resolutions which, while certainly imaginative, are too far removed from realpolitik.

Ultimately, and no matter what is sometimes said, it is undoubtedly in the external aspect of human rights that the European Parliament has been able to develop the most active "power of influence", by setting itself up as the standard-bearer of the community of values. It plays that role both "against" the Council of the European Union, in order to denounce its overcautiousness, and against non-member states, which it may, for example, deprive of the benefit of a co-operation agreement (and the financial manna which it represents!) by refusing its consent.

At the same time, integration may be defined by reference to its object, and clearly the definition and development of human rights within the EU refer to what is called "normative" integration, which is known to be part of the very specific context of monism with primacy. Thus the co-existence between the European corpus of human rights specific to the construction of the Community and the body of national systems of human rights bathes in a very particular ambience of articulation which goes beyond the usual question, which is that of public international law, on the convergences or differences between international instruments and national regimes on human rights.

Furthermore, an examination of the impact of the Community's construction confined to the sole basis of the definition and development of human rights would legitimately lead to the question of the implementation of those rights being ignored.

396. It will be noted that the convention method, used in 1999 for the preparation of the Charter of Fundamental Rights and in 2003-4 in the preparation of the Constitutional Treaty, seems to be perpetuated by Article 48(3) TEU, in the Lisbon version. That article envisages the convention method as a sort of ordinary procedure (which may none the less be disapplied). Recourse to the convention method favours a greater association of the representatives of the European peoples in the revision of the treaties and, consequently, in the definition of the legal corpus of fundamental rights specific to primary law.

More particularly, the question of their application by the Community judicature would be disregarded. Two main reasons, of unequal explanatory value, may lead there.

The first is that, according to a prudent and orthodox vision of the objection to "government by the judges", the Community judicature should be a very indirect actor in the definition of human rights, since it should endeavour merely to declare the existence of such rights by reference to the general principles of law, to explain the content of those rights in the exercise of its role of interpreting the principle or the rule relied on, or, finally, to resolve any conflicts that may arise between those rights.[397]

The second reason is that the seminar programme has made provision for returning to that judicial dimension of the definition and development of human rights on the occasion of their implementation by the European Court of Human Rights. There is no doubt that on that basis Community law offers a vast scope for discussion which greatly exceeds the modest ambition of this contribution, which focuses not on the implementation of those rights but rather on their definition. I shall note, as a matter of interest, a number of recent decisions which have aroused the interest of authors dealing with the new issue known as "conflicts" between human rights and the economic freedoms guaranteed by the Treaty of Rome. They singularly renew the traditional "positive interaction" approach, according to which human rights play a part in the achievement of the fundamental freedoms of the internal market.[398] It is the well-known situation in which

397. The Community case law contains a number of cases in which the Community courts have resolved conflicts, either between a fundamental freedom (the free movement of goods) and a fundamental right (the right to demonstrate) (judgment of 12 June 2003 in Case C-112/00 *Schmidberger*), or between a fundamental freedom (freedom to provide services) and a fundamental right (human dignity) guaranteed by a national constitution (judgment of 14 October 2004 in Case C-636/02 *OMEGA*), or between two fundamental rights guaranteed by Community law (intellectual property right and the right to private life and to the protection of personal data) (judgment of 29 January 2008 in Case C-275/06 *Productores de musica de España*). For a detailed treatment of the question of conflicts of norms in relation to fundamental rights and the relevant Community case law, see Grewe C. (1999), "Les conflits de normes entre droit communautaire et droits nationaux en matière de droits fondamentaux", *L'Union européenne et les droits fondamentaux*, Bruylant, Brussels; Jacque J. P. (2009), "Vers une nouvelle étape dans la protection des droits fondamentaux dans l'Union européenne", *La France, L'Europe et le monde, Mélanges en l'honneur de J. Charpentier*, Pedone, Paris, pp. 355-61; Kaddous C. (2008), "Droits de l'homme et libertés de circulation, complémentarité ou contradiction?" *Mélanges en hommage à Georges Vandersanden, Promenades au sein du droit européen*, Bruylant, Brussels, pp. 563-91.

398. For the positive interaction of human rights and free movement of goods, see judgment of 11 July 2005 in *Cinéthèque*, where the freedom of expression guaranteed by Article 10 of the ECHR is invoked in support of the free movement of video cassettes; for the positive interaction between human rights and the freedom to provide services, see judgment of 18 June 1991 in *ERT*, where a member state's reliance on its right to derogate from freedom to provide services is appraised against the yardstick of freedom of expression guaranteed by Article 10 ECHR; for the positive interaction between human rights and free movement of persons, see the judgment of 11 July 2002 in Case C-60/00 *Carpenter*, where the right to respect for family life guaranteed by Article 8 ECHR is invoked by a Philippine national threatened with deportation in support of the freedom to provide services for her British husband (who could be deprived of that freedom as a result of his wife's deportation); for the positive interaction between human rights and the free movement of capital, see judgment of

human rights are invoked in support of the exercise of economic freedoms. The situations of negative and conflicting interaction with which the Community courts have had to deal more recently are quite different. A first category of these is the situation in which the member state relies on human rights (for instance freedom of expression or human dignity) in order to justify the obstacles which it places in the way of freedom of movement. In other cases it is not the states, but private individuals, who rely on human rights as against other individuals, in order to oppose their exercise of their economic freedoms as guaranteed by the Community Treaty.[399]

Faced with the many, indeed too many, opportunities to examine the impact of Community construction on the definition and development of human rights, I hope that I shall be forgiven for restricting my discussion to human rights in the Community and the Union system and for referring only very indirectly to the problem (covered by other contributions) of the national systems of the member states. By refocusing my analysis on the particular scope of the definition and development of human rights by and for the system of the Union, I propose to discuss three key ideas, which argue that the definition and development of human rights in the Community system have:

– suffered, in the history of the construction of the Community, from a certain restrictive and mercenary vision specific to the "Europe of merchants";
– remain entangled in the obsessions with the division of competences;
– been sometimes stimulated by integration (including economic integration), which may speed up the recognition of human rights.

1. The definition and development of fundamental rights, set back by the restrictive vision of integration

On many occasions authors have endeavoured to emphasise the consequences which the original and restrictive vision of the construction of the Community had for the internal system of protection of human rights. That system has reached maturity only relatively recently, an event which owes much "to the turning point of the Treaty of Amsterdam."

1.1. The lack of vision of the Europe of merchants

Beyond the political ulterior motives, which have prompted the not irrelevant assertion that the construction of the Community was primarily a political

25 January 2007 in Case C-370/05 *Festersen*, where the right to free choice of residence guaranteed by Protocol No. 4 to the ECHR (Article 2) is invoked in support of the free movement of capital. For a detailed analysis of those cases, see Kaddous C. (2008), op. cit.

399. In both Case C-438/05 *Viking Line* 11 December 2007 and Case C-341/05 *Laval* 18 December 2007, the Court of Justice, in adjudicating, after balancing human rights (the right to take collective action) against economic freedom (freedom of establishment under Article 43 TEC in *Viking Line*; freedom of establishment under Article 49 TEC in *Laval*), in favour of freedom of movement, revived the controversy on "the subordination of human rights" to the requirements of economic integration. For a detailed analysis of those cases, see Kaddous C. (2008), op. cit.

project, the initial years of the construction of the Community are marked by an economic union conceived as an "investment fund" which is difficult to envisage as a common fund of values.[400] Thus, it is hard to imagine the "Europe of merchants" as a destroyer of freedoms or again as the herald of fundamental rights. The prevailing general context for fundamental rights is therefore that of a kind of "free union"[401] and of mutual confidence between the organisation and the member states which see no need to enter into formal commitments in the sphere of fundamental rights.

The consequences of that relative indifference to human rights on the part of the organisation and its member states are well known. They affect the completeness of the protected fundamental rights, the status conferred on them by the Treaties and also the function assigned to them. It also gives rise to a sometimes "biased culture" of human rights which has an impact on their definition and their development.

1.1.1. The incompleteness of fundamental rights

The absence in the Treaties establishing the European Communities of formal commitments for the protection of fundamental rights cannot be assimilated to a real legal void. There is in fact a legal corpus of fundamental rights, but one that is restricted, as it relates to those economic freedoms which were expected to fashion the common market. The main principles of freedom thus enshrined in positive law concern free competition (Article 85 TEC), free movement of goods (Articles 30 to 37 TEC), freedom of movement for workers (Articles 48 to 51 TEC), freedom of establishment of independent professions (Articles 52 to 58 TEC), free movement of services (Articles 59 to 66 TEC), and free movement of capital (Articles 67 to 73 TEC). There is no need to underline here the tenuous link which those freedoms have with human rights, with the doubtless exception of freedom of movement for workers. The Treaties are also clearly concerned with the prohibition of discrimination, in its many and varied forms, although they are limited to discrimination on the basis of nationality.[402] Finally, since the original version of the Treaty there has been a principle

400. The metaphor is taken from Braibant G. (2000), "Les enjeux pour l'Union", *Vers une charte des droits fondamentaux pour l'Union, Regards sur l'actualité*, special no. 264, La documentation française, Paris.
401. Mougin C. F. (1998), "Vers une Union entre les peuples européens libre et démocratique", *Liber Amicorum en l'honneur de J. Georgel*, Apogée, Rennes.
402. The Treaty of Rome does indeed establish a principle of non-discrimination, but one which is limited in scope: Article 7 (now Article 12) prohibits, within the scope of application of the Treaty, any discrimination on grounds of nationality. In addition to that general principle, the Treaty contained a number of special provisions, of more limited scope, prohibiting discrimination based on nationality: for example, Article 48(2) in relation to freedom of movement for workers or Article 37(1) in relation to the establishment of national monopolies. Only when the Treaty of Amsterdam was adopted

of equality between men and women, which was, however, initially limited to remuneration.[403]

1.1.2. The heterogeneous nature of fundamental rights

In addition to the very incomplete definition *ratione materiae* of fundamental rights proposed by the Treaty of Rome in its initial version, it is also the diversity of status which it confers on rights and freedoms that characterises its first restrictive approach. Certain freedoms are thus simply mentioned without being seen as elements of positive law. That is the case, for example, of freedom of association, which was already mentioned in the European Coal and Steel Community (ECSC) Treaty, or again certain rights and freedoms of a social nature, in respect of which the Treaties merely call for co-operation between states for their development[404] under the auspices of the European Commission. Conversely to that restrictive status calling for mere promotion, the rights and freedoms which contribute to the structure of the internal market, such as freedom of movement and free competition, are given the status of positive law and are sources of obligations which are actually binding on the states and also on their economic players. The definition of these obligations underwent constant development in the history of the construction of the Community, as a consequence of the revision of both primary and secondary law, and as a result of the case law.

1.1.3. A biased culture of human rights

Authors are virtually unanimous in underlining that "biased culture" of fundamental rights and freedoms which prevailed in the early stages of the construction of the Community and which sometimes continues even today, notably in the external aspect of fundamental rights.[405] This neologism of "biased culture of human rights" is employed in an attempt to highlight what is frequently an economist's reading of human rights.

This particular vision is essentially the consequence of the fact that the development of fundamental rights at an internal level is primarily dependent on the

was the prohibition of discrimination extended to discrimination based on other criteria (race, ethnic origin, religion or belief, age, sex or sexual orientation) (Article 13 of the EC Treaty).

403. It was necessary to await subsequent developments of the Treaty of Rome in order to see the emergence of a principle of equal treatment and equality of opportunities for men and women, whereas the 1957 version of the Treaty guaranteed only equal remuneration. This example reflects the relationship between the definition of fundamental rights and their development, which may be analysed either as the creation of new rights or as the extension of the guarantee provided by rights that were already recognised.

404. For a detailed analysis of the differences in legal status conferred on human rights by the original version of the Treaties, reference can usefully be made to Akandji Kombe J. F. (1999), "Le développement des droits fondamentaux dans les traités", Leclerc L. et al. (eds), *L'Union européenne et les droits fondamentaux*, Bruylant, Brussels, p. 35.

405. Flauss J.-F. (1999), "Droits de l'homme et relations extérieures de l'Union européenne, Leclerc L. et al. (eds), *L'Union européenne et les droits fondamentaux*, Bruylant, Brussels, pp.137-172; Soriano M. C. (ed.) (2006), *Les droits de l'homme dans les politiques de l'UE* (in particular Section III on external relations, with contributions by I. Govaere and A. Van Bossuyt, F. Hoffmeister), Larcier, Brussels.

particular objectives of integration. First among those objectives are economic integration and the requirements of the construction of the single economic area, the common market and the internal market. Thus the Community judicature has no hesitation in making the protection of fundamental rights subject to the requirements of the general interest specific to the construction of the Community. In second place are the objectives of normative integration and of the assertion and the consolidation of the primacy of the Community legal order over national laws. There is no need to dwell excessively on the formidable influence developed by certain constitutional courts in order to "put pressure" on the Community system and to force it, first of all by means of judicial decisions and then by the revision of the Treaties, to develop a vision in which human rights enjoy greater autonomy, with the clear objective of neutralising any assaults on the primacy of Community law. In each case one finds the well-known analysis of a form of subordination of fundamental rights to the specificity of integration and closer union between member states.

The absence of genuine autonomy of human rights can also be seen in the external relations, since it was when the Community entered into economic and co-operation arrangements that the instruments of the external aspect of the defence and promotion of human rights were first introduced. That is the case of the political conditionality[406] which accompanies the co-operation agreements and the principal technical and financial programmes like the Phare Programme, Technical Aid to the Commonwealth of Independent States, Community Assistance for Reconstruction, Development and Stabilization, and the Euro-Mediterranean Partnership. By that conditionality, the Community makes the establishment or the pursuit of economic co-operation conditional upon respect by its partners of human rights which in many cases can be seen to have been defined through an economist's vision. Thus one may recall the example of the women's rights which the EU attempts to promote.[407] As this is most frequently seen (in accordance with the initial internal Community logic) from the economic aspect of gender equality, the EU finds it difficult to attain a logic of fundamental right linked with the dignity of the person. That is a matter for regret when it is known that, in certain states partners of the EU, women are the daily victims not only of discrimination but also of serious violence. This violence, which is harmful both to

406. Schneider C. and Tucny E. (2002), "Réflexions sur la conditionnalité politique appliquée à l'élargissement de l'Union européenne aux pays d'Europe centrale et orientale", *Revue d'études comparatives Est ouest* 33, No. 3, pp. 11-44; Schneider C. (2005), "Réflexions sur le rôle de la conditionnalité politique dans l'affirmation de l'UE comme acteur global", Mougin C. F. and Schneider C. (eds), *L'Union européenne acteur global dans le nouvel ordre mondial,* Académie européenne d'été (action J. Monnet Recherche de l'UE) de Grenoble et de Rennes, interactive digital publication "Droit in situ", Paris, 2006; Schneider C. (2008), "Au cœur de la coopération internationale de l'union européenne: quelle stratégie à venir pour la conditionnalité politique?" *Mélanges en l'honneur du professeur Jean Touscoz*, France Europe éditions, Nice, pp. 750-78.

407. Rollinde M. (2005), "Le partenariat euro-méditerranéen et les droits fondamentaux", Berramdane A. (ed.), "Le partenariat euro-méditerranéen à l'heure de l'élargissement de l'Union européenne", Karthala, Paris.

their physical integrity and to their dignity, cannot be stemmed by the restrictive approach relating to gender equality.

1.2. Access to maturity owing to the turning point of the Treaty of Amsterdam

The Maastricht Treaty did admittedly make its own indirect contribution to the development of the legal corpus of fundamental rights, notably through the introduction of European citizenship, which thus permitted a significant extension of the freedom of movement of persons by severing the link with its initial reference to economic integration and the requirements of the internal market. However, European citizenship, which differed on many points from the human rights-based approach, was not sufficient to exhaust it. It was therefore indeed the Treaty of Amsterdam that constituted the "veritable accelerator" of progress in the definition and development of human rights in the Community system, an acceleration which prefigured the subsequent consecration achieved by the Charter of Fundamental Rights of the European Union (see Section 3, below). In addition to strengthening the protection of fundamental rights, the Treaty of Amsterdam promoted respect for those rights to the status of "founding principles of the Community system". It thus achieved an inversion of the functionality of human rights which had hitherto characterised Community integration.

1.2.1. The consolidation of the legal corpus of human rights

An important example of the strengthening of the legal corpus of human rights is the entry into primary law of social rights as a general category of fundamental rights. Social rights are explicitly mentioned in the amended Preamble[408] to the Treaty on European Union, by virtue of a reference which the Preamble makes to the 1961 Council of Europe European Social Charter and the 1985 Community Charter of Fundamental Social Rights. In addition, certain social rights which were already protected, such as equality between men and women, received an enhanced definition, as may be seen from, in addition to the example already given of its extension to areas other than remuneration, the introduction of positive discrimination in the name of the promotion of that equality.[409] Finally, the most significant contribution concerns the prohibition of discrimination proposed by the new Article 13 of the Treaty on the European

408. This reference is also explicitly made in the new Article 136 of the Treaty on the European Community (former Article 117) on social policy, according to which the Community and its member states are to set themselves as objectives the promotion of employment, improved living and working conditions, proper social protection, and also dialogue between management and labour and the development of human resources. Article 137 TEC provides that the Council may adopt, by means of directives, "minimum requirements". However, the assertion that national diversities are to be taken into account is omnipresent in the mechanism of the Community social policy, which presents itself primarily as a mechanism to support the action of the member states which is incompatible with the removal of their competence.

409. See Article 141(4) TEC, which makes it lawful for a member state to maintain or adopt positive discrimination designed to make it easier for an underrepresented sex to pursue a vocational activity.

Community, which supplements Article 12 (formerly Article 6), which authorised the Community to legislate to prohibit discrimination on grounds of nationality. Article 13 extends the Council of the European Union's legislative power to the prohibition of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Clearly, Article 13 belongs to those special or particular competences (see Section II above) according to which the Community does not have *ab initio* a "general and direct legislative power" to regulate that fundamental right. It is only within the scope of its competences that the Community can adopt such measures.[410] The development introduced by the Treaty of Amsterdam with respect to the legal corpus is therefore as much concerned with the introduction of new reference rights as with the extension of rights which were already protected. However, it is the inversion of their functionality that has had the most marked impact on specialist authors.

1.2.3. The inversion of the functions assigned to the protection of human rights

The Treaty of Amsterdam gives new momentum to the cause of protection of human rights specific to the construction of the Community through the assertion of the "constitutional anchorage" of respect for those rights.[411] Henceforth, by virtue of the new Article 6 TEU (a revised version of the former Article 7 of the Maastricht Treaty), respect for fundamental rights is presented not only as the basis of the system of government of the member states but indeed as a "founding principle" of the EU, implying that the EU and its member states are thereby under an obligation to comply with that principle. Thus new mechanisms have been devised for *a priori* and *a posteriori* control of respect for that obligation. The revised Article 49 of the Treaty on European Union introduces into positive primary law a political conditionality of accession, borrowed from the law of the Council of Europe, and which in Community law had only the status of "soft law".[412] An *a posteriori* control of respect for human rights is provided for in Article 7 TEU, which establishes a new mechanism designed to punish a member state found to have committed a serious and persistent breach of fundamental rights.[413]

If the brief look at the broad stages in the development of fundamental rights has enabled us to highlight the procrastinations essentially linked with the restricting

410. When we say that the Community, acting through the Council, may take measures necessary to combat discrimination, we are reminded that the institutions cannot be criticised for having failed to act.

411. Constantinesco V. (1999), "Le renforcement des droits fondamentaux dans le traité d'Amsterdam", *Le traité d'Amsterdam: réalités et perspectives*, Pedone, Paris.

412. See Copenhagen Declaration of 1973.

413. This mechanism of imposing a sanction for a serious and persistent breach of human rights by a member state was later supplemented by the Treaty of Nice, by a mechanism of prevention and alert in the event of a risk of a breach (see Article 7(2) TEU). The current positive law of Article 7 is thus subdivided into a sanction mechanism limited to the exceptional circumstance of a serious and persistent breach and a preventive and "monitoring" mechanism in the event of a simple risk, the determination of which is no longer "bound" by the requirement of unanimity, as in the context of a finding of a serious and persistent breach.

vision of the "Europe of merchants", it seems to me that this development has particularly suffered from the obsession with the division of competences that characterises Community integration.

2. The definition and development of human rights taken hostage by the "obsessions" with the division of competences

The objection might admittedly be raised that the question of the division of competences cannot be the monopoly of that Community integration which I have conceived in the broad sense, that is to say, dissociated from the exclusive reference to the Community method alone. That question, which is very much present in the constitutional law of federal states, may even arise sometimes in the law of classic international organisations unconnected with integrated co-operation. Nonetheless, the specificity of that question in the construction of the Community cannot be denied. The *sui generis* model of the unidentified political object leads to very diverse forms of the removal of competence from the member states without calling in question the principle of their sovereignty. In reality, it is only in what is, moreover, the quite rare situation in which the Community has exclusive competence[414] (which does not arise in the field of fundamental rights) that one is closest to the existence of a genuine removal of competence from the state.[415] In any event, whatever the precise nature of the competence attributed to the Community, the obsession with the division of competences is omnipresent and the question of the definition and the development of fundamental rights cannot escape that obsession, illustrations of which are to be found in the internal aspect and the external aspect of those rights (2.1.). In the context of the internal aspect, it has become particularly widespread because certain authors have sought to assert a general competence on the part of the system in relation to fundamental rights, an assertion which positive law has denied (2.2.).

2.1. The omnipresence of obsession with the division of competences

Admittedly, this obsession with the division of competences is very much in evidence in the internal aspect of the protection of fundamental rights. However, it is impossible to overlook the fact that it has in many regards marked the external aspect, that is to say, the "policy of the defence and promotion of human rights" of the EU in its relations with non-member states.

414. Examples of exclusive competence are rare in Community law: they are to be found, for example, in the commercial policy or the fisheries policy.

415. Being the closest does not, however, mean that every exclusive competence necessarily entails the complete removal of competence from the state. That may be explained by the fact that while the Community has not exercised that exclusive competence, action by the member states remains possible, which is a perfectly understandable solution if all risk of a legal void is to be avoided.

2.1.1. The obsession with the division of competences in the internal aspect of human rights

Faced with certain authors who, in the name of the community of values, were in favour of accepting that the Community had a general competence for fundamental rights, the states increasingly denied that this was so and took greater precautions to contain any broad interpretation of the special competences recognised to the Community. The member states are thus not prepared to sacrifice on the altar of integration and the community of values their own systems of protection of fundamental rights, an integral part of their constitutional pact with respect to which they are scarcely inclined to accept interference by the Community and EU system.

Many more examples could be given of this reluctance on the part of member states with respect to the possible instrumentalisation of the cause of the Community protection of fundamental rights to the detriment of their own competences. They all reflect that difficulty in combining the development of fundamental rights by and for the Community legal order with respect for the sovereignty of the member states.

A first example, which might nowadays be considered relatively obsolete, is provided by the Regulation of 29 April 1999[416] relating to the development and consolidation of democracy and the rule of law and respect for human rights, in which the Council of the European Union (and therefore the member states) reduced the Commission's proposals to just Community action for the benefit of non-member states, and thus solely to the external aspect, to the exclusion of the internal aspect, of human rights. Thus the states opposed any possibility for the EU to take action to promote fundamental rights within the EU. It was ultimately necessary to wait until, owing in particular to instruments such as the Network of Independent Experts on Fundamental Rights or the European Union Agency for Fundamental Rights, that new vision, so claimed by certain authors, of the transition from a negative concept (the monitoring of breaches) to a more positive concept of human rights (an objective to be achieved) was asserted.[417]

A second illustration of the states' restrictive strategy may be found in the works which preceded the adoption of the Charter of Fundamental Rights of the European Union. Thus, the preamble to the Charter emphasises that "this Charter reaffirms [fundamental rights], with due regard for the powers and tasks of the Union and the principle of subsidiarity". Likewise, Article 51 on the scope of the Charter was amended on the occasion of the Intergovernmental Conference which led to the final adoption of the Charter. Article 51(1) provides that the Charter is to apply to the member states only when they are implementing EU

416. 29 April 1999, OJ 1999 L 120, pp. 1 and 8.
417. Alston P. and Weiler J.H.H. (2001), "Vers une politique des droits de l'homme authentique et cohérente pour l'UE", in Alston P. (ed.), *L'Union européenne et les droits fondamentaux*, Bruylant, Brussels, pp.1-68.

law. The member states are thus to respect the rights and observe the principles of the Charter in accordance with their respective powers and with regard for the limits of the EU. Paragraph 2 of that article states that the Charter "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties". A trace of this virtually obsessive concern, with rigorously identical formulations, can also be found in declaration No. 1 relating to the Charter, adopted within the context of the Intergovernmental Conference. Certain authors have stated that these redundancies, which were introduced in order to respond to the "determination of certain member states", formed part of a "hammering",[418] so much did the relationship of Community protection of fundamental rights to the distributive system of competence already benefit owing, in particular, to the contribution of the case law, from those well-known reserves of respect for national competences.[419] At the most, it should be emphasised that these "hammerings" form part of those legal techniques sometimes described as the "petrifaction of competences". They are widely used by states to consolidate the principle of speciality in the allocation of competences to the EU and to limit broad interpretations of the allocated competences.

A final example may again be found in the discussions leading to the definition of the status of the European Union Agency for Fundamental Rights, the establishment of which was determined by Council Regulation (EC) No 168/2007 of 15 February 2007.[420] The Agency certainly could not be an authority for the definition of human rights. Nonetheless, its general task of defending and promoting human rights is clear and, there again, has not failed to raise questions which effectively dispel any doubt as to that "Community obsession with the division of competences". Controversy quickly arose as to whether the Agency should be "merely [a] Community [agency]" or, on the contrary, an agency of the EU. Such a choice was of cardinal importance. In addition to what was already the very important question of whether it would be able to extend its activities to the particular sphere of freedom, security, and justice, the freedom-destroying risks of which were often emphasised, was the even more fundamental question of the consultative competence of the new agency for control of respect by member states of their obligations under Article 7 TEU. In the context of that provision, "it is indeed all the actions of the member States, including their autonomous actions, that is to say, those unconnected with the mere implementation of Union law, that may be evaluated against the yardstick of their compatibility with the requirements of human rights".[421] It therefore came as no

418. See Priollaud X. and Siritzky D. (2008), *Le traité de Lisbonne, texte et commentaire article par article des nouveaux traités européens (TUE-TFUE)*, La documentation française, Paris, pp. 454-5.
419. See Case C-249/96 *Grant*, judgment of 17 February 1998, and Case 5/88 *Waschauff*, judgment of 13 July 1989.
420. OJ 2007 L 53; see also Opinion of the European Economic and Social Committee of 14 February 2006, OJ 2006 C 88; Opinion of the Committee of the Regions of 6 July 2005.
421. See Schneider C. (2009), "L'Agence européenne des droits fondamentaux, promesse ou illusion pour la protection non juridictionnelle des droits fondamentaux?" *Mélanges en l'honneur de Jean*

surprise when, on the occasion of the adoption by the Council of the European Union of the regulation on the status of the agency, the Commission's proposals along those lines disappeared. "The mill of the obsessions of competences" had done its work.

2.1.2. The obsession with the division of competences in the external aspect of human rights

The defence and promotion of human rights are expressly stated to be an explicit objective of the external relations of the Community: the policy on development co-operation (Article 177(2) TEC) and the policy on economic, financial, and technical co-operation (second sub-paragraph of Article 181a(1) TEC) use the same form of words, according to which each of those policies "shall contribute to … the objective of respecting human rights and fundamental freedoms". On the other hand, there is no such reference in the commercial policy, and that is relevant to the delimitation of Community competences between that policy and the others. Finally, with respect, this time, to the Common Foreign and Security Policy (CFSP), the Treaty on European Union includes in Article 11, among the objectives assigned to that policy, the objective of respect for human rights. This shows that one of the main instruments of co-operation in the sphere of foreign policy is that of institutionalised political dialogue among partners. This institutionalisation at all levels, whether at ministerial level or senior official level, often takes the form of special committees which frequently include a committee on human rights.

The fact nonetheless remains that differences as to the precise scope of those competences of the Community or of the EU arose between the organisation and its member states, the latter claiming that the Community lacked competence. Thus certain states have maintained the argument, not accepted by the European Court of Justice (ECJ), that the introduction of a political dialogue in a commercial agreement must have the consequence that, for the conclusion of that agreement, recourse to the legal basis of the commercial policy (where the Community has exclusive competence, a type of competence where the removal of competence from the member state is naturally the most marked) is prohibited.[422]

As for political conditionality, it too has been at the origin of a dispute over the division of competences between a member state and the Community: from a case brought by Portugal in 1996.[423] It could be inferred from the case of 3 December 1996 that the introduction of a conditionality clause in an economic agreement (in this particular case between the EU and India) did not

Charpentier, Pedone, Paris, p. 485.

422. ECJ, Case C-70/94 *Werner*, 17 October 1995: in that case the Court recalled that even the very political purpose of a measure (in this case the introduction of the CFSP instrument of political dialogue into an economic and commercial agreement) cannot in itself affect the exclusive competence of the Community in commercial matters, in light of Article 113.

423. ECJ, Case C-268/94 *Portugal v. Council*, 3 December 1996.

render the agreement a mixed agreement. Securing the characterisation of a mixed agreement is important for a state: the state is in effect a party, on the same basis as the Community, to the agreement, which can become binding only when it is ratified by all member states.

In the same case, the Court held that a conditionality clause does not mean that human rights are established as a specific field of co-operation between the Community and its partner.[424] There is certainly, in that decision in *Portugal v. Council*, a vision identical to that in Opinion 11/94 on the accession of the Community to the ECHR: the obligation placed on the EU to respect human rights, as the objective assigned to certain of its external policies of promoting respect for human rights in the international field is not capable of being assimilated to a general competence of the EU in those fields.

2.2. The absence of general competence of the EU in the matter of fundamental rights

The EU's lack of general competence in the matter of fundamental rights is a fact that is difficult to dispute. Admittedly, the member states are prepared to accept that human rights should be safeguarded by Community law when it is the Community system that acts. Likewise, they accept that Community law on human rights should apply where the member states implement Community legislation. However, the belief that the member states are prepared to accept that the protection of fundamental rights is an object of the EU and thereby confers on the EU an unrestricted right to legislate is a myth sustained by a number of points of confusion.

The first of these, clearly highlighted by Opinion 2/94 on accession by the Community to the ECHR, consists in confusing an obligation to respect human rights with competence in that sphere. As has been pointed out on many occasions, that does not amount to saying that the Community must respect a particular human right when it legislates in its sphere of competence, and that it is competent to regulate it by, for example, harmonising the relevant national laws. It is important to point out here the contribution made by Opinion 2/94, where the Court rejected the Commission's argument that it was permissible to infer from the numerous references to human rights in various Community and EU policies that a horizontal objective existed which allowed, in particular, the use of Article 308 as a legal basis for accession.[425]

424. Thus, such a clause could not serve as the legal basis for a Community decision specifying the criteria of eligibility for co-operation projects: in the Court's view, the sole purpose of a conditionality clause is to provide a legal basis for the right to suspend co-operation in accordance with the law of treaties.

425. While Community law gives a certain place to those horizontal objectives applicable to all policies, it never does so implicitly, but explicitly, as may be seen in, for example, Article 3(2) TEA for equality between men and women.

In the same way, it is doubtless that difficulty in understanding precisely the relationship between fundamental rights and competence and the necessary distinction between competence and the obligation to respect those rights that gave rise to the discussions which were evident on the occasion of the drafting of the Charter of Fundamental Rights of the European Union. Why, asked certain members of the convention, introduce into the Charter the affirmation of rights considered to be alien to the sphere of competence of the EU? That question was discussed with respect to the prohibition of the death penalty. While it seems actually difficult to accept, as positive law now stands, that the EU could "legislate" in that sphere, there is nothing to prevent the idea that, in the context of its competences, it might adopt a measure contrary to the prohibition of such a penalty.[426]

A second source of confusion is the consequence of the clearly horizontal nature of the obligation placed on the EU and its member states to respect human rights when they act. There again, however, such a horizontal obligation cannot be confused either with an express general competence to legislate in that sphere or with a horizontal objective permitting, for example, recourse to Article 308 of the Treaty of Rome, a form of insidious revision of that Treaty.

In conclusion on this complex issue of the relationship between human rights and competence specific to Community law and its system of allocating competence, it will be recalled that the fact that the EU does not have a general competence to act and legislate in the sphere of fundamental rights cannot be assimilated to the exclusion of all competence. These competences of the EU exist for many reasons, including that specific to a form of dynamic integration, including economic integration. In certain respects, economic integration may induce the EU to define and develop fundamental rights for the purpose of attaining its objectives.

3. The definition and development of fundamental rights stimulated by integration and the progress of Community construction

Integration, including economic integration, proves to be a source of the definition and development of fundamental rights when it is noted that the Community develops specific and special competences in that field in order to achieve its aims, particularly the aim of a unified economic area (3.1.). Furthermore, the progress in political integration has led it to reflect and to deal with the freedom-destroying risks linked with the progress of closer political union (3.2.) and,

426. See Jacque J.P. (2004), "Droits fondamentaux et compétences internes de la Communauté européenne", Cohen-Jonathan G. (ed.), *Libertés, justice, tolérance: Mélanges en hommage au Doyen,* Bruylant, Brussels, Vol. II, pp.1007-28. After referring to the existence of a comparable debate for the adoption of the Bill of Rights, the author relies, in the case of the Charter of Human Rights, on the example of the agreement on extradition and mutual assistance concluded between the EU and the United States after the attacks of 11 September 2001, which precludes extradition involving the risk of capital punishment for the individual extradited.

finally, in this brief account of the dynamics of integration the major support consisting in the adoption of the Charter of Fundamental Rights of the European Union must not be overlooked (3.3.).

3.1. The definition and development of fundamental rights stimulated by the requirements of the unified economic area

Certain competences of the EU in relation to human rights do exist. Marked by the seal of the principle of speciality, they have their origin in the needs of economic integration, the attainment of the objectives of which in a certain way stimulates the intervention of the system to define and develop human rights. Some of these competences are direct when their very object is to ensure and develop equality between men and women or to prohibit discrimination. Others are much more indirect and are expressed in the form of regulations designed to safeguard human rights in the exercise of specific economic competences.

3.1.1. The dynamics of the direct protection of fundamental rights

It has already been emphasised that the Treaties of the EU attribute specific direct competences in the field of human rights, as, for example, Article 13 TEC relating to the prohibition of discrimination, or Article 3(2) TEC relating to equality between men and women. There are other examples, such as that provided by Article 286 TEC, introduced by the Treaty of Amsterdam, which deal with protection of personal data.[427] It seemed important at a certain point in the construction of the Community to define the rules applicable to data held by the Community institutions and to ensure that they were consistent with respect for private life. These examples, which form part of a genuine aim of protecting and developing human rights, must be distinguished from those relating to the special indirect competence recognised to the Community.

3.1.2. The dynamics of indirect protection

These hypotheses concern the Community system's right to act, based on a particular type of competence which is not the protection of fundamental rights. Put simply, the Community, by virtue of its obligation to respect human rights, will have to pursue a two-fold objective; it will first of all have to ensure that the measures which it adopts in the context of its competences, in particular on the basis of economic union, contain no provision contrary to human rights. In the second place, it will have to ensure that the measures which it adopts are not capable of harming those same rights. This refers to the situation in which a Community

427. As Jacque J.P. (2004), "Droits fondamentaux et compétences internes de la Communauté européenne", Cohen-Jonathan G. (ed.), *Libertés, justice, tolérance: Mélanges en hommage au Doyen,* Bruylant, Brussels, Vol. II., quite rightly points out, "there was no legal basis for specific obligations for the processing of data held by the institutions, whereas Community law had made it possible to establish a system applicable to the member states on the basis of Article 95 (harmonisation of the laws of the member state) but which can intervene only if differences in legislation constitute an obstacle to the common market".

measure which has been adopted, without being directly incompatible with a particular right or freedom, may harm such a right or freedom when it is implemented. The EU is therefore under an obligation to take, within the framework of its special competence (freedom of movement or free competition), all the provisions necessary to prevent this.[428]

In order to guarantee this Community protection of fundamental rights, the EU may employ the technique of interpretation clauses. That is so, for example, in the case of the regulation adopted on 7 December 1997[429] in order to ensure the free movement of goods or services endangered by protest movements by producers. This regulation, which fixes the obligations of member states to restore movement in the event of obstacles of this type, stipulates in its operative part that it must not be interpreted as affecting the exercise of fundamental rights as protected by member states. It is clearly the rights to take collective action and in particular the right to strike that are at issue. This example is singularly emblematic when it is known that Article 137, on social policy, which provides that the Community is competent to adopt directives laying down minimum requirements, explicitly excludes from its scope the right to strike and the right to impose lock-outs. The Community is indeed not competent to legislate in that field, but it may use its harmonisation competences to prevent those fundamental rights from being breached.

In other situations the Community's action is further reinforced insofar as the Community rule is not confined to mere interpretation clauses but introduces derogating rules the very purpose of which is to permit a freedom to be attained. That will be the case of a Community act adopted in the context of the internal market relating to national monopolies[430] on the slaughter of animals which introduces exceptions to the rules which it lays down for the slaughter of animals in order to take certain religious practices into account. It will not escape the informed observer that legislation whose object is to avoid the distortion of competition and which provides for derogations in order to respect religious freedom cannot be assimilated to legislation the object of which is to define and regulate religious freedom.

Finally, in a third series of hypotheses, it is possible to find Community acts which in themselves propose a regulation of fundamental rights that is adopted in order to prevent differences between the regulations of member states from constituting obstacles to the objective of a single economic area. This leads to the development of specific legislation, which does indeed concern fundamental

428. It is clear that the basis of Community competence to act is indeed that of its special competence, which, where the Community exercises it, must respect fundamental rights, and not a hypothetical and utopian general competence in relation to fundamental rights.
429. See Council Regulation (EC) No 2679/98, sometimes known as the "Strawberry Regulation" by reference to its origin, connected with the movements of French farmers intercepting Spanish lorries in order to destroy their cargo.
430. Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing.

rights but which is built on the legal basis of the harmonisation of laws. Put simply, its aim is not to harmonise fundamental rights (and, consequently, to substitute a Community definition for the national definitions), but to prevent the differences in definition provided by the national laws from constituting an obstacle to economic integration.

Examples include the Council Directive 89/552/EEC of 3 October 1989, known as the cross-border television directive, which is based on freedom of establishment (Article 52 TEC, now Article 43), or the directives on the protection of personal data. The first, the object of which is to abolish barriers to the free broadcasting of television, endeavours, in order to avoid the perverse effects of an exacerbation of the logic of the market which would favour entertainment programmes to the detriment of information programmes and also excessive concentrations or advertising methods that would destroy freedoms, to provide, in the name of freedom of expression and pluralism of ideas, limitations and indeed prohibitions on advertising.

The directives of 24 October 1995[431] and 12 July 2002[432] are even more significant, in so far as their very object is to achieve harmonisation of national laws on the protection of personal data. However, the origin and the purposes of the Community intervention are indeed those of the requirements of the proper functioning of the internal market. The differences between national legislations as regards the definition of the right to protection of personal data may prevent the free movement of that data and distort competition. It is therefore on that basis, and not on the basis of any general competence in relation to fundamental rights, that the Community acts.

3.2. The definition and the development of fundamental rights stimulated by the progress of political union

The construction of the area of freedom and security and the development of the CFSP provide examples of the reinforcement of human rights which they have initiated in order to ensure that in its action the EU does indeed respect fundamental rights.

431. See Council Directive 95/48/EC of 24 October 1995.

432. See Council Directive 2002/58/EC of 12 July 2002, which has the same objective in the field of electronic communications. It is often analysed as leading to a significant strengthening of fundamental rights: in fact it was adopted following a co-decision procedure, which enabled the Parliament to increase pressure to that effect. It is aimed at freedom of telephone communications and protects these communications from interception, while making provision for exceptions for the purpose of the protection of public order and security. However, these restrictions on the right to private life are determined with a level of precision which highlights the lacunae in the first directive of 1995: the restrictions must be necessary, appropriate, and proportionate in a democratic society. The grounds used to justify such a limitation (national security, defence and public security, the prevention, investigation, detection and prosecution of criminal offences) are much more precise. Finally, the restrictive measures can be adopted only for a specific period.

3.2.1. The stimulation of fundamental rights and the area of freedom of security and justice

The functional inversion achieved by the Treaty of Amsterdam of the functions assigned to human rights is at the origin of a genuine change in paradigm of the Justice and Home Affairs (JHA) policy, renamed the Area of Freedom, Security and Justice, to better assert that the action of the EU developed with respect to the requirements of security and justice cannot be detrimental to respect for fundamental rights. As informed observers have pointed out, "the sword and the shield of criminal law" must be joined together.[433] Thus the Third Pillar of the EU contains many of the techniques referred to above, which are the interventions of the EU suitable for implementing its obligation to respect fundamental rights.

It is worth mentioning, in that regard, both the principle of mutual recognition of judicial decisions[434] between member states and its limits. As regards the principle, its revolutionary nature has often been emphasised, since a national court is precluded from opposing the enforcement of a judicial decision delivered in a different member state on the ground that it is not compatible with its own legal order. Does not the recognition of such a principle imply, in the name of integration, a kind of mutual confidence in the fact that, in spite of the diversity of the national legal systems, human rights are also protected? At the same time, this principle of mutual recognition has limits which the EU itself has defined, albeit imperfectly.[435] It is precisely those limits that allow the enforcing court to object to the recognition and enforcement of a judicial decision if that decision gives the impression that fundamental rights may have been breached.

In the same way, the EU, through the Commission, rapidly became aware that such a principle called for a minimum harmonisation of criminal law, which led, for example, to a proposal for a framework decision on the procedural guarantees to be granted to accused persons in criminal proceedings. It is easy to see on the occasion of that particular example that there exists, in the name of integration and its particular intensification (here the Area of Freedom, Security and Justice) a sort of "forced couple" between, on the one hand, the obligation to respect human rights and, on the other, their definition and development at EU level. This "forced couple" must find its voice between the different instruments represented by mutual recognition and the harmonisation of laws.[436]

433. De Kerchove G. (2002), "Respect des droits fondamentaux, contrainte ou condition de réalisation de l'espace européen de liberté de sécurité et de justice", in Soriano M. C. (ed.) (2006), *Les droits de l'homme dans les politiques de l'UE*, pp. 269-278, note 9.
434. See Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant; see Framework Decision 2003/577/JHA of 22 July 2003 on the execution of orders for freezing property; see Framework Decision 2005/214/JHA of 24 February 2005.
435. See De Kerchove G. (2002), op. cit., who points out that the exception to enforcement based on breach of fundamental rights is defined in an outrageous manner by the framework decisions, which make provision for that exception only for the mutual recognition of financial penalties.
436. As informed observers have emphasised, mutual recognition and harmonisation are not alternatives, since they pursue different aims. Harmonisation makes it possible to avoid the differences in legislation of which those who have committed misdemeanours and crimes might seek to take advantage.

Another illustration of the contribution of the Area of Freedom, Security and Justice to the definition and development of human rights may be found in the definition of the principle of availability, according to which the data gathered by the police must be made available without barriers to all the services of the member states. There again the assertion of such a principle is necessarily accompanied by an action of the EU designed to provide itself with harmonised legislation on the protection of personal data with the intention of controlling the exchange of police and judicial data.

While it is difficult, moreover, to take the view that there is now a genuine external policy of the area of freedom, security, and justice, it is undoubtedly possible to point to certain of those premises which may also affect the definition and development of human rights. One example is those clauses designed to afford protection against the imposition of the death penalty which the EU attempts to promote in the agreements on extradition and mutual judicial assistance which it concludes with its partners.[437]

3.2.2. The stimulation of fundamental rights and the CFSP

In addition to the example already given of the action of defence and promotion of fundamental rights through political dialogue, the CFSP relatively recently proposed the novel development of a "human rights"-centred concern in its external political action. This development was to apply in the spheres of so-called "smart sanctions"[438] whereby the EU, either in application of a resolution of the Security Council, or acting autonomously, more particularly in the context of the fight against terrorism, would impose sanctions on individuals or groups of individuals, for example by freezing their financial assets.

The question quickly arose as to respect by the EU for the fundamental rights of the persons targeted by such measures. This gave rise to proceedings before the Court, which were more unexpected[439] because the Treaty on European Union lays down the principle of judicial immunity of acts adopted in the context of the CFSP. It is important to note here that a sphere of action like the CFSP, which had been set up against a general background of judicial immunity, is in a way "caught" by the requirements based on the obligation to respect human rights, which include the rights of defence, private property, freedom of expression, or

However, it cannot be undertaken on a large scale without jeopardising the principle of subsidiarity. As for the principle of mutual recognition, while it seeks to make the national systems coincide while preserving their differences, it cannot be instrumentalised to prevent or delay harmonisation.

437. This type of clause is sometimes described as a "Lithuanian" clause, which the United States did not succeed in having removed from the two agreements which it concluded with the EU on 25 June 2003.

438. They are called thus in order to distinguish them from state sanctions, the practice of which has demonstrated the perverse effects and in particular the harm caused to populations innocent of the crimes with which their totalitarian governments are charged.

439. See the remarkable summary of these cases offered by Rigaux A. and Simon D. (2007), *Johannis-Andrae Touscoz amicorum discipulorumque opus,* France Europe éditions, Nice, pp. 779-804.

freedom of association. It is also important to bear in mind that it is that protection initially developed by the Court that was in a way "constitutionalised". The Treaty establishing a constitution for Europe, like the Treaty of Lisbon, expressly introduced the obligation placed on the EU to ensure that acts containing restrictive measures include the necessary legal safeguards (Article 215(3) TFEU). It is likewise expressly provided (Article 275 TFEU) that the Court has the jurisdiction to review the legality of such acts.

3.3. The "coronation" of the Charter of Fundamental Rights of the European Union

There is no need here to overemphasise the extent to which the Charter of Fundamental Rights of the European Union constitutes an essential step in the definition and development of fundamental rights in their somewhat uneven history within the EU.[440] While it has not escaped the disagreement over the division of powers, it nonetheless shares that increase in importance of the political union which, in the eyes of some, legitimately called for the constitutionalisation of its system. However, that constitutionalisation cannot do without a "declaration of human rights" of its own. I make no claim to deal exhaustively with such a text, which has been the subject of numerous studies. I shall therefore choose, in a very subjective manner, a number of the aspects which affect the definition of the rights protected by the Charter. This definition shows a certain modernity. At the same time, the Charter also reflects an intention on the part of the EU and its member states not to fix definitively the protection of the rights that which it proposes.

3.3.1. The modernity of the definition of fundamental rights protected by the Charter

This modernity follows, in the first place, from the summary which the Charter proposes of all the generations of human rights – civil and political rights, economic and social rights, and certain rights that are sometimes called "third generation" rights (the right to the protection of the environment, rights associated with technological evolution, such as bioethics, or the protection of personal data); there is therefore indeed a desire to embrace the entire field of fundamental rights, and this desire for completeness is sometimes accompanied by a form of imprecision as to category, as certain authors, regretting the presence

440. Schneider C. (2002), "Brèves réflexions sur la dialectique de l'ordre et du désordre pour une histoire des droits fondamentaux dans le système communautaire", *Au carrefour des droits, Mélanges en l'honneur du Professeur L. Dubouis*, Dalloz, Paris, pp. 635-47; Schneider C. (2003), "De quelques nouvelles péripéties de la dialectique de l'ordre et du désordre dans le système communautaire de protection des droits fondamentaux: réflexions sur la charte des droits fondamentaux de l'Union européenne", Ferrand J. and Petit H. (eds), *L'odyssée des droits de l'homme, vol.1, fondations et naissance des droits de l'homme*, l'Harmattan, Paris, pp. 373-89; C. Schneider (2007), "Autres systèmes européens de protection", *Jurisclasseur Libertés* 380, 66 ff.

of the chapter on citizenship, have pointed out.[441] Ultimately, and in spite of its imperfections in "attempting too much and achieving nothing", the Charter is a text which may proclaim the indivisibility of human rights defended by certain authors. I am thinking, more particularly, of certain disputes relating to the overlooking of economic and social rights resulting from specific instruments which are the source of reduced guarantees.

Modernity is also the consequence of the fact that a number of the rights guaranteed are redefined and modernised, most frequently in order to take account of the dynamic interpretations in the case law or of the evolution of the Community treaties; the most significant is without doubt that of the right to marry, defined in a way that permits homosexual marriage, where it is authorised under national laws. In this category, mention might also be made of the principle of equality between men and women, which is extended to all areas, as expressly provided for in the Treaty of Amsterdam amending the Treaty of Rome.

Another source of modernity is the result of the distinction which the Charter draws between rights and principles. This distinction reflects the compromise found by the Convention at the initiative of the representative of the French Government, Guy Braibant, in order to escape the deadlock in which it was in danger of being stuck, as a result of the pressure brought to bear by the Germans and the British, who, for very different reasons,[442] were opposed to the introduction in the Charter of certain social rights which were suspected of not being justiciable. The Convention was unable to escape the recurrent discussions of the justiciability of these rights, but was able to overcome them by having recourse to principles, which it distinguishes from rights. Principles call, for their implementation and therefore for their justiciability, on the implementing texts of the states, and are therefore supposed to remove the spectre of those rights/claims placing unbearable financial burdens on the states. To use Braibant's words, principles are less than a classic right, since they require intermediate texts in order to be justiciable, but they are more than a political objective in so far as they benefit from a "normative justiciability" according to which "the right to" entailed by the principle would find its sanction in the prohibition imposed on the public powers (national for domestic law, Community for the EU) on adversely affecting the principles concerned when they engage in their normative activity. Owing

441. See Arnold R. (July 2000), "Le Processus de constitutionnalisation au sein de l'UE" in the *Conference of Jean Monnet Chairs on the Intergovernmental Conference 2000 and beyond,* Brussels, 6-7 July 2000. Professor Arnold stressed that number of the political rights (active and passive vote in the European Parliament, rights of the private individuals against the Community institutions) appearing in the charter were not in much order legal nationals considered basic rights but as simple constitutional laws.

442. For German writers, only a subjective justiciable right comes within the concept of "rights", whereas for British lawyers there is "no right without a remedy, that is to say, without an [effective] action". It is well known, moreover, that the United Kingdom was particularly hostile to the idea that the Charter might contribute to the development and reinforcement of social rights.

to that compromise, the content of the social rights safeguarded by the Charter appears to be very substantial,[443] although it must not be overestimated.[444]

Admittedly, the modernity of the Charter is relative, in so far as, in principle, the Charter does not create new rights[445] and amounts to a mere codification of the *lex lata*. One must merely emphasise the existence of a grey line between the exercise designed to codify rights which already exist and the undoubtedly closer exercise of the codification of the *lex ferenda*, consisting in rewriting them by reference to many sources of inspiration (such as case law, various international texts, and constitutional traditions of the member states).

3.3.2. Maintaining the opening to the progressive development of human rights

It would be wrong to think that after it becomes positive law following the entry into force of the Treaty of Lisbon the Charter will be the sole reference source for the protection of fundamental rights in the EU. It will indeed acquire the status of primary law, but nonetheless it will not entail the disappearance of the other sources of fundamental rights specific to Community legal order, as confirmed in Article 6 TEU of the Treaty of Lisbon. Article 6 refers, as general principles of law, to the ECHR, but also to the constitutional traditions of the member states. Beyond the examination of the way in which the multiplicity of sources will affect the way in which each will be led to play, one cannot ignore their respective evolutive forces. In addition to being used for interpretative purposes, it is certainly the task of the general principles of law of stimulating the development of the *lex ferenda* of human rights that is of interest. Thus the traditions of the member states are not fixed and both the texts of their constitutions and their constitutional case law are bound to evolve. Thus, beyond the dynamic future of interpretation proper to the Charter, fundamental rights in the EU will be able to drink from the future of the general principles of Community law and the constitutional principles of the states. Both will either establish new rights or give a new extension to existing rights.

443. See the examples cited by See Priollaud X. and Siritzky D. (2008), *Le traité de Lisbonne, texte et commentaire article par article des nouveaux traités européens (TUE-TFUE),* La documentation française, Paris: the right of workers to receive and impart information and to be consulted; the right of negotiation; the right to strike; the right of access to placement services; protection in the event of unfair dismissal; the right to fair and equitable working conditions; and the right of access to services of general interest.

444. See J.P. Jacque, op cit.: "in respect of social rights, the Charter almost always follows a reference to the right safeguarded by a reference to national legislation. Where it does not do so, the reason is that the right in question is already the subject of Community rules. In the latter hypothesis, it is the Community rule, and not the Charter, that is the source of the obligation borne by the States, which in their action to implement this fundamental right governed by Community law are obliged to respect it."

445. This assertion, which merits further discussion, may be inferred from a number of factors: I shall mention, more particularly, the text of the terms of reference given to the Convention responsible for drawing up the Convention, or again the Preamble to the Protocol on the application of the Charter of Poland and the United Kingdom, which states that the Charter does not create new rights.

Conclusion

There is no need to point out at the close of this overview (the restricted nature of which I hope will be excused) of the topic entrusted to me that Community integration has an impact on the definition and development of human rights and the subtle relationship which it has with sovereignty, or rather sovereignties.

Thus the EU has, over the years, been capable of developing a negative integration in relation to human rights, where the definition of those rights is rooted in the prohibitions on action issued against the member states and for which, when all is said and done, they are quite well prepared by the common market and at the same time by their own approach to the protection of human rights.

What is quite significantly different is the question of the positive integration capable of being developed by the EU defined on the basis of constructive measures designed to establish a synergy between all the national policies relating to respect for human rights. Do not the member states and the European peoples then feel themselves more "stressed" in their profound identity, which in certain respects does indeed show the limits of the Community of values? The debate over economic and social rights that "poisoned" the work of the Convention on the Charter of Fundamental Rights provided perfect evidence of the states' reluctance to allow "rights to" to be defined at Community level. Was not Ireland's refusal to approve the Treaty of Lisbon based on the anxiety of its people that, in the name of human rights, they would be placed under a positive obligation, namely the obligation to recognise the right to abortion?

There is no doubt that the subtle relationship between the development of human rights and sovereignty in the construction of the Community and its complex system of allocating competences renews, in its way, the conviction borrowed from the moralist La Rochefoucauld, that "our virtues are most frequently vices in disguise".

Commentary on Catherine Schneider's report

by Christoph Möllers[446]

The question of the relationship between the transfer of sovereignty, competences, and human rights at the EU level also necessitates clarification of our understanding of freedoms and fundamental rights. If we use the standard definition of the concepts of transfer of sovereignty and competences as meaning the handing over of legislative powers from the member state level to the EU, we have to clarify the extent to which such a transfer can have any impact on fundamental rights. As a rule, the transfer of competences should have no effect on fundamental rights as long as responsibility for implementing the transferred legislation remains with the member states, although this does not apply to the same extent to a thoroughgoing positive fundamental rights policy.

(1) This is precisely the point that emerged in the early phases of European construction – and, in fact, there was a similar process at the birth of the United States of America. European fundamental rights, as distinct from European fundamental freedoms, have no role to play in Community law, because interference in individual freedoms resulting from the latter is committed by national authorities and is restricted by national basic rights. For this reason itself, the dimension of EU law geared to protecting fundamental rights, which the European Court of Justice (ECJ) has been promoting since the 1970s, was initially therefore only relevant to a very small number of cases. As legal theorists quickly realised, this very much involved a strategy for legitimating the expansionism of the ECJ.

A second reason why fundamental rights were initially of very limited significance was to be found in the areas covered by the regulations relating to European integration. In most cases, the reciprocal opening of domestic markets, far from restricting rights, actually facilitated active expression of individual freedoms. The phase which was rightly referred to as "negative integration" removed member states' restrictions on transnational trade. This is why it would seem less than convincing to interpret the so-called fundamental freedoms as set out in the European treaties, which the ECJ has formulated as directly applicable subjective rights, as the exclusively economic origin of European fundamental rights. Fundamental rights are legal remedies which individuals can invoke vis-à-vis the authorities or legislators. However, the fundamental freedoms set out in

446. Professor of Public Law, Georg-August University, Göttingen, Germany.

the treaties were hardly ever directed against the European legislative process; on the contrary, they have been used to facilitate and expedite the latter. Given that the ECJ interpreted the basic rules in the treaties as subjective rights, intensive use was made of transnational economic freedoms, which in turn led to a need for pan-European standardisation. Where the protection of these fundamental freedoms is supported, the European legislator is able to regulate the single market. In establishing the scope of a transnational subjective right, such as the right to free trade in the EU area, the ECJ is also defining the European legislator's competences in relation to the member states, because only the EU legislator is then empowered to further develop these transnational freedoms. The enforceability of these "mobile freedoms" before the ECJ indirectly bolsters the sway of the European legislator. It would appear perfectly reasonable to accuse this mechanism of being confined to economic matters, but this criticism is ultimately directed less against a European conception of fundamental rights and more against European policy, which was expressly geared from the outset to facilitating political integration by forging economic ties among the various European countries.

(2) The question of comprehensive EC/EU competence theoretically lapsed when the ECJ decided also to apply fundamental rights to European sovereign decisions. The introduction of Article 6.1 of the Treaty on European Union and the dialogue that developed between the ECJ and the European Court of Human Rights has further contributed to solving any problems regarding jurisdiction. Of course, the European integration process itself has changed. At the very latest, the Maastricht Treaty transformed the EU into an organisation which massively restricts individual rights, notably in the field of the Third Pillar. In principle, the fundamental rights which could be relied on in this connection are available even before the entry into force of the Charter of Fundamental Rights of the European Union. The ECJ lacks any culture of fundamental rights protection not only vis-à-vis member states but also in relation to the EU itself. Perhaps the Charter serves as a political signal to the European courts that they should also be protecting European citizens more effectively against European sovereign decisions.

(3) An implicit negative or liberal interpretation of fundamental rights has underlain the comments so far, with fundamental rights being seen first and foremost as a means of defence against the public authorities. Such an interpretation is obviously not the only one, as shown by the creative way the European legislator has dealt with fundamental rights. This positive interpretation of the legislative construction of freedoms lends greater weight to the question of competences, as has also emerged from the examination of fundamental freedoms. Such an institutionalised fundamental rights policy, for instance in the form of action against racism or other forms of discrimination, is more characteristic of some member states than of others, but it is also a distinguishing feature of the EU, which thereby seeks, *inter alia,* to secure the standards of Article 6 of the Treaty on

European Union, without interfering excessively in the member states' domestic politics. In this field, however, particular urgency attaches not only to the question of competences, but also to that of the legitimacy of all European action, because the organisation and securing of fundamental rights through sovereign organisations can easily prompt suspicions of paternalism.

The European Union Fundamental Rights Agency within the European and international human rights architecture: the legal framework after the entry into force of the Treaty of Lisbon

by Armin von Bogdandy and Jochen von Bernstorff[447]

Introduction

The creation of the European Union Agency for Fundamental Rights (hereinafter the "Agency")[448] was an important step in the expansion of an EU policy on fundamental rights.[449] This development was closely linked to the adoption of the Charter of Fundamental Rights of the European Union, which was elevated to the level of primary European law by the Treaty of Lisbon.[450] Various changes in EU primary law foreseen by the Treaty of Lisbon contributed to the consolidation of a more active role of the EU in the field of human rights promotion and protection with the Agency as an integral institutional player. Pursuant to the – not accidentally contorted – language of Article 2 of the Regulation establishing the Agency (hereinafter the "Regulation") its objective is:

> to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.

The basic institutional structure chosen for the Agency is that of an administrative agency established under EU law, even though the Agency has a number of peculiarities due to its assigned area of responsibility.

However, it would be short-sighted to view the establishment of the Agency solely as a phenomenon of EU law. As the Regulation makes clear, it was also

447. Armin von Bogdandy is a member of the Agency's Scientific Committee and director at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany. Jochen von Bernstorff is a senior fellow at this institute and a visiting professor for international and European Law at the University of Göttingen, Germany. We are grateful to Gráinne de Búrca and Gabriel Toggenburg for their helpful comments.

448. Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007, L 53/1.

449. For details on this policy field, see Toggenburg G. N. (2006), "Menschenrechtspolitik", Weidenfeld W. and Wessels W. (eds), *Jahrbuch der Europäischen Integration*, Nomos, Baden-Baden, pp. 167-72, and Toggenburg G. N. (2008), "The role of the new EU Fundamental Rights Agency: debating the 'sex of angels' or improving Europe's human rights performance?", *European Law Review* 3, p. 385. On the protection of minorities as a fundamental rights issue, see Recital 10 of the Regulation establishing the Agency; Article 1 of the Framework Convention for the Protection of National Minorities of 1 February 1995, OJ II 1997, 1408.

450. Even if not fully justiciable in the UK and Poland.

designed in light of a model of specialised independent institutions promoting human rights. This model, developed by the United Nations, has led to national human rights institutions in a growing number of countries. More than 40 such specialised administrative institutions for the promotion of human rights have been introduced worldwide with diverse institutional designs, above all in the form of national commissions and institutes.[451] The idea behind such institutions is that the constitutional commitment to fundamental rights and their application by courts is not sufficient for their full implementation. The UN General Assembly's "Paris Principles" call for independent and pluralistically composed human rights institutions which should promote the effectiveness of human rights by working in co-operation with, but also as a counterpart to, domestic authorities.[452] The reference to the Paris Principles in the Regulation suggests that it should also be analysed in light of these UN recommendations.[453]

Yet, it is significant that the Agency is not denominated as a "human rights" Agency,[454] but as a "fundamental rights" Agency. The term "human rights" stands, at least in Europe, mostly for international guarantees, whereas the term "fundamental rights" usually denominates domestic constitutional guarantees of an individual polity. The member states had initiated the agency-project using the term "Human Rights Agency" (see recital 5 of the Regulation), but the European Parliament and the European Commission succeeded in changing its denomination to that of a "Fundamental Rights Agency". Accordingly, the Agency appears more set to develop the EU as an autonomous polity and Community law as a municipal legal order[455] and less as an element of the multi-level human rights architecture. In fact, there can be a tension between the project to better implement regional and universal human rights and the project to develop the municipal and constitutional fundamental rights of a specific polity.

The increasing influence of specific human or fundamental rights institutions in numerous states is calling into question an understanding of fundamental rights protection that is mainly focused on judicial review. Under the approach taken here, administrative rights promotion is conceived of as a significant instrument supplementing legal protection by the courts and therefore an important field of

451. Aichele V. (2003), *Nationale Menschenrechtsinstitutionen,* Frankfurt-am-Main. Since 2003, the German Institute for Human Rights (*Deutsches Institut für Menschenrechte*), in France "La Commission nationale consultative des droits de l'homme", in Denmark the "Danish Centre for Human Rights" and in Australia the "Human Rights and Equal Opportunity Commission".

452. Resolution 48/134 of the UN General Assembly of 20 December 1993, UN Doc. A/RES/48/134, the Annex to the Resolution sets forth the principles.

453. Recital 20; Nowak M. (2005), "The agency and national institutions for the promotion and protection of human rights", Alston P. and De Schutter O. (eds), *Monitoring fundamental rights in the EU: the contribution of the Fundamental Rights Agency,* Oxford, pp. 91-107 addressing this question before the Agency had been established.

454. Most national institutions refer to "human rights" in their name, see the examples referred to in footnote 451.

455. On the role of fundamental rights for the EU as a legal order, see joined cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat v. Council and Commission*, and the Opinion of Advocate General Poiares Maduro, delivered on 23 January 2008, paras. 17 ff.

administrative activity: European administrative law scholarship should, so goes our thesis, move accordingly into this field. In a way, an important development might come full circle: the development of the European administration by the European Commission and the Council of the European Union in the 1970s and 1980s entailed a process of constitutionalisation of the European Communities, in particular through fundamental rights protection,[456] whereas now the developed constitutional law of the EU might usher in a new field of administrative law if the Agency's potential is realised.

To contribute to this end, the relevant developments in the EU will first be recapitulated (Section 1) in order to then present the Agency's activities and tasks as a specialised agency for the promotion of fundamental rights where numerous unsettled issues lurk (Section 2). I will then analyse the Agency's possible impact on the constitution of Europe (Section 3), before recalling the main findings and discussing the prospect of human and fundamental rights promotion as a new area of administrative law.

1. The context of the Agency's establishment

1.1. From a purely reactive to a more proactive fundamental rights policy

Fundamental rights policies, which are not mentioned in the original Treaties of Rome, have steadily gained importance in the European integration process since the late 1960s, in particular in the jurisprudence of the European Court of Justice (ECJ).[457] As is well known, they were first developed by the ECJ as a reaction to the demands of the national courts. Within the project of a political union, political activities also increased, including the drafting and proclamation of the Charter of Fundamental Rights of the European Union in 2000.[458] The Charter, which was elevated to the level of primary European law by the Treaty of Lisbon,[459] as well as the ECJ's now extensive references to the European Court of Human Rights' case law, are part of an evolution which has significantly developed the European legal system by strengthening its fundamental rights dimension. The Agency has now been added and may itself become a potentially significant administrative component. As such, it needs to be situated in the overall EU context. Accordingly, a closer inspection of some aspects of the history of human rights protection in the EU is useful.

The European legal order at first served an economic association: it was created with the objective of integrating the European peoples and states by merging

456. On this development, see Weiler (1999), *The constitution of Europe – "Do the new clothes have an emperor?" and other essays on European integration,* Cambridge.
457. *Grundrechtsgehalte im Europäischen Gemeinschaftsrecht,* Baden-Baden; Clapham (1991), *Human rights and the European Community – Vol. I, A critical overview,* Baden-Baden, 29 ff.
458. For details on earlier proposals, see Bieber, de Gucht, Lenaerts and Weiler (eds) (1996), *Au nom des peuples européens – In the name of the peoples of Europe,* Baden-Baden, 365 ff.
459. Even if not fully justiciable in the UK and Poland.

their national markets.[460] European law was thus an instrument of far-reaching political and social change. Its principal aim was not the protection of the individual's fundamental rights, but rather the construction of an internal market in order to create a common European future. Fundamental rights were only gradually taken into consideration and then only to limit the discretion of the supranational institutions. They did not determine the EU's objectives and activities.

While the freedoms of the EC Treaty have been crucial for the constitutionalisation of the EU,[461] these hardly qualified as fundamental rights.[462] Fundamental rights developed as general principles (*principes généraux*), which, given their unwritten nature, are rather malleable.[463] Only since 1993 has primary law set out that fundamental rights shall be respected (Article 6 TEU).[464] Certainly, fundamental rights have thus far not been the most important individual guarantees under Community law.[465] They are less central than in many constitutional orders, not just in comparison to the basic rights under the German Basic Law (*Grundgesetz*), whose importance might seem unique, perhaps idiosyncratic when compared to the rest of the world. Although the ECJ has over time become more rights sensitive, this aspect has not decisively shaped its jurisprudence.[466]

On the policy side, fundamental rights promotion – at least until the Treaty of Amsterdam – only played a limited role within the EU, although the quest for an active policy is an old one. In particular the former Directorate General of the European Commission (Employment, Social Affairs and Equal Opportunities) and the European Parliament lobbied for affording fundamental rights policies a higher priority back in the early 1990s.[467] This demand was raised in programmatic form by Philip Alston and Joseph Weiler in a trailblazing work

460. Ipsen (1972), *Europäisches Gemeinschaftsrecht,* Tübingen, p. 110.
461. The principle of direct applicability is the basis for individual rights; in more detail Beljin (2007), "Dogmatik und Ermittlung der Unionsrechte", *Der Staat* 46, pp. 489-514.
462. The freedom of movement of workers is the exception to this, the ECJ has qualified it rather early as a fundamental right; O'Leary (1999), "Free movement of persons and services" Craig and de Búrca (eds), *The evolution of EU Law,* Oxford, p. 377, 378 ff. For the legal difference between market freedoms and fundamental freedoms in EU law, von Bogdandy A. (2000), "The European Union as a human rights organization*?", Common Market Law Review* 37, p. 1307, 1326 ff.
463. On general principles in detail, Pescatore (1968), "Les droits de l'homme et l'intégration européenne", *Cahiers de droit européen* 4, pp. 629-55; on human rights as an "integral part" of the general principles of community law, Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.
464. The fundamental freedoms of Article 6(2) EU are not the internal market freedoms under the EC Treaty but are derived from fundamental rights traditions of the member states and from international conventions; on the status of the Charter of Fundamental Rights in this context, Kingreen in Calliess/ Ruffert (eds), *EUV/EGV,* 3rd Ed. (Munich, 2007), Article 6 EUV paras. 38-39.
465. For an analysis of the relevant case law see below.
466. Recent decisions show a clearer fundamental rights-oriented profile, see Case C-540/03, *Parliament v. Council* [2006] ECR I-5769, paras. 35 ff.; Case C-305/05, Ordre des barreaux francophones et germano*phone and Others v. Council* [2007] ECR I-5305, paras. 28 ff.; in appreciation of these recent developments in the ECJ's decisions see Kühling (2009), "Fundamental Rights", von Bogdandy/Bast (eds), *Principles of European Constitutional Law* (2nd edn), Oxford, Ch.13.
467. See the documents referred to in Alston (ed.) (1999), *The EU and human rights,* Oxford, pp. 939-40.

commissioned by the European Parliament, which was searching for a human rights policy.[468] Alston and Weiler challenged legal scholars and politicians to expand their frame of reference and to more intensively study the possibilities of enforcing human rights beyond legal review. This marked the first time that the call for an agency monitoring the respect for human rights by EU institutions, member states, and private persons[469] gained prominence in the literature. They also demanded significant organisational and procedural changes, such as an independent ombudsman and a directorate general for fundamental rights.[470]

The process which eventually led to the Agency follows the general path of supplementing negative integration with positive integration. These concepts were developed within the context of the internal market programme. Negative integration means above all market integration by means of the deregulating effect of the four freedoms, which are enforced by the courts, whereas positive integration refers to regulatory intervention by the EU's political and administrative institutions.[471] For proponents of an active fundamental rights policy, the traditional approach corresponds to negative integration which needs to be supplemented by the active political and administrative promotion of fundamental rights as part of positive integration. Alston and Weiler referred to phenomena of racism and xenophobia, insufficient compliance with the laws on equal treatment and anti-discrimination, the inadequate protection of economic, social, and cultural rights for underprivileged groups and minorities, and the unsatisfactory legal status of refugees and asylum seekers in Europe.[472] Furthermore, inspired by US practice, they called for non-discrimination legislation, such as legislation against sexual harassment and other forms of discrimination at the workplace.[473] Policies on minorities, migration, and general non-discrimination policies should be joined under such an active human rights policy, which would be implemented not so much by the courts as by a specialised independent agency, involving non-governmental organisations.[474] Article 19 TFEU (ex Article 13 EC), introduced by the Treaty of Amsterdam, shows that such demands resonate in the political

468. Alston and Weiler, "An 'ever closer Union' in need of a human rights policy" in Alston, ibid., pp. 3-66. Their approach decisively influenced the Comité des Sages and its "Human rights agenda For the European Union for the year 2000. Leading by example", in Alston, ibid., Annex (after p. 917). For a critique see Bogdandy, A. v. (2009), footnote 462, ibid., 1307 ff., which I modify in light of the following considerations.

469. Alston and Weiler, footnote 468 , pp. 55-9. The European Parliament is already involved in fundamental rights issues, irrespective of whether an infringement is caused by the EU, a member state, or a private person. It therefore lays claim to a general competence of becoming engaged in the area of fundamental rights, see EP-Doc. A5-60/2000, A5-50/2000.

470. Alston and Weiler, footnote 468, pp. 40-2, pp. 45-52.

471. Scharpf (1999), *Governing in Europe: effective and democratic?* Oxford, 43 ff.; Maduro (1998), *We the Court*, Oxford, 109 ff.

472. Alston and Weiler, footnote 468, 14 ff.

473. Alston and Weiler, footnote 468, p. 16, p. 60.

474. See the EU Network of Independent Experts on Fundamental Rights, Thematic Comment No. 3: The Protection of Minorities in the European Union, 25 April 2005, CRF-CDF.ThemComm2005.en, http://ec.europa.eu/justice_home/cfr_cdf/doc/thematic_comments_2005_en.pdf (accessed 17 December 2008), in particular pp. 20, 92 ff., prepared by Olivier De Schutter.

realm, and important legislation has been enacted in the last decade.[475] The same Treaty, by laying down Article 6 and Article 7 EU, also highlighted the increasing political importance of human rights in the EU.

Two further important developments in the 1990s prepared the groundwork for an active human rights policy: the EU's human rights and minority policies vis-à-vis East European states in the accession process (Section 1.2) and the activities of the European Monitoring Centre on Racism and Xenophobia, established in 1997 (Section 1.3).

1.2. Protection of minorities in the accession states

The EU became actively involved in the field of human rights protection after the fall of the Berlin Wall. The basic features are well known: the collapse of the socialist dictatorships permitted ethnic conflicts in central and eastern Europe to re-ignite, some of which turned into important security issues for the West, such as the wars in the former Yugoslavia, the Baltic states' treatment of their Russian-speaking populations, and the tensions associated with Hungarian minorities.

As the embedding of the Agency in the regional and universal human rights architecture is a major topic, it seems important to note that the EU entered this policy field not on its own accord, but in co-operation with a number of international institutions. In 1993, the Western European political actors reached an understanding on a common policy for the treatment of minorities, which consolidated the legal, organisational, and legitimatory resources of diverse European organisations into one overarching policy for the protection of such groups in the associated countries. This was evidenced, first, in conclusions of the meeting of the European Council in Copenhagen from 21 to 22 June 1993 relating to the opening of perspectives for accession for these countries under the so-called Copenhagen criteria, which included the effective protection of minorities,[476] and, second, in the Declaration of the Heads of State or Government of the member states of the Council of Europe (Vienna, 9 October 1993), which charged the Committee of Ministers with elaborating an independent legal regime for the protection of minorities.[477] It was on this basis that a policy of human rights protection was developed, the institutional pillars being the EU, the Council of Europe, and the Organization for Security and Co-operation in Europe. Notwithstanding a number of jurisdictional issues and tensions between

475. E.g. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L 80/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 302/16; focusing on the discrimination against third-country nationals ; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003, L 251/12; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004, L 16/44.
476. Conclusion of the Presidency of 21-22 June 1993 (SN 190/1/93), 13.
477. Second dash of the Vienna Declaration of 9 October 1993, www.coe.am/en/docs/summits/vienna_summit.pdf (accessed 1 July 2011).

the organisations, their work can be understood as a co-operative effort helping to formulate and implement human-rights sensitive treatment of minorities in the transformation states.[478]

The legal bases for this new political field were the criteria for accession to the EU pursuant to Article 49 EU in conjunction with the criteria set forth later in Article 6(1) EU (now Article 2 TEU).[479] However, the standards were mostly those of the Council of Europe, among those the Framework Convention for the Protection of National Minorities, which was elaborated during the period from 1993 to 1995 by the Council of Europe.[480] Its ratification and implementation in most cases[481] was considered to be a crucial prerequisite for fulfilling the Copenhagen criteria and Article 49 EU.[482] Further legislative concretisation was effected by the soft law instruments of various actors.[483]

Additionally the task of implementing the European human rights policy for the protection of minorities has been dispersed across a number of organisations. The EU is at the centre; the opportunity to accede is the principal mechanism in the sense of a positive incentive.[484] However, this incentive depends on effective external monitoring of the implementation of the imposed standards in the accession states. A number of institutions have assumed this task. For example, the European Commission regularly prepares progress reports based on its own information, on information provided by the other international institutions, as well as on information from civil society. In addition, the Council of Europe remains engaged in the process, in particular via the advisory committee on the Framework Convention for the Protection of National Minorities.[485]

478. On the interaction of the organisations, Toggenburg G. N., "The Union's role vis-à-vis minorities. After the enlargement decade", *EUI Working Papers, Law No. 2006/15*, 24. For a more complete analysis Bogdandy A. v. (2008), "The European Union as situation, executive, and promoter of the international law of cultural diversity", *European Journal of International Law* 19, pp. 241-275.
479. The criteria were set forth in the Conference on Security and Cooperation in Europe document of 29 June 1990, Document of the Conference on the Human Dimension of the CSCE (Copenhagen, 29 June 1990), item 1. In more detail, Toggenburg G. N. (2008), "Der Menschenrechts- und Minderheitenschutz in der Europäischen Union", Weidenfeld (ed.), *Die Europäische Union* (5th edn), Bonn, p. 294, p. 309.
480. Dated 1 February 1995, entered into force on 1 February 1998; for details of the negotiations, see Hofmann R. (1995), *Minderheitenschutz in Europa. Völker- und staatsrechtliche Lage im Überblick,* Berlin, 200 ff.
481. Latvia, for instance, had not fulfilled this prerequisite.
482. Sasse G. (2004), "Minority rights and EU enlargement: normative overstretch or effective conditionality?" Toggenburg G. N. (ed.), *Minority protection and the enlarged EU,* Budapest, p. 61, p. 68, p. 72.
483. In detail Bogdandy A. v. (2008), footnote 478, pp. 241, 260 ff.
484. Smith K. E. (2001), "Western actors and the promotion of democracy", Zielonka and Pravda (eds), *Democratic consolidation in Eastern Europe, Vol. II, international and transnational factors*, Oxford, p. 31-57; Zielonka in Zielonka and Pravda, ibid., "Conclusions. Foreign made democracy", pp. 511-56.
485. Article 26 of the Framework Convention; for details see Hofmann R. (1999), "Das Überwachungssystem der Rahmenkonvention des Europarates zum Schutz nationaler Minderheiten", *Zeitschrift für Europarechtliche Studien*, pp. 379-92.

Overall, the EU developed a human rights policy in the accession procedures during the 1990s with respect to the associated countries. This policy's justification and effectiveness were a direct result of the East European states' desire to accede. However, this policy has not been a complete success everywhere, which raises the question of how to react to deficits in implementing human rights after accession. The Agency's forerunner organisation – the European Monitoring Centre on Racism and Xenophobia – offered one approach.

1.3. The European Monitoring Centre on Racism and Xenophobia

The European Monitoring Centre on Racism and Xenophobia (hereinafter the "Centre") was established in 1997 by virtue of an EC Regulation.[486] Pursuant to the founding document, the prime objectives and tasks were to provide "objective, reliable and comparable data" on the phenomena of racism, xenophobia, and anti-Semitism at the European level.[487] The growing power of xenophobic parties in a number of European states as well as continuing structural problems in the treatment of minorities, such as the Roma/Gypsy in the 1990s, initiated and drove the process for establishing the Centre. The Regulation mandated the Centre with studying the extent and analysing the development of these phenomena and their manifestations, causes, consequences and effects, as well as identifying examples of successful counter-strategies.

The Centre's role concerned, above all, the collection of objective and comparable data. The thematically narrow formulated remit stood in contrast to a broad focus regarding the relevant policies in this field: the Centre could make an issue of any relevant political, social, and legal event in the member states. Any act in connection with xenophobic phenomena could become a target for action by the Centre; there was no restriction as to the scope of application of Community law.[488] As part of the European reaction to the change in government in Austria in 2000, the then chairperson of the Centre's management board described the Centre in an official declaration as the EU's "eyes and ears".[489]

The Centre's endeavours were from the outset directed at the creation of a new network of governmental and non-governmental actors as well as co-operation with existing networks for combating racism, xenophobia and anti-Semitism. It was apparent to the actors from the beginning that the Centre could accomplish its tasks only as a part of such a broader association of relevant actors in the field. With the help of this network, first, a type of "early warning system" had to be established and second, positive developments in the member states

486. Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ 1997, L 151/1; for further information, see Flauss J.-F. (2001), "L'action de l'Union européenne dans le domaine de la lutte contre le racisme et la xénophobie", *Revue trimestrielle des droits de l'homme,* pp. 487-515.
487. Article 2(1).
488. Article 2.
489. Bulletin Quotidien Europe No. 7649 of 5 February 2000, 3, 5; for further information see Schorkopf F. (2001), *Die Maßnahmen der XIV EU-Mitgliedstaaten gegen Österreich,* Berlin, p. 26.

had to be identified. In particular, as foreseen in the Regulation establishing the Centre, the Centre created a European Information Network on Racism and Xenophobia (RAXEN).[490] This included the creation of contact points at universities or in civil society for the purpose of collecting data. The information gathered was assessed and evaluated by a global network of experts, namely the Rapid Response and Evaluation Network (RAREN). This approach was intended to couple decentralised observation capacities with scientific expertise in order to use the results to jump-start broader thematic studies and specific opinions by the Centre. The Centre's principal management resource was the allocation of financial resources for conducting studies and the organisation of conferences. At the same time, the Centre used these networks to establish so-called "round tables" in a number of member states, where representatives of civil society and government representatives met to discuss national problems and "best practices" at regular intervals.[491]

2. The European Union Fundamental Rights Agency in detail

Since the Agency was founded as the Centre's successor, it has been able to build on its basic organisational structures. Within the EU administrative landscape it is to be classified as an information agency. At the same time, the Agency tends toward the UN standardised model of independent national human rights institutions. According to the UN General Assembly's Paris Principles of 1993, independent and pluralistically composed administrative institutions should facilitate the national implementation of human rights.[492] In the following section the Agency will be analysed first in terms of Community law as an information agency with respect to its structure (2.1.), its goals, tasks, and limits (2.2.) in order to then evaluate it in light of the "national human rights institutions" model for the promotion and protection of human rights propagated by the UN (2.3.).

2.1. The organisation and its power structures

The Agency largely corresponds to the model of a European information agency.[493] The increasingly dense European information space is administered not only by the European Commission, but also increasingly by specialised

490. Article 4.
491. *Inter alia* in Great Britain, Ireland, Italy, Luxembourg, the Netherlands, France, Denmark, Germany, Finland and Austria, see Winkler B. (2002), "Bestrebungen zur Bekämpfung von Rassismus und Fremdenfeindlichkeit in der Europäischen Union" Deile et al. (eds), *Jahrbuch Menschenrechte,* Frankfurt-am-Main, p. 262, p. 268.
492. Resolution 48/134 of the UN General Assembly from 1993, UN Doc. A/RES/48/134, Operative Paragraph 2.
493. For details, see Bogdandy A.v. (2008), "Informationsbeziehungen innerhalb des Europäischen Verwaltungsverbundes", Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle (eds), *Grundlagen des Verwaltungsrechts,* Vol. II, Munich, pp. 347-404; Idem, (2003) "Links between national and supranational institutions: A legal view of a new communicative universe", Kohler-Koch (ed.), *Linking EU and national governance,* Oxford, pp. 24-52.

agencies.[494] The development of these agencies has been occurring in an outsourcing process, in which some of the EU's administrative tasks are assumed by specialised administrative entities other than the European Commission; this has been one of the most important trends in EU administrative law over the last 15 years.[495] Depending on the method of counting used, there are some 20 EU agencies.[496] *Information* agencies differ from other agencies in that their primary tasks lie in the provision of information and communication as well as network management, to be understood here as part of the endeavour to create and maintain an effective European information space. Although the European Commission remains the principal European body managing information, agencies in general and information agencies in particular are increasingly assuming important roles.

Article 308 EC (now Article 352 TFEU) forms the legal basis for the establishment of the Agency, as it does for most of the other agencies. It possesses its own legal personality. However, the EU provides the organisational framework for the Agency, as it does for the other agencies. Thus, the Agency uses the EU's translation services, has recourse to its staff rules and regulations, and is subject to the EU's budgetary authority.[497] The European Court of Justice (ECJ) has jurisdiction to determine the lawfulness of the Agency's acts.[498]

The seat of the Agency is Vienna.[499] It is located in a grand building, as of 2009 has 62 employees, and has a budget of €17 million. The Agency consists of seven departments. Three departments are dedicated to human resource requirements and internal administration (Directorate, Administration Department, and Human Resources and Planning Department); two other departments are thematically dedicated (Equality and Citizens' Rights Department and Freedoms and Justice Department); and two departments are dedicated to the Agency's external political effect (Communication and Awareness Raising Department and External Relations and Networking Department).

Organisationally the Agency is composed of four bodies: a Management Board, an Executive Board, a Scientific Committee, and a Director. The Management

494. On the role of agencies in European Administration, see Vos (2000), "Reforming the European Commission: what role to play for EU agencies?" *Common Market Law Review* 37, p. 1113, Chiti (2000), "The emergence of a community administration: The case of European agencies", *Common Market Law Review* 37, p. 309.
495. Examples of the extensive literature include Fischer-Appelt (1999), *Agenturen der Europäischen Gemeinschaften*, Berlin, 46 ff.; Geradin and Petit, "The development of agencies at EU and national levels: Conceptual analysis and proposals for reform", *Jean Monnet Working Paper 01/04*, 1, 36 ff. A general classification of the agencies within the Union's institutional structure can be found in de Búrca (1999), "Institutional development of the EU: A constitutional analysis" in Craig and de Búrca (eds), footnote 462, p. 75, who is critical of this tendency.
496. See the list at http://europa.eu.int/agencies/index_de.htm (accessed 4 December 2008), which differentiates according to the Union's pillars. The denomination of the agencies varies.
497. Article 25(3) on translation services and Article 20 on the budget.
498. Article 27.
499. Article 23(5).

Board possesses the greatest power.[500] It is tasked with electing the members of the Executive Board, appointing the members of the Scientific Committee,[501] and appointing the Director. The Director is responsible for implementing the Management Board's decisions, as well as for matters of day-to-day administration and all staff matters;[502] he is also accountable to the Board itself.[503] The Management Board thus controls the person who manages the Agency's day-to-day work. In addition, it is responsible for making the substantive decisions relating to the Agency's work, set forth in the Agency's Annual Work Programme.[504]

The Management Board is not composed of representatives of the member states' governments, but of "independent persons", who are nevertheless appointed by the member states. The Regulation establishing the Agency speaks of persons who have "high level responsibilities in an independent national human rights institution or other public or private sector organisation".[505] Since not all member states have such human rights institutions, it was necessary to create an opening for other independent persons.[506] The European Commission appoints two representatives and the Council of Europe appoints a further independent person as a member of the Management Board. The European Parliament cannot appoint a member of its own, but shall be involved in the selection of the members of the Scientific Committee and Director.[507] The involvement of the Council of Europe in the management body is intended to co-ordinate the activities of the Agency with those of the Council of Europe and avoid duplication as well as friction. In the lead-up to the establishment of the Agency there was a great deal of tension because some actors were fearful of competition with the Council of Europe as the principal European human rights institution.[508]

Thus, in contrast to the other information agencies, at the management level it is not about a close interlocking of the ministerial bureaucracies at the European level, but the Agency rather seeks to network administrative agencies specialised in the promotion of human rights which, to a greater or lesser extent, operate independently of the ministerial bureaucracies. Consequently, independent persons dominate the Management Board. In other information agencies the national ministries are usually represented in the management board, often at the level of the Deputy Minister, and are thus directly involved in shaping the programme and controlling the agency in question. At the Agency the integration of responsible administrative units in the member states' ministries is achieved via "National Liaison Officers" who serve only as the Agency's external contact

500. Article 12.
501. Article 12(6)(k) for the Scientific Committee, Article 13(1) for the Executive Board, Article 12(6 (c) for the Director.
502. Article 15.
503. Article 15(5).
504. Article 12(6)(a).
505. Article 12(1)(a).
506. The respective members can be found on the website, fra.europa.eu.
507. Article 14(1), Article 15(2).
508. For a deeper analysis of this relationship, see below.

points.[509] While the European Commission is integrated into the Agency's structures, it is not a significant actor, let alone *primus inter pares*, as is the case for instance in an executive agency under Council Regulation (EC) No 58/2003, which is completely under the European Commission's management and control.

The European Commission's most important point of influence lies in the preparation of the Agency's multi-annual programme. At this juncture the Council of the European Union also gains influence over the Agency's work. The fact that, in contrast to most of the other agencies, the multi-annual programme has to be adopted by the latter Council, attests to the sensitivity of the subject matter.[510] However, the Regulation establishing the Agency leaves open the question of how detailed this programme might be, which is of importance for the UN Paris Principles.[511]

The Executive Board has only a supporting role with respect to the Management Board. The Scientific Committee, by contrast, is assigned its own task: it is "the guarantor of the scientific quality of the Agency's work, guiding the work to that effect."[512] To this end, the Scientific Committee gives opinions on projects and the output of the Agency. It is not explicitly set forth whether its pronouncements are binding for other organs of the Agency, specifically, whether the Scientific Committee may bar a project or demand a modification. The wording of Article 14(5) of the Regulation refers to the Committee as a "guarantor" that is "guiding" the work of the Agency, indicating the authoritative nature of its decisions. The explicit establishment of formal procedures for pronouncements (Article 14(6) of the Regulation) confirms such interpretation according to which the pronouncements on scientific issues are binding upon other organs of the Agency. Furthermore, in terms of the object and purpose of the provision, it should be borne in mind that the Committee can only fulfil its legal role as "guarantor" if other organs of the Agency have to respect the scientific standards stipulated on a case-by-case basis by the Committee. In view of this task the Director must involve the Committee in the Agency's work.[513]

2.2. Goals, tasks and limits

The Agency has no legislative or regulatory powers, no quasi-judicial competences in the sense of an ombudsman,[514] and no authority to adopt legally binding decisions with effect for third parties. Pursuant to Article 2 of the Regulation, the Agency's objective is to provide the relevant institutions, bodies, offices, and agencies of the Community and its member states with assistance and expertise

509. Article 8(1).
510. Article 5(1); the quorum required is a simple majority pursuant to Article 205(1) EC.
511. For further details see below.
512. Article 14(5).
513. Article 14(5) sentence 2 explicitly states this in reference to all the Agency's products mentioned in this provision.
514. Recital 15, cf. Article 4(2).

relating to fundamental rights. Although that sounds very limited, it might be the basis of considerable administrative action.

In accordance with Article 3(3) of the Regulation, the Agency shall only deal with fundamental rights issues in the EU and its member states when implementing Community law. In this respect the focus is significantly narrower than that of the former Centre which could also monitor the member states outside the remit of Community law, though only with a much narrower focus on certain forms of discrimination. The reference to Community law entails that the Regulation only allows the Agency to act with respect to those activities of the EU which are governed by the EC Treaty or the European Atomic Energy Community Treaty.[515] Thus, the Regulation does not cover activities in the areas of police and judicial co-operation in criminal matters under the Treaty of European Union, which are particularly sensitive when it comes to the protection of fundamental rights.

Notwithstanding this limitation, the French Council Presidency as early as 2008 commissioned an opinion by the Agency on the fundamental rights conformity of a draft framework decision on the use of Passenger Name Records for law enforcement purposes,[516] which falls under Articles 29, 30(1), and 34(2) EU.[517] The drafting of such an opinion corresponds with the aforementioned Council Declaration regarding the consultation of the Agency within the Areas of Police and Judicial Cooperation in Criminal Matters, according to which "the Union institutions may, within the framework of the legislative process … each benefit, as appropriate and on a voluntary basis, from such expertise also within the areas of police and judicial cooperation in criminal matters".[518] Accordingly, the Agency could draft opinions relating to Third Pillar measures under the Treaty of European Union upon request by other EU bodies.

According to this logic, it also appears to be possible for the Agency to become involved in a procedure under Article 7 EU if the Council of the European Union so requests. This was, as illustrated above, controversial during the legislative process.[519] However, the Council clarified in the aforementioned declaration that:

> neither the Treaties nor the Regulation establishing the European Union Agency for Fundamental Rights preclude the possibility for the Council to seek the assistance of the future European Union Agency for Fundamental Rights when deciding to obtain

515. On the relationship between EU law and EC law in detail, Bogdandy A.v. (1999), "The legal case for unity", *Common Market Law Review* 36, p. 887.
516. COM (2007) 654.
517. This decision has been endorsed by various actors. See http://fra.europa.eu/fra/material/pub/discussion/FRA_opinion_PNR_en.pdf (accessed 20 Dec. 2008), see also European Parliament resolution of 20 November 2008 on the proposal for a Council framework decision on the use of Passenger Name Records (PNR) for law enforcement purposes.
518. Declaration by the Council of 12 February 2007, Council document 6166/07, 4.
519. Ibid., 5; in more detail, De Schutter (2008), "The two Europes of human rights: the emerging division of tasks between the Council of Europe and the European Union in promoting human rights in Europe", *Columbia Journal of European Law* 14, p. 509, pp. 524-25.

> from independent persons a report on the situation in a Member State within the meaning of Article 7 TEU when the Council decides that the conditions of Article 7 TEU are met.[520]

The limits set out in Article 3(3) of the Regulation only regard the Agency's autonomous activities. When, by contrast, the Agency gives advice following the request of an EU institution, the competence and limits need determining with respect to the requesting body, not the requested. As soon as an EU institution might initiate an action under Article 7 TEU, it can avail itself of the help of the Agency for its investigations.

The tasks of the Agency are, in broad terms, to:

- collect and analyse information and data of high scientific value as a basis for EU fundamental rights policies;
- disseminate the aggregated information;
- give political advice;
- network the relevant institutions and actors in the field of fundamental rights protection, and to function, as the European Parliament puts it, as "a network of networks".[521]

2.2.1. Collecion and analysis

Making available information and data of high scientific value as a basis for a fundamental rights policy leads to the Agency's task of collecting and analysing data and information, which also includes information gathered by national and international research and monitoring institutions.[522] An important objective in analysing the data is the determination of priorities for future EU policies. An important aspect of this first area of responsibility is the methodological improvement of data comparison. It is the Agency's explicit responsibility to develop common indicators and analytical standards, which allow for a greater coherence of the data and thus an improved comparability.[523] This task of the Agency is by no means merely technical in nature. The development of specific standards and methods for collecting data may contribute to further developing a common "language" for fundamental rights issues, thereby shaping and fostering common debate on these issues in the emerging European public sphere. This is particularly the case where the elaborated indicators, not least as a result

520. Declaration by the Council of 12 February 2007, Council document 6166/07, 3.
521. Resolution of the European Parliament of 18 May 2006, para. 35, OJ C 117 E/242.
522. Article 6; according to its 2009 work programme, the Agency will focus on projects in the following areas: the information society and, in particular, respect for private life and protection of personal data; issues related to asylum, immigration, and integration of migrants; racism, xenophobia, anti-Semitism, Islamophobia, and related intolerance; discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation, and against persons belonging to minorities and any combination of these grounds; the rights of the child, including the protection of children; participation of the citizens of the EU in the EU's democratic functioning; access to efficient and independent justice, see Annual Work Programme 2009 http://fra.europa.eu/fra/material/pub/WP/wp09_en.pdf (accessed 14 January 2009).
523. Article 4(1)(a) and (b).

of consultation activities, are subsequently used by a number of relevant public and private actors in the member states. This is ensured by millions of euros for commissioned research using these common indicators. The political power of the Agency is to a great extent based on the possibility to develop these standards, thereby contributing to the emergence of a common European perception of fundamental rights issues.[524] The selection of the issues, the manner in which data is collected, and how it is presented need to be conceived as administrative action to further fundamental rights within the EU. This policy operates indirectly by sponsoring projects of numerous public and private actors.[525]

2.2.2. Dissemination

Turning to the mandate to disseminate information, the Agency publishes thematic reports based on its analytical research and surveys.[526] In addition, the Regulation tasks the Agency with developing its own communication strategy to raise public awareness of fundamental rights issues.[527] This competence opens up the opportunity for the Agency to proactively identify problems. It is not yet clear whether Article 4(1)(d) of the Regulation prevents the Agency from disseminating information on occurrences in a specific member state, since it is only meant to formulate and publish conclusions and opinions on "specific *thematic* (rather than *national* AvB/JvB) topics".[528] This formulation seems to be too vague, however, in foreclosing this important area of activity. Moreover, in practical terms it seems impossible to prepare the envisaged thematic analyses and opinions on the situation of fundamental rights without reference to the legal and factual situation on the ground in a concerned member state. Therefore one should conclude that a specific situation in a member state can be examined by the Agency, and that the result can be disseminated. What is not authorised is drawing an outright conclusion of a violation of a fundamental right, Article 4(2) of the Regulation, but not the indication of critical situations. The annual report on fundamental rights issues, which highlights examples of good practice in protecting fundamental rights, is another possibility for the Agency to shape the public perception of fundamental rights issues in Europe.[529]

2.2.3. Advisory role

The Agency's responsibilities include assisting the formulation and implementation of policy (political advice). Assistance may be provided to the political institutions where they request opinions, conclusions and reports from the

524. Generally on information administration, Schmidt-Aßmann (2006), *Das allgemeine Verwaltungsrecht als Ordnungsidee* (2nd edn)., Berlin, 278 ff.
525. On comparable management of the sciences Schmidt-Aßmann (2006), ibid., pp. 133-4.
526. Article 4(1)(f). The Annual Work Programme 2008 foresaw, *inter alia*, data collection projects on racism in sport and the examination of legal instruments and judicial data in reference to the rights of the child, http://fra.europa.eu/fra/material/pub/WP/wp08_en.pdf (accessed 23 December 2008).
527. Article 4(1)(h).
528. De Schutter, footnote 519, p. 524.
529. Article 4(1)(e).

Agency.[530] These Agency products can become part of the EU legislative process.[531] However, under the Regulation this is so far only possible if the respective EU institution or body has requested such an opinion. Thus, the Agency can draft reports and opinions on its own within the framework of its work programme, but these will only become officially relevant for the EU's legislative procedures if the respective EU body has made a specific request. Gabriel Toggenburg has argued that such an opinion triggers the obligation of the requesting institution to provide specific reasons if it opts to disregard it.[532] Although this might stretch the jurisprudence on Article 10 EC as it stands, it indicates the potential impact of the Agency's opinions. Thus, if the Agency succeeds in building a close working relationship with the EU's legislative bodies, it might influence future legislation. A first case in point was the request mentioned above by the Council of the European Union for an opinion on the use of Passenger Name Records. In its opinion the Agency came to the conclusion that parts of the draft framework decision violated European fundamental rights standards under the ECHR and the Charter of Fundamental Rights of the European Union and that modifications therefore were necessary.[533]

2.2.4. Networking

The Agency is also mandated to network the relevant institutions and actors in the field of fundamental rights protection, to function, as the European Parliament puts it, as "a network of networks". As part of this mandate, national human rights institutions are foreseen as co-operation partners along with the Council of Europe, OSCE, UN, and other international organisations.[534] A related special task of the Agency is the institutionalised consultation with civil society at the national, European, and international level via a co-operation network by the name of the "Fundamental Rights Platform". The co-operation with the platform takes place under the authority of the Agency's Director and serves to pool knowledge and develop new Agency programmes and activities as well as to further national implementation of fundamental rights.[535] Hereby Community law recognises civil society actors as being important pillars in bringing about effective enjoyment of fundamental rights. The Agency's organisational structure is thus characterised by an extensive inclusion of relevant external actors in the Agency's bodies. This serves the organisation's object and purpose: the structure facilitates a high degree of interaction both with governmental as well as non-governmental actors in the member states and with other bodies and institutions of the EU and the Council of Europe. This type of co-operative problem tracking, analysis, and knowledge production influences the perception of crucial actors

530. Article 4(1)(c) and (d).
531. Article 4(2).
532. With a broad interpretation of an obligation of loyal co-operation between EU institutions based on Article 10 EC, Toggenburg G. N. (2009), "Exploring the fundaments of a new agent in the field of rights protection: the Fundamental Rights Agency in Vienna", *European Yearbook of Minority Issues 7*.
533. On this, see the annotation in footnote 517.
534. Article 8(2)(a) and (b).
535. Article 10.

across the board and can thereby impact on the implementation of fundamental rights in the member states. The Agency as an institutionalised information network can thus exercise public authority through targeted politico-legal effects of knowledge production and dissemination.[536]

2.3. The Agency and the Paris Principles

Article 16 of the Regulation establishing the Agency stipulates that it shall fulfil its tasks in "complete independence". This distinguishes the Agency from other EU agencies. Recital 20 explicitly refers to the UN principles for independent human rights institutions (Paris Principles). In line with these principles, the composition of the Management Board should "ensure" the independence of the Agency with respect to both the institutions of the EU as well as member state governments. When a Council Regulation established the Agency's predecessor, the Centre, there was talk of "independent experts" and its "largely independent" activities. The Agency, however, goes one step further and explicitly refers to the "principles relating to the status and functioning of national institutions for the protection and promotion of human rights (the Paris Principles)".[537] The independence of the Agency can therefore be justified by recourse to this international standard and can be fleshed out by it. In the following, the Agency's institutional set-up will be assessed in more detail through the matrix set out by the Paris Principles for independent human rights institutions. The General Assembly Resolution of 1993 contains criteria relating to their tasks, their independence, and their operational methods.[538]

In terms of the tasks, human rights institutions should be given as broad a mandate as possible to promote and protect human rights.[539] For the Agency, this is the case as the Regulation refers to Article 6(2) EU (now Article 6(3) TEU).[540] In Recital 9 of the Regulation it becomes evident that a broad interpretation of Article 6(3) TEU is implied, an interpretation which includes a number of economic and social rights.[541] However, it should be noted that the universal human rights, which form the focus of the General Assembly's Resolution, are not explicitly referred to anywhere in the Regulation; only Recital 4 alludes to them. In order to develop the Agency in light of the Paris Principles, the link to universal institutions and standards of human rights promotion should be always reflected and stressed in the Agency's work.

536. On information networks under the auspices of the OECD as public authority, see Goldmann, M. (2007), "Der Widerspenstigen Zähmung, oder: Netzwerke dogmatisch gedacht", Boysen et al. (eds), *Netzwerke,* Berlin, pp. 225-45.
537. Recital 20.
538. Resolution 48/134 of the UN General Assembly of 20 December 1993, UN Doc. A/RES/48/134.
539. Ibid., Annex, under the section "Competence and responsibilities", No. 2.
540. Article 3(2).
541. Recital 2 already cites the social charters adopted by the Council of Europe; for further details see Alston, "The contribution of the EU Fundamental Rights Agency to the realization of economic and social rights", Alston and De Schutter, footnote 453, pp. 159-188.

A problematic limitation is the restriction of the scope of the Agency to the "implementation of *Community* law" in Article 3(3) of the Regulation as this excludes the Third Pillar from the Agency's field of activities.[542] The fact that the Agency may nonetheless act in this area at the request of an EU institution does not satisfy the Paris Principles. Neither does it seem in line with the idea of an independent human rights institution that the Agency is not mandated to pronounce itself ex-officio in the course of legislative procedures but can only do so upon the request of an EU institution (Article 4(2) of the Regulation).[543] In view of the relevance of policies under the so-called Third Pillar and the importance of a general mandate to monitor EU legislation for its fundamental rights compatibility, we find it difficult to conclude that the Agency's mandate is sufficiently broad.

Less critical regarding the criterion of a sufficiently broad mandate we see the exclusion of member states' activities outside the remit of Community law. If one perceives the Agency as part of a supranational polity, operating in co-operation with comparable member state institutions, then a restriction to the scope of Community law can be understood as a reasonable division of labour between the supranational and national level in line with the principle of subsidiarity. In addition, due to the broad anti-discrimination directives[544] the fact that the Agency is confined to issues regarding the implementation of Community law is likely to turn out to be less of a limitation for its supervision of member states than some of the member states may have thought when the Agency was established.

Geographically, Article 3(3) of the Regulation restricts the Agency's activities to "fundamental-rights issues in the European Union and in its member states". Nonetheless, pursuant to Article 28 of the Regulation, candidate countries and countries with which a Stabilisation and Association Agreement has been concluded may participate in the Agency. The potential geographical area within which the Agency may conduct activities is thereby expanded significantly.

According to the Paris Principles, central criteria for a human rights institution are its independence and a pluralistic internal structure.[545] The personal independence of the Agency is achieved, as shown above, by the requirement that independent persons form the Management Board. Yet there is little control over whether the member states actually do appoint independent individuals. With

542. As mentioned above, the Commission originally envisaged that the Agency would also be responsible for fundamental rights in the areas of police and judicial co-operation in criminal matters, but this proposal was blocked by the Council. The compromise reached removed this area from the substantive scope of the Agency's competence, but stipulates that the Council would make another decision on this issue at a later date, Declaration by the Council of 12 February 2007, Council Document 6166/07, 4; on the legal objections against the Agency's jurisdiction in the Third Pillar raised by the German *Bundesrat* Toggenburg G. N. (2007),"Die Grundrechteagentur der Europäischen Union: Perspektiven, Aufgaben, Strukturen und Umfeld einer neuen Einrichtung im Europäischen Menschenrechtsraum", *MenschenRechtsMagazin*, p. 86, p. 99.
543. Toggenburg G. N., 3 EL Rev. (2008), op. cit. footnote 449, 393 ff.
544. See footnote 475.
545. Resolution 48/134 of the UN General Assembly of 20 December 1993, UN Doc. A/RES/48/134, Annex, under the section "Composition and guarantees of independence and pluralism", Nos. 1-3.

respect to operational independence, Article 16(1) of the Regulation mandates the Agency to fulfil its tasks in "complete independence". The greatest restriction on this lies in Article 5(1) of the Regulation, which confers upon the Council of the European Union the competence to adopt a multi-annual framework for the Agency. In this procedure, the Agency only has a consultative role. In order not to overly restrict the Agency's independence within the meaning of the Paris Principles, the multi-annual framework should only lay down an abstractly formulated programme, which allows the Agency considerable autonomy. On the whole, there is a great deal of tension between the "external programming" of the Agency and the criterion of an independent human rights institution.

Establishing networks and the involvement of National Liaison Officers on the ground level help to ensure that the institution is sufficiently pluralistic in nature. In respect of the methods of operation, the Paris Principles foresee a close co-operation with civil society, which is institutionally provided for at the Agency on multiple levels. The institutionalised co-operation with non-governmental organisations and the institutions of civil society in the "Fundamental Rights Platform" is a case in point.[546] As to the plurality of actors involved in the institution's activities, the Agency fulfils the criteria of the Paris Principles.

Thus, in summary, it can be said that the current legal mandate of the Agency does not completely satisfy the Paris Principles' model of an independent human rights institution. The main discrepancies in this regard are the exclusion of the Third Pillar from its active mandate,[547] the missing mandate to pronounce itself *ex-officio* in legislative procedures, as well as its dependence on the European Commission and the Council of the European Union regarding the multi-annual work programme.

3. The agency's possible impact on the constitution of Europe

Fundamental rights are a central element of any constitutional order. The establishment of a specific administrative body for their promotion is likely to have an impact on that order. This is particularly so for the constitutional order of the EU, which is only one element of the overall constitution proposed for Europe.[548] Any development here needs to been seen in relationship with the constitutional orders of the member states, but also the European Convention on Human Rights (ECHR) and its institutions, given their constitutional role. The establishment and operation of the Agency touches upon four fundamental constitutional issues: first, the development of the EU as a guarantor of constitutional principles in the European legal area; second, the relationship between the Agency and the institutions of the ECHR; and third, the impact of its activities on the constitutional autonomy of the member states.

546. Article 10.
547. The Lisbon Treaty should improve the situation, see below.
548. Weiler, footnote 456.

3.1. The EU as a guarantor of constitutional principles in the European legal area

The central argument advanced in the following is that an active EU fundamental rights policy, that is the raison d'être of the Agency, is in line with the constitutional decision taken with reference to the Treaty of Amsterdam to develop the fundamental rights profile of the EU and cultivate it into a guarantor of constitutional principles in the European legal area. The most visible legal manifestations are the insertion of the constitutional principles in Article 6(1) EU (now Article 2 TEU) and of the sanction mechanism in Article 7 EU. By explicitly setting forth the principles of structural compatibility in Article 6(1) EU, the Amsterdam Treaty formulates common constitutional principles for all public authority in the European constitutional area and assigns to the EU the role of their guarantor via Article 7 EU. It has to ensure these normative essentialia throughout the European constitutional area, including the member states.[549] Important legislation in this respect has been enacted, in particular, but not exclusively, under the competence of Article 13 EC (now Article 19 TFEU).[550] Moreover the EU under the legal personality of the EC has become a party of an important UN human rights treaty instrument.[551]

The Charter of Fundamental Rights of the European Union is another key aspect of this constitutional development. The decisions to draft and to adopt the Charter were taken with the purpose of creating specific fundamental rights yardsticks for the EU and thereby further developing the EU as an autonomous polity, rather than simply referring to regional and universal human rights. As the name of the Agency suggests (Recital 9), its establishment was closely linked to the Charter project, providing an administrative component of its promotion and implementation and aiding its visibility towards EU citizens. As mentioned above the Charter has now become binding primary law.

3.2. The agency and the institutions of the ECHR

The ECHR and its institutions, the Council of Europe and the European Court of Human Rights, are part of the proposed constitution of Europe.[552] So far, human rights protection and human rights promotion in the European legal area have been more a task of these institutions than of those of the EU. Accordingly, the Agency needs to be embedded carefully in this overall structure. In the course of the Agency's legislative history it was repeatedly pointed out that the Agency

549. In more detail Bogdandy A. v. (2000), "The European Union as a supranational federation", *Columbia Journal of European Law* 6, pp. 27-54.
550. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L 80/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 302/16.
551. Council Decision of 20 March 2007, CS/2007/7404 (Signing of the UN Convention on the Rights of Persons with Disabilities).
552. See the reference to the ECHR in Article 6(2) EU; Grabenwarter (2008), *Europäische Menschenrechtskonvention,* München, pp. 5-6.

should not duplicate the Council of Europe's work or become an institutional competitor. These concerns have been addressed by the Agency's specific institutional design, for example through the close institutional involvement of the Council of Europe in its management.[553]

In substance, it is illuminating to recollect how the question of the relationship between the ECHR and the Court on the one side and the EU system on the other was resolved in the Charter of Fundamental Rights of the European Union. During its drafting, the question of whether or not the EU needed its own fundamental rights policy had already been discussed. As a result, Article 52(3) of the Charter promotes harmony between corresponding rights in the Charter and the ECHR. At the same time, the paragraph in its second sentence clearly stipulates that "this provision shall not prevent Union law to provide more extensive protection". In this vein, many provisions of the Charter go beyond the human rights set out in the ECHR. Like the member states, the EU is not precluded by its constitutional recognition of ECHR standards in Article 6(2) EU from establishing a higher level of protection than prescribed by the Council of Europe's human rights standards.[554] Moreover, it needs to be stressed that the EU with its Agency differs fundamentally from an international organisation charged with human rights protection. In an increasing number of issues, the EU itself exercises public powers and therefore, like the states, needs to formulate accompanying internal fundamental rights policies.

This did not allay concerns in the Council of Europe. To address them, on 15 July 2008 the Agency and the Council of Europe concluded a co-operation agreement, prescribing in detail how inter-institutional linkages were supposed to be strengthened and how duplication would be avoided.[555] The agreement stipulates as a general principle that co-operation with the Council of Europe shall cover the whole range of the Agency's activities, both present and future.[556] Both institutions shall hold regular consultations, notably regarding the Agency's annual work programme, its annual report, and its co-operation with civil society.[557] The agreement also contains a reciprocal obligation to exchange information and data generated in its activities[558] and foresees the possibility for the Agency to fund specific projects of the Council of Europe.[559] Both institutions are entitled to attend each other's relevant meetings as observers.[560] The detailed provisions aim at complementary institutional practices fostered through intensive co-operation including joint projects. The Agency herewith follows the path beaten by previous constitutional decisions, namely to fully

553. See above.
554. For an extensive discussion of the relationship between the Agency and the Council of Europe, see De Schutter, footnote 519, 530 ff.
555. OJ 2008, L 186/7.
556. No. 6 in the Agreement (OJ 2008, L 186/8).
557. No. 13 (a)-(c) in the Agreement (OJ 2008, L 186/9).
558. Nos. 7-11 in the Agreement (OJ 2008, L 186/8).
559. No. 15 in the Agreement (OJ 2008, L 186/9).
560. No. 4 in the Agreement (OJ 2008, L 186/8).

recognise the important role of the Court in the elaboration and enforcement of European human rights standards by intensively co-operating with Strasbourg, while at the same time moving towards a specific EU fundamental rights policy that effectively ensures that EU institutions themselves respect fundamental rights standards, and which – with regard to the member states – may even go beyond the level of protection granted by the ECHR.

But there is more potential for a mutually supportive relationship, as the Agency might in the long run help to reduce the enormous number of cases which currently overwhelm the Court and has led to a crisis in the Court.[561] In order to reduce the workload of the Court, intensified co-operation between domestic institutions on the one side and the Council of Europe and the Court on the other may be crucial. Among these domestic institutions are first and foremost the courts (including the ECJ), but also domestic bureaucracies, in particular specific institutions such as the Agency. The Agency could follow up on Court cases in which the Court has pointed at structural violations in an EU member state in order to then propose a fine-tuned use of the full panoply of EU instruments for remedying systemic problems. These diverse instruments might even prove to be more effective than those of the Council of Europe, in particular if the Agency co-operates closely with the European Commission and becomes the organising heart of a broader network of human or fundamental rights institutions in Europe. Hence, the Agency might fulfil an important role in facilitating the implementation of standards and decisions that have been produced in Strasbourg, thereby strengthening the constitution of Europe.

3.3. The constitutional autonomy of member states

This leads to a further, most sensitive constitutional issue: the degree to which EU institutions in general and the Agency in particular can monitor and perhaps even challenge member state action on the grounds of alleged violations of fundamental rights. At stake is the constitutional autonomy of the member states, protected by Article 4 TEU, on the one hand, and the EU guarantee of a common standard of fundamental rights protection on the other. It is one of the fundamental premises of European integration to date that the member states remain largely autonomous from the EU in the shaping of national policies for fundamental rights protection,[562] but at the same time the EU has evolved into a guarantor of common constitutional principles.

561. For a thorough analysis and evaluation of strategies on how to cope with the problem see Wolfrum and Deutsch (eds) (2009), *The European Court of Human Rights overwhelmed by applications: problems and possible solutions,* Heidelberg; on the "explosion" in the number of cases, see the Report of the Group of Wise Persons to the Committee of Ministers, Council of Europe – Committee of Ministers Doc. CM(2006)203 of 15 November 2006; as of 12 May 2009, the Council of Europe has adopted Protocol No. 14bis as a recent measure to address the crisis in the Court.

562. Weiler, "Fundamental rights and fundamental boundaries" Weiler, footnote 456, pp. 102-29. This does not preclude that some of the member states may model their fundamental rights autonomously on European standards, Huber (2008), "Offene Staatlichkeit: Vergleich", Bogdandy A. v., Villalón and Huber (eds), *Handbuch Ius Publicum Europaeum, Vol. II,* Heidelberg, § 26 paras. 98 ff.

Article 6 and Article 7 TEU stipulate a role of the EU with respect to the fundamental rights performance of member states.[563] Systemic fundamental rights violations cannot be excluded. A considerable number of indicators demonstrate that the fundamental rights situation in EU member states does not always satisfy European fundamental rights standards. In particular, the treatment of some minority groups, such as the Roma/Gypsy, has in some member states become so critical that even the threshold of Article 7 TEU may have been reached.[564] Given Article 7 TEU, it can hardly be denied that the EU has a competence to monitor the fundamental rights situation in the member states. Yet Article 7 TEU does not provide a competence to the Agency. In this respect, it can only act upon a request by the Council of the European Union.[565] Its autonomous field of monitoring is, however, far narrower. The Regulation states that the Agency "shall deal with fundamental-rights issues … in its Member States when implementing *Community* law". This is even more restrictive than Article 51(1) of the Charter which refers to Community law. Moreover, the focus on "implementation" instead of the broader "within the scope of Union law" wording seems to have been deliberate because such a broader formulation would have clearly also included cases where member states derogated from EU law.[566] Yet in the interpretation of the term "implementing", the more recent jurisprudence of the ECJ needs to be taken into account. The Court states, in reference to a general obligation of the member states, the need to respect fundamental rights in the implementation of Community legislation. Rather than striking down the EU legislation for the violation of fundamental rights, it requires the member states to protect the fundamental rights of its citizens while implementing EU law, taking recourse to the Charter and the jurisprudence of the Court.[567] This has become particularly visible in the challenge brought to Council Directive 2003/86/EC

563. Kühling (2007), "Fundamental rights" in Bogdandy A. v. and Bast (eds), *Principles of European Constitutional Law,* Oxford, p. 501, p. 524 ff.; Ruffert (2007) in Calliess/Ruffert (eds), *EUV/EGV*, (3rd edn) Munich, Article 7, paras. 7 ff.

564. As an example of a violation of fundamental rights found by the Court in this field, see the groundbreaking judgment of the Court of 13 November 2007 on the discrimination against the Roma in the Czech school system: *D. H. and Others v. the Czech Republic*, Grand Chamber, Application No 57325/00; see also the successful complaint alleging violation of the right to housing of, and discrimination against Roma in Greece under the European Social Charter: *Roma Human Rights Centre v. Greece*, Decision of the European Committee on Social Rights of 8 December 2004, Complaint No 15/2003; Wolfrum (1985), "The legal status of Sinti and Roma in Europe; a case study concerning the shortcomings of the protection of minorities", *Annuaire Européen* 33, pp. 75-91; Guglielmo (2004), "Human Rights in the Accession Process: Roma and Muslims in an Enlarging EU" in Toggenburg G. N. (ed.), *Minority protection and the enlarged EU: the way forward,* Budapest, pp. 37-58; De Schutter and Verstichel (2005), "The role of the Union in integrating the Roma: present and possible future", *Edap* 2, www.eurac.edu/documents/edap/2005_edap02.pdf, accessed 1 July 2011.

565. See above.

566. As in the landmark ERT case, Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925.

567. See on this development, Bast "Legal instruments and judicial protection" Bogdandy A. v. and Bast (eds), footnote 466, ch. 10, section II, subsection 3; Kühling (2007), footnote 563.

on the right to family reunification by the European Parliament in 2006.[568] As has been noted by critical voices in the literature, this strategy gives the Court the power to reinterpret legislation and to limit the discretion of member states when implementing Community law on the basis of a fundamental rights-sensitive review.[569] This approach expands the concept of "implementation" and thereby also the possible scope for the Agency's monitoring of member states.

This possible scope of monitoring should not be perceived as a potential further threat to member states' autonomy. In contrast to the ECJ, the Agency functions as an expert network identifying relevant fundamental rights issues with a view to developing and reforming EU legislation. Through ex-ante assessments, data gathering, and independent political advice on fundamental rights implications of EU policies it can even diminish the likelihood that the ECJ will have to engage in wide-ranging ex-post reinterpretations of EU legislation while assessing the fundamental rights implications of the implementation measures in the member states. In this vein, the Agency has been given the competence of providing expertise to interested member states in the context of the implementation of EU legislation upon their request.[570]

There is a lot to say to the view that the Agency should construct a solid database on the fundamental rights situation in the member states and strive for a corresponding European public awareness; in addition it should consolidate the emerging network among the relevant national institutions. Eventually, a European fundamental rights system with significant added value may evolve through structured information and data exchange with the national independent human rights institutions. Monitoring of member states in this sense does not imperil the constitutional autonomy of member states.

This conclusion is not to suggest that the Agency should primarily monitor the member states. The EU's legislation and administration itself have increasing relevance for fundamental rights. In the EU's complex inter-institutional negotiating procedures fundamental rights issues have not always been well represented and defended. The Agency offers an opportunity to counter this deficit and to further fundamental rights promotion. The Council of the European Union's request for a preliminary draft opinion on the draft framework decision on the use of Passenger Name Records for law enforcement purposes mentioned above points in the right direction.

568. Case C-540/03 *European Parliament v. Council* [2006] ECR I-5769; see for this tendency also Case C-305/05 *Ordre des barreaux francophones et germanophones and Others v. Council* [2007] ECR I-5305.
569. On this problem, Huber (2008), "Unitarisierung durch Gemeinschaftsgrundrechte – Zur Überprüfungsbedürftigkeit der ERT-Rechtsprechung", *Europarecht* 2, p. 190; Masing (2006), "Vorrang des Europarechts bei umsetzungsgebundenen Rechtsakten", *Neue Juristische Wochenschrift* 5, p. 264.
570. Declaration by the Council of 12 February 2007, Council document 6166/07, 4.

Conclusions and outlook

The creation of the Agency represents an institutional acknowledgement that the EU, at the dawn of the last century, embarked on the journey of an EU-specific fundamental rights policy. It has to be understood in the context of the development of an outright political union, of the transition of central and eastern European states from autocratic rule to democracy, and of new competences in fundamental rights-sensitive policy areas. Although the Court moved towards a more fundamental rights-sensitive jurisprudence, no institutional mechanism was in place to independently and specifically assess possible fundamental rights implications of EU policy. Moreover, new competences in the fundamental rights field added to the need for EU institutions to have reliable data on the fundamental rights situation in the member states. Sometimes member states were either not in a position or not willing to deliver the necessary data. But different standards of data gathering, too, made it impossible to compare and analyse the available information. A further task that could not be satisfactorily accomplished by the existing institutional set-up was the co-ordination of EU policy with human rights institutions in the member states, the Council of Europe, and the universal institutions in the human rights field. Throughout this contribution the Agency has been seen as an answer to these perceived needs.

As regards the current legal basis and institutional structure of the Agency, the most important conclusions drawn in this article are: even though the Agency is conceived as an EU information agency, it enjoys a particular status by the references to the UN model of an independent human rights institution in line with the Paris Principles. Unfortunately, the current Agency can only to a limited extent satisfy the prerequisites of the UN model. The main discrepancies are the missing mandate to pronounce itself *ex-officio* in legislative procedures, as well as its dependence on the European Commission and the Council of the European Union regarding the multi-annual work programme. Furthermore, the founding Regulation does not actively embed the Agency's activities in the universal human rights discourse.

The entry into force of the Lisbon Treaty had a considerable impact on the Agency. Given that the basis for the Agency's work is the Regulation and not primary law, the effect of the Lisbon Treaty on the Agency is being mediated by the Regulation. Most importantly, the entry into force of the Lisbon Treaty brings police and judicial co-operation in criminal matters into its remit. This "reform treaty" moved this policy field from the Treaty on European Union to the Treaty on the Functioning of the European Union (Article 67 et seq.), which is the amended EC Treaty. Article 3 of the Regulation on the scope of activities refers to the "Treaty establishing the European Community", which, after the entry of the Lisbon Treaty, includes that policy field. One could only argue in favour of a continuing exclusion of this policy field if Article 3 were to be interpreted as a static reference to the EC Treaty as it stood in 2007. Yet, the normal form of reference within a legal order is a dynamic one, and there are no indications that this

rule should not apply here. Recital 32 of the founding Regulation also reflects a dynamic understanding of the issue of competence by stating that "nothing in this Regulation should be interpreted in such a way as to prejudice the question of whether the remit of the Agency may be extended to cover the areas of police cooperation and judicial cooperation in criminal matters."

Finally, on the more abstract level of EU scholarship, this article aims to contribute to the development of an EU administrative law of fundamental rights protection and promotion. The protection and promotion of rights by independent administrative institutions is relatively new and only slowly being discovered by legal scholarship.[571] Experience at the national level so far has shown that such institutions – even without quasi-judicial authority – can provide an effective contribution to the implementation of fundamental rights. At the same time it is beyond question that human or fundamental rights promotion by independent administrative institutions, as foreseen by the UN Paris Principles, cannot replace judicial review. It is designed to be a supplemental administrative element. As such, it carries a potential that deserves to be further explored both in practice and theory.

571. Gusy (2008), "Grundrechtsmonitoring. Grundrechtsdurchsetzung außerhalb gerichtlicher Instanzen", *Der Staat* 47, p. 511, 522 ff.; with a comparative law survey: Aichele (2003), footnote 451.

The national level (examples)

Combining abstract *ex ante* and concrete *ex post* review: the Finnish model

by Kaarlo Tuori[572]

1. Finland's constitutional development during the last 20 years is a Northern expression of the wave of "new constitutionalism" – or "world constitutionalism", as it has also been called – which in recent decades has swept around the globe. The new constitutionalism has encompassed even European countries – such as the Nordic democracies of Sweden and Finland, or the UK with the enactment of the Human Rights Act 1998 – which have not been confronted with a similar constitutional *Vergangenheitsbewältigung* as the former totalitarian states. The most recent manifestation of new constitutionalism is the establishment of concrete *ex post* review of legislation in France, where legislative supremacy has, ever since the French Revolution, been ideologically propped up by the Rousseauian notion of legislation as the untouchable expression of the "general will". In Finland, the milestones in the constitutionalisation of its legal order and legal system are the ratification and incorporation into domestic law of the European Convention on Human Rights (ECHR) in 1990; the reform of the Bill of Rights of the Constitution of Finland in 1995; and the new Constitution of Finland of 2000 which introduced *ex post* constitutional review of legislation.

The immediate backdrop to constitutionalisation in Finland, as in many other western European countries, too, lies in the Europeanisation of the legal system, a two-pronged process with a human rights and an EC/EU legal dimension. The European Court of Human Rights not only complements national review mechanisms but has also provided an inducement to their development. Thus, even critics of constitutional review might prefer national over transnational control, and considerations of national sovereignty are likely to have played their part, not only in the incorporation of the ECHR into the domestic legal order, but also in the adoption or strengthening of institutionalised constitutional review in those western European countries which have traditionally clung to the doctrine of legislative supremacy, such as the UK or France. The Community law system of preliminary rulings, in turn, was designed after the German and Italian model of *ex post* concrete constitutional review, with the Luxembourg Court in the role of the guardian of "higher" law. An integral element in the constitutionalisation of Community law was the assumption by the Court of Community law's direct

572. Professor of Jurisprudence, University of Helsinki, Speaker of the Centre of Excellence of Helsinki, Member of the Venice Commission (Finland).

effect and supremacy over conflicting domestic law. The upholding of these principles falls not only to the Luxembourg Court but also to national courts, which, in case of a contradiction, are supposed to give preference to Community law. Such powers of reviewing acts of the legislature in the light of Community law have presumably levelled the ground for the introduction of a national system of *ex post* constitutional review in such (former?) bastions of legislative supremacy as the UK and France, as well as – we may add – Finland.

2. Before discussing the Finnish model of constitutional review, let me briefly present my position on the general justifiability of external constitutional review of legislation. My stance is that of a moderate critic: I subscribe to what might be termed a "last-resort defence of constitutional review", but I also concede the relevance of critical standpoints to stake out the limits of justifiable review.

From its early beginnings in late 18th-century USA, constitutional review and judicial supremacy have been accompanied by critical debates on the review's overall justification and legitimate limits. The global trend of new constitutionalism has entailed the globalisation of the controversies over constitutional review. Not only in the USA but in many other countries around the globe as well, "judicialisation"[573] and the ensuing "courtocracy" or "juristocracy"[574] have come under attack. The criticism, of course, displays variation, depending on the particular type of review the critic is focusing on. However, there are common themes, too, which Jeremy Waldron discusses in a representative way. He construes his case on certain background assumptions and concedes that if these fail, his argument may not hold either. He makes four assumptions. We are dealing with a society with:

- democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage;
- a set of judicial institutions, again in reasonably good order, set up on a non-representative basis to hear individual lawsuits, settle disputes, and uphold the rule of law;
- a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights;
- persisting, substantial, and good faith disagreement about rights (that is, about what the commitment to rights actually amounts to and what the implications are) among the members of the society who are committed to the idea of rights.[575]

Waldron backs his case with two arguments, which are familiar from other critical interventions as well. First, judicial review tends to obscure the real

573. Shapiro M. and Stone Sweet A. (2002), *On law, politics, and judicialization*, Oxford University Press, Oxford.
574. Hirschl R. (2007), *Juristocracy*, Harvard University Press, Cambridge, Mass./London.
575. Waldron J. (2006), "The core of the case against judicial review", *Yale Law Review* 115, pp. 1346-407.

issues at stake when citizens hold diverging views about rights and to focus on "side-issues about precedents, texts, and interpretation". This might be called juridification of rights-issues. Second, judicial review is illegitimate from a democratic point of view. Waldron says that "by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights".[576] This is the famous "counter-majoritarian difficulty".[577]

I am not wholly convinced by Waldron's argument. If we enlarge our definition of democracy from the majoritarian principle in the direction of a deliberative conception, no a priori obstacles exist to even constitutional adjudication being surrounded by critical debates and thus acquiring democratic traits; to consider adjudication as somehow necessarily undemocratic is simplistic and one-sided. Another problem in Waldron's argument relates to his background assumptions, which tend to exclude such rights violations that defenders of constitutional review have in mind and that in their view constitute the legitimate object of review. Even in a "healthy", functioning democratic *Rechtsstaat* – among which I would like to include Finland – individual cases can appear where the need for constitutional review is apparent. Waldron does not really address the defence of constitutional review to which I would like to subscribe and which I call the last-resort argument.

When arguing for his case against judicial review, Waldron alludes to controversies, such as those surrounding abortion, which have a conspicuous ethical or moral nature and where the policy aspect, that is, the instrumentalist dimension of practical reason, plays a secondary role. When a court strikes down legislation pertaining to such issues, it does not invalidate the legislature's policy choices but, rather, its ethical or moral standpoints. If the lawmaking procedure has already included ethical and moral deliberations and if the legislature has explicitly based its decision on ethical or moral grounds, the last-resort argument for constitutional review does not justify the court's intervention.

Abortion cases may be the most heatedly discussed instances of constitutional review but treating them as paradigmatic examples might be ill-advised. Most legislative projects aim at policy goals and pursue economic or social policies, security objectives, and suchlike. In standard cases, the legislative motive is of a primarily pragmatic nature, and moral and ethical considerations play merely the role of side-constraints; the relation of pragmatic to ethical and moral aspects is exactly opposite to their respective significance for the law on abortion. It is such standard cases that the last-resort argument addresses.

The concerns about democracy and politicisation of adjudication are warranted and caution against constitutional review's overstepping its legitimate

576. Ibid.
577. Bickel A. (1962), *The least dangerous branch*. New York.

boundaries, and reversing explicit policy or value choices of the legislature. They do not, however, deliver a fatal blow to justifiable judicial review but serve merely as a reminder of its limits. Equally relevant is the threat of juridification of politics which can ensue from an overly "thick" interpretation of the constitution. Attempts to nail down controversial policy or value choices in constitutional interpretation are prone to restrict the freedom of democratic political deliberation and decision making. One should also be aware of the dangers of ossified constitutional doctrine. Nevertheless, the juridification argument should not be allowed to obscure the positive role doctrine plays in ensuring the consistency and controllability of constitutional adjudication. In constitutional law, just as in other fields of law, doctrinal constructions are needed but they should not be allowed to petrify into ideological formations which obstruct, rather than facilitate, the framing of the relevant issues.

3. Debates on constitutional review are usually centred on three basic constitutional models: the US model of diffused judicial review; the German centralised model of a constitutional court; and the (pre-1998) British model of parliamentary supremacy which does not accept external review of parliamentary legislation. Although the case against judicial review, based on the countermajoritarian difficulty or the democracy argument and juridification of rights-discourse, is claimed to have a more general reach, it has primarily been based on the US experience. Nonetheless, similar concerns have been made in the criticism of the German model. Critics see in its constitutional court a third legislative chamber, which has not been content with the role of Hans Kelsen's negative legislator but has developed into a most significant positive legislator.[578]

The German model has attained global fame as an alternative to US-type constitutional review. But it is important to note that post-Second World War development has brought about novel, intermediary, or hybrid forms which cannot be attached to either the German and American models or the model of legislative supremacy. These are often ignored, although they can be understood as experiments that concede the principal need of constitutional control but attempt to avoid the problematic consequences of which the critics have warned us. This holds for the innovations that Stephen Gardbaum has gathered under the label "new Commonwealth model of constitutionalism".[579]

I would also include the Finnish system of constitutional review in the novel hybrid forms. As regards *ex post* constitutional review of legislation, Finland – in line with other Nordic countries – has opted for the diffused or decentralised model of the US. The uniqueness of the Finnish system lies in its particular combination of abstract *ex ante* and concrete *ex post* review.

578. Kelsen H. (1929), "Wesen und Entwicklung der Staatsgerichtsbarkeit", *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* 5. Berlin/Leipzig, pp. 30-123.
579. Gardbaum S. (2001), "The new Commonwealth model of constitutionalism", *American Journal of Comparative Law* 49, pp. 707-60.

In the Finnish democracy, just as in other Nordic countries, parliament has traditionally enjoyed a very prominent status, also vis-à-vis the courts. Its elevated position has been manifest in, for instance, the high ranking of *travaux préparatoires* in the hierarchy of legal sources: higher than that of precedents of the supreme courts. Before the constitutional reform of 2000, the Finnish system did not allow for any *ex post* control by courts of the constitutionality of parliamentary legislation. The control of constitutionality consisted exclusively of abstract *ex ante* review, exercised by the Constitutional Law Committee of the Parliament of Finland.

The Constitutional Law Committee is a peculiar quasi-judicial body. Like other committees, it is composed of members of parliament and displays a political character. But its deliberations are based on the opinions given by constitutional experts – mostly university professors – and, as a rule, the Committee abides by their view. In their adherence to a legal rather than political pattern of argumentation, reports of the Committee are notably different from those of other parliamentary committees. For instance, reports routinely invoke constitutional precedents as settling the issue at hand, although by no means has the Committee bound itself to a strict doctrine of *stare decisis*. The experts of the Committee do not have any official status, nor is their role even mentioned in the Constitution of Finland or the rules of procedure of parliament. Still, it is quite decisive, and it is hardly conceivable that the Committee would depart from a unanimous expert view. If there is diversity among expert opinions, the political stance of the members has more leeway and voting reflecting the government/opposition division occurs, although relatively seldom.

Although the Committee belongs to the institutional organisation of parliament, its deliberations are not part of the regular parliamentary procedure. It is only called on when doubts about the constitutionality of a bill have been raised. In contrast to the abstract *ex ante* review by many constitutional courts or such a quasi-court as the French *Conseil constitutionnel*, the Committee has not been turned into an instrument of political opposition. On the contrary, in standard cases it is the government which, in the bill it submits to parliament, advises the latter to consult the Committee. The initiation of constitutional review very rarely causes political controversies. The Committee's assessment is binding on parliament. However, ever since the 19th century, an essential feature of the Finnish model has consisted in parliament's power to override the Committee's ruling through a statute of exception: a bill which the Committee has found to be unconstitutional can still be enacted in the qualified procedure required for amending the constitution.

The new Constitution of Finland of 2000 did not bring about any formal changes to the *ex ante* control through the Constitutional Law Committee. The major novelty was the introduction of concrete *ex post* control. Article 106 of the Constitution of Finland states that "if in a matter being tried by a court, the application of an Act would be in evident conflict with the Constitution, the court of law shall

give primacy to the provision in the Constitution". Nonetheless, it would be hasty to conclude that Article 106 has introduced a radical break in Finnish constitutional tradition, a decisive transition from the *ex ante* control of the Constitutional Law Committee in the direction of judicial *ex post* review. Courts have only been entrusted with a weaker form of strong judicial review: they have the power, not to declare a piece of legislation null and void, but merely to set it aside in the case at hand. As was explicitly emphasised in the *travaux préparatoires* to the new constitution, the primary means for the courts to contribute to its implementation remains their duty to construe statutes consistently with constitutional provisions. The *travaux préparatoires* stressed the primacy of *ex ante* control under the new constitution, too. Correspondingly, in its only ruling appealing to Article 106, the Supreme Court of Finland stated that "the control of the laws' constitutionality falls mainly to the Constitutional Law Committee, which in the legislative process exercises *ex ante* supervision".[580] It may well be that in practice, the major alteration, induced by the availability of concrete *ex post* control, will be more thorough *ex ante* monitoring. And indeed, the Constitutional Law Committee's workload, as measured by the number of its reports, has significantly increased after the basic rights reform of 1995 and the entering into force of the new constitution in 2000.

In the *travaux préparatoires* to the new constitution, the primacy of *ex ante* review was anchored in the requirement of an evident conflict established by Article 106. If the Constitutional Law Committee, in its *ex ante* review, has explicitly stated that the controversial statute is not in breach of the constitution, it is hardly conceivable that a court could find an evident conflict with a constitutional provision.

Parliament's power to override the Constitutional Law Committee's ruling bears a resemblance to the Canadian notwithstanding clause. In the decades preceding the constitutional reforms of 1995 and 2000, some constitutional scholars criticised statutes of exception for weakening the protection of basic rights and for transforming *ex ante* constitutional review into a merely formal assessment of the legislative procedure to be followed. Indeed, the number of statutes of exception diminished considerably even before the constitutional reforms of 1995 and 2000. According to the *travaux préparatoires* to the new constitution, statutes of exception should be resorted to very sparingly, as a rule only when they are needed for incorporating an international treaty or some other obligation of international law. Statutes of exception have lost most of their previous significance, and when finding a conflict with the constitution, the Constitutional Law Committee no longer contents itself with pronouncing on the procedural question, but indicates how the bill should be amended in order to remove the conflict.

580. KKO 2004: 26, Advance Decision of the Supreme Court of Finland, www.finlex.fi/fi/oikeus/kko/kko/2004/20040026 accessed 1 July 2011.

In sum, through the central role of the Constitutional Law Committee the Finnish model of constitutional review has retained a notable parliamentary label. The judiciary has not acquired the dominant role of the US and German models, which has been attacked by critics, but accomplishes merely a complementary function. Still, signs of judicialisation and juridification of politics are detectable in the Finnish development as well. After all, the Constitutional Law Committee represents a quasi-judicial element within the legislature, and its increased significance may result in a certain juridification of legislative politics. In the governmental bills submitted to parliament, an augmentation of references to constitutional basic-right provisions is visible. This reflects a heightened awareness of basic rights in legal and political culture and, hence, can in principle be deemed a positive phenomenon. Nevertheless, the danger of juridification inherent in this development should not be ignored either.

(4) The criterion of an evident conflict with the constitution as a presupposition of the courts' power to set aside a parliamentary law fulfils other important functions as well as establishing the primacy of the *ex ante* review exercised by the Constitutional Law Committee. Thus, with this criterion, explicitly spelled out, the Finnish and Swedish constitutions have, as it were, positivised the plea for judicial restraint. Related to the general requirement of judicial restraint, the criterion of an evident conflict entails the primacy of interpretive means to avoid contradictions with the constitution. Accordingly, the *travaux préparatoires* to the bill of rights of 1995 and the new constitution of 2000 stressed the courts' obligation to construe statutes consistently with the constitution. This obligation connects the Finnish model to such examples of the new Commonwealth model of constitutionalism as the New Zealand Bill of Rights and the UK Human Rights Act 1998, which also are premised on the primacy of interpretive tools.

In Germany, the alleged danger of politicisation of adjudication and juridification of politics – a development which has been characterised as a "transition from a parliamentary legislative state to a constitutional-court state"[581] – has been related to particular doctrines, adopted by the Federal Constitutional Court of Germany: basic-rights norms as legal principles; the horizontal effect of basic-rights norms (*Drittwirkung*); and the state's protective duty (*Schutzpflicht*). In connection with the 1995 reform of the constitutional bill of rights, these doctrines made their entry into Finnish constitutional law, too. However, the evident-conflict clause restrains their impact. Thus, invoking this clause, it can be argued that it is up to the legislator, and not the courts, to decide on basic rights' direct horizontal effect in the relationships among private subjects. This holds both for the traditional *Rechtsstaat* function of liberty rights as a bulwark against the arbitrary exercise of power and for their role as general legal principles with potential consequences in every field of law. A statute's alleged negligence of

581. Böckenförde E.-W. (1991), *Übergang vom parlamentarischen Gesetzgebungsstaat zum verfassungsgerichtlichen Jurisdiktionsstaat*, p. 190.

basic rights' horizontal effect could hardly be warranted to amount to an evident conflict with the constitution.

Originally, the criterion of evident conflict was borrowed from the Swedish constitution. At present, constitutional reform is under deliberation in both Sweden and Finland. Voices have been raised in favour of abolishing this restriction on *ex post* constitutional review. However, as I have argued, it implies important normative messages which have lost nothing of their pertinence.

Processes of definition and development of human rights besides popular sovereignty: a comment

by Richard Clayton[582]

Although I know rather less about the structure protecting human rights in Finland than I should do, Kaarlo Tuori's paper helps to emphasise how diverse the systems we have put in place in various Council of Europe countries to maintain human rights are.

One of the principal themes that generated argument during this UniDem seminar was whether the judicial protection of human rights is in conflict with the idea of popular sovereignty (as embodied in the democratic process). However, it seems to me that some of the papers have overstated the position and there are two brief points I want to make.

First, it is not difficult to achieve human rights protection which does not trespass on the legislative prerogatives, as the UK Human Rights Act 1998 (HRA) demonstrates. Secondly, the suggestion that the democratic system protects oppressed minorities so as to make redundant judicial remedies for human rights breaches is, on analysis, very hard to sustain.

As is well known, the fundamental legal principle and political fact which runs through British constitutional law is the idea that no act of the sovereign legislature (comprising the Queen, the House of Lords, and the House of Commons) could be invalid in the eyes of the courts, that it is always open to the legislature, so constituted, to repeal any legislature whatsoever and that no parliament could bind its successors.[583] The traditional formulation of parliamentary sovereignty now needs modification to reflect the UK's membership of the European Community[584] and the idea that it is the courts themselves who police the doctrine.[585]

Nevertheless, the principle of parliamentary sovereignty is critical to the constitutional settlement that led to the enactment of the European Convention on Human Rights (ECHR) via the HRA. Under the HRA the courts have no power to

582. QC, Barrister, Associate Fellow at the Centre of Public Law, University of Cambridge, United Kingdom.
583. Wade, W. (1955), "The basis of legal sovereignty", *Cambridge Law Journal* 13, Issue 2, pp. 172-197: 174.
584. See *R v. Secretary of State for Transport, ex p Factortame Ltd (No. 2)* [1990] ECRI-2433.
585. See *R (Jackson) v. Attorney General* [2006] 1 AC 262, particularly, Lord Steyn at para. 102 and Lord Hope at para. 107.

override parliament or to strike down statutes. Instead the courts have a power under section 3 of the HRA to interpret legislation so far as possible to be compatible with ECHR rights. As Lord Nicholls stressed in *Ghaidan v. Godin Mendoza*, section 3 has an unusual and far-reaching character; it may require the court to depart from the unambiguous meaning that legislation would otherwise bear.[586] If, however, the conflict between a statutory provision and an ECHR right cannot be overcome, the court has the power to make a declaration of incompatibility.[587]

The upshot is that the courts can defeat legislative intent either by a strained statutory interpretation or by making a declaration of incompatibility. But parliament retains the last word. Unlike the US Supreme Court, whose views on constitutional rights can only be overturned by a complex process of constitutional amendment, it is always open to the British legislature to reverse the decisions of the courts under the HRA. As a result, the principle of parliamentary sovereignty has been preserved; the HRA avoids the spectre of judicial supremacism which the American system has created.

No doubt all of us benefit from sharing different experiences of how human rights can be carried into effect by domestic legislation. But the HRA provides a model to show that there is no necessary conflict between the courts and the legislature over human rights.

I next want to say something about an assumption made by some of the papers that criticise the role of the courts for allegedly usurping democratic functions by adjudicating on human rights. Of course the HRA (like all human rights instruments) has been used to good effect by powerful and wealthy elites; it is difficult to see how any mechanisms can be created which overcome or prevent this phenomenon.

But I think that the value of providing human rights which are enforceable by the courts has a deeper importance. The principal beneficiaries of human rights are the politically dispossessed: minorities, gypsies, prisoners or suspected terrorists, and so on. They have no stake in the political process because there seldom are any votes for politicians who champion their cause.

Take, for example, the important Grand Chamber decision in *A v. United Kingdom* which decided that suspected terrorists had an irreducible fairness right to see the case against them which is said to justify their detention.[588] Although it would be reminiscent of Kafka's *The Trial* to subject any detainee to such treatment, it is simply inconceivable that such fairness rights would be expressly enacted by parliament. In fact, the House of Lords rejected this principle when

586. [2004] 2 AC 557, para. 30.
587. Under section 19 of the HRA.
588. Judgment of 19 February 2009.

it was argued before it – until prompted by the Strasbourg Court,[589] underlining why international courts have such a vital residual role in protecting human rights.

589. *Secretary of State for the Home Department v. MB* [2005] 2 AC 738, in which three of the four Law Lords making up the majority favoured remitting the case to the first instance court for reconsideration (Baroness Hale, Lord Carswell, and Lord Brown); only Lord Bingham took the view that the concept of fairness "imports a core, irreducible minimum of procedural protection" involving disclosure to the controlee of the thrust of the case against him: see paras 41 and 43. However, following the Grand Chamber decision, a panel of nine judges in the House of Lords adopted Lord Bingham's approach: see *Secretary of State for the Home Department v. AF (No 3)* [2009] 3WLR 74.

Judicial review as a substitute for not yet constituted instances of popular sovereignty

by Peter Paczolay[590]

1. Development of human rights?

These papers focus on the definition and development of human rights. The topic addressed in this paper is the relationship between sovereign lawmaking and the judiciary. I have the feeling that we presuppose that human rights are developing, indeed. I am afraid that the reality is more pessimistic. Although I admit that there is a clear historical tendency of the development and proliferation of human rights, the beginning of the 21st century marks a crisis and decline in the protection of human rights. Among the causes of this decline one can mention the inability of the international community to respond effectively to mass violations of human rights. Another trend redefines the hierarchy of human rights, and in order to protect human dignity and to fight different forms of hatred, both at international and national level classical political liberties as freedom of speech are being restricted.

The legitimacy of judicial review as an anti-majoritarian institution spreads from the presumption that judicial review contributes to a higher level of protection of human rights. As so appropriately put by US Supreme Court justice Robert Jackson:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's rights to life, liberty, and property, to free speech, a free press, freedom of worship and assembly may not be submitted to vote; they depend on the outcome of no elections.[591]

However, the positive role of judicial review is not approved sociologically; judges might contribute to the development of human rights, and sometimes might erode them.

2. From "the mouth of the law" to "government by judiciary"

The classical approach to the role of the judiciary is based on:

– the separation of powers that reduces the role of the judiciary to the application of laws, especially in civil law countries, as formulated by Charles

590. President of the Constitutional Court of Hungary, Member of the Venice Commission (Hungary).
591. *West Virginia State Board of Education v. Barnette*, 319 US (1943) 624, 638.

Montesquieu, who characterised a judge as the mere "mouth of the law" (*bouche de la loi*);

– the division of politics and law, namely that political decision-making pertains to the organs of popular sovereignty (representative and/or direct democracy), separated from the world of law.

However, the presumption of this strict dichotomy has been challenged at least since the 1920s, when the concept and accusation of "government by judiciary" was born. The legal realism that became very influential in the US during the 1930s also contributed to the new view of judicial activity. Hans Kelsen remarked as early as 1926 that judicial decisions are not simply about declaring the law and accenting the legislator's will. Judges, when interpreting the law in a judicial decision, create individual legal norms.[592]

The problem of political and judicial decision-making is even more complicated in the case of judicial review. Judicial review, at its inception in the American experience, was understood as the tension between higher law and popular sovereignty. American political and legal thought of the 18th century developed two concurring theories: that of fundamental law as a higher law; and the will-of-the-people concept of popular sovereignty. American constitutionalism developed in the interaction of the two values, popular sovereignty and rule of law. The two values are embodied in the political departments and the judiciary, respectively: "popular sovereignty suggests will; fundamental law suggests limit."[593] Popular sovereignty might be exercised in different ways, either directly or by the representatives of the people.

The Venice Commission has recently in an *amicus curiae* brief explained the meaning of popular sovereignty:[594]

> It is evident that in a constitutional State the idea of a power which does not face limitations and obligations based on the Constitution cannot be accepted. The sovereignty of the people established in the framework of a constitutional legal system cannot be mistaken for the constituent power and it is perfectly compatible with popular sovereignty to require that its exercise has to follow specific procedures … The sovereignty of the people is a very general principle which becomes operational through the more specific provisions of the Constitution and cannot be used to set aside these provisions.

The limited role of the judiciary compared to the "political" branches underwent dramatic changes during the 20th century, and the general accusation was

592. Kelsen H. (1926), *Grundriss einer allgemeinen Theorie des Staates*, Rohmer, Wien.
593. McCloskey R. (1960), *The American Supreme Court*, University of Chicago Press, Chicago, p. 12.
594. Draft *Amicus Curiae* Brief for the Constitutional Court of Albania on the Admissibility of a Referendum to abrogate Constitutional Amendments, CDL(2009)030.

raised against judges under the label of "government by judiciary", formulated first by Edouard Lambert in 1922.[595]

3. Judiciary and democracy

The basic tension between judicial review and democratic theory is the countermajoritarian character of the former. As clearly formulated in the above citation, judicial review limits the will of the people. However, the extension of judicial review and the growing importance of constitutional courts overstepped those boundaries that Kelsen, the father of the European model of judicial review, attributed to this delicate institution.[596] European judicial review did not remain within the boundaries of the negative legislator, but often prescribes positive rules for the legislator or the ordinary judge. Moreover, it became clear that judges routinely participate in the formulation and implementation of public policies, thus responding to social demands.[597]

The orthodox understanding of the dichotomy of politics and law was exceeded in the late 1950s. The paper that Robert Dahl presented at the Role of the Supreme Court Symposium and published in 1957[598] opened the way to a dramatically new approach to the political role of judges. Dahl proved the thesis that the US Supreme Court is not only a legal institution but "it is also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy."[599] Dahl approved his thesis by sociological analysis, and argued in a convincing way that the US Supreme Court often must choose among controversial alternatives of public policy by appealing to at least some criteria of acceptability on questions of fact and value that cannot be found or deduced from precedent, statute, and constitution.[600] These alternatives sometimes reveal severe disagreements in society, as in segregation, economic regulation, or later, abortion cases. Dahl also made clear that the US Supreme Court's manoeuvring between majority criterion and the criterion of Right or Justice might: (1) accord with a minority against the majority; (2) accord with the majority; or (3) accord with one minority against other minorities. Doing all this the US Supreme Court can either promote certain policies, or delay them.

A few years later, Gabriel Almond described a functional approach of governmental activities, whereby governmental "output" functions consist of the rule-making, rule-application, and rule-adjudications functions. According to

595. Lambert E., (1922), *Le gouvernement des juges et la lutte contre la legislation sociale aux Etats-Unis*, Giard, Paris.
596. Kelsen H., "La garantie jurisdictionnelle de la Constitution (La justice constitutionelle)", *Revue de droit public et science politique*, XXXV, pp. 197-257; Gruyter W. de (1929), *Wesen und Entwicklung der Staatsgerichtsbarkeit*. Berlin/Leipzig.
597. Becker T. (1970), *Comparative judicial politics*, Rand McNally, Chicago.
598. Dahl R. A. (1957), "Decision-making in a democracy: the Supreme Court as a national policy-maker", *The Journal of Public Law*, 6, p. 280.
599. Ibid., 279.
600. Ibid., 281.

Almond, the structures of government are multi-functional. This means that rules are made by civil servants and judges as well as by legislatures; rules are applied by the courts as well as by the executive; and judgments are made by civil servants and ministers as well as by judges.[601] The functional doctrine of separation of powers replaced the pure theory of separation of powers. Taking the example of the courts, a judge, when dealing with a case, exercises all three functions.[602]

Dahl himself returned to the subject and repeated some of his earlier findings. He called the role of judges exercising judicial review "quasi guardianship":

> If fundamental rights and interests cannot be adequately protected by means consistent with the democratic processes, then the remaining alternative is to ensure their protection by officials not subject to the democratic process. Because these officials would make their decisions within the context of a generally democratic system, yet would not be democratically controlled, they might be called quasi guardians.[603]

Taking into account American and comparative experience, Dahl formulated some noteworthy remarks. First, he noticed an inverse ratio between the authority of the judges as quasi guardians and the authority of the people (*demos*) and its representatives. The more competences judges have, the less space is left for the *demos*. The first rule is thus as follows: "The broader the scope of rights and interests subject to final decision by the quasi guardians, the narrower must be the scope of the democratic process."[604]

Moreover, the power of the quasi guardians is not merely negative: a court may find it necessary to go beyond mere negative restraints and attempt to lay down positive policies. So the second rule: "The broader the scope of the rights and interests the quasi guardians are authorized to protect, the more they may take on the functions of making law and policy."[605]

4. Popular sovereignty and individual rights in the framework of judicial review

Judicial review may either act against popular will (or majority rule) or substitute it. The concept is based on the idea that the defence of human rights is expanding and growing. Judges decide instead of politicians – to put it in the simplest way.

Thus judicial review does not limit popular will but substitutes it as a forerunner of future political decisions. A key example was *Brown v. Board of Education* in 1954, which declared racial segregation unconstitutional. Another decade was

601. Almond G. A. and Coleman J. S. (1960), *The politics of developing areas*, Princeton, pp.16-17.
602. Vile M. J. C. (1967), *Constitutionalism and the separation of powers*. Clarendon, Oxford, p. 318.
603. Dahl R. A. (1989), *Democracy and its critics*, Yale University Press, New Haven, p. 187.
604. Ibid.
605. Ibid., p. 189.

needed for the legislator to enact the Civil Rights Act (1964). *Roe v. Wade* in 1973, legalising abortion, is another example of a judicial decision that went against the popular will. Similar examples from the jurisprudence of European constitutional courts illustrate how the judiciary responded to questions and social needs that the legislator or other beneficiaries of the popular will were not able to answer adequately.[606]

In present-day European democracies the legislative and executive powers (the latter being controlled by the parliamentary majority) form a "power bloc", against which the one and only counterbalance is judicial review.

5. Some Hungarian examples

The constitution determines those political decisions that are antecedently likely to reflect prejudices and other negative preferences of the majority at any given time. It removes these decisions from the purview of majoritarian political institutions altogether. In Hungary it is within the competence of the constitutional court to review the constitutionality of legal norms with special consideration given to the protection of fundamental rights.[607] Therefore the court is authorised to pass constitutional decisions when what is at stake is whether some legal provisions passed by a majority vote violate fundamental rights, with special emphasis on the principle of equal human dignity.

In the very first year of constitutional adjudication the decision on capital punishment signalled the significance of constitutional review and shocked an unprepared parliament and public. The court declared capital punishment unconstitutional and abolished it. The reasoning of the court was rather summary, and the justices enlarged upon their own theories in concurring opinions. Nevertheless, it is clear that the court analysed the connection of the right to life and the right to human dignity and declared them inviolable.[608] This reasoning was subsequently taken up by the constitutional courts of South Africa,[609] Lithuania,[610] Albania,[611] and Ukraine.[612]

The realm of personal data protection was another example of the Constitutional Court of Hungary's effort to modernise various spheres of legal regulation even

606. Sweet A. S. and Brunell T. L. (1998), "Constructing a supranational constitution: dispute resolution and governance in the European Community", *American Political Science Review* 92, No. 1, pp. 63-81.
607. The jurisdiction and the functions of the Constitutional Court are regulated in Article 32/A of the Constitution and in Act No. 32 of 1989 on the Constitutional Court, available at www.mkab.hu/en/enpage5.htm.
608. See the English translation of the decision on capital punishment in Sólyom L. and Brunner G. (eds) (2000), *Constitutional democracy. The Hungarian Constitutional Court*, University of Michigan Press, p.118.
609. *The State v. T. Makwanyane and M. Mchunu*, CCT/3/94, Judgment of 6 June 1995.
610. Case No. 2/98. Judgment of 9 December 1998.
611. Case No. 65. Judgment of 10 December 1999.
612. Case No. 11-rp/99. Judgment of 29 December 1999.

against the will of the parliamentary majority. In 1991 the court invoked the right to informational self-determination and declared unconstitutional the unrestricted use of the uniform Personal Identification Number (PIN) system. It also set a deadline for the legislature to modify the system according to the requirements set out in the decision.[613]

The same progressivist urge that the court exhibited in the case law on data protection also lay behind its decision to enforce the recognition of same-sex partnerships in the civil code and in all respective laws.[614] The decision emphasised that the state "can maintain and support traditional institutions, as well as create new legal forms for acknowledging new phenomena, and with this it can, at the same time, extend the boundaries of 'normality' in public opinion".[615] Based upon this authorisation in December 2007 the Parliament of Hungary adopted the Act on Registered Partnership. The Act would have enabled same-sex and different-sex couples to enter into registered partnerships. In its Decision 154/2008 the Constitutional Court of Hungary found the Act on Registered Partnership unconstitutional, as it "downgraded" marriage by according recognition to both different-sex and same-sex partnerships. However, under the same decision a partnership scheme only for homosexual couples would be constitutional.[616] While with its first decision the court was going ahead of popular sovereignty, with the second decision it took a step back to fall in line with the will of the parliamentary majority (with the reference to the protection of marriage as enshrined in the Hungarian Constitution).

Last but not least, I should mention the court's decision on environmental protection, in which it spelled out a non-derogation rule: the legally secured level of environmental protection may be reduced only under conditions that are valid for the restriction of any fundamental right.[617]

613. See the English translation of the PIN Decision, p. 139.
614. See the English translation of the Same Sex Partnership Decision, p. 316. I should mention, however, that the applications failed to challenge the notion of marriage as a union exclusively of a man and a woman.
615. Ibid., p. 318.
616. Following the Constitutional Court Decision 154/2008, in April 2009, the Parliament of Hungary adopted a revised Act on Registered Partnership.
617. See the English translation of the Environmental Protection Decision, p. 298.

Commentary on Peter Paczolay's report

by Regina Kreide[618]

Peter Paczolay is the President of the Constitutional Court of Hungary, and in his paper he describes and judges the role of the court in such a differentiated and reflective way that this alone speaks in favour of this contested institution.

His main thesis expresses his reflection on the role of the court for the development of human rights, and he comes to the conclusion – or so I understand it – that judicial review is ambivalent but in some cases it may be a welcome instrument to direct the popular will towards basic human rights ideas.

On the one hand, judicial review functions as a "substitute" for popular sovereignty. Whereas Hans Kelsen still argued for a judicial review that only controls the processes of judicial decisions and its compatibility with constitutional law but without determining or changing the content of law, judicial review has a different function nowadays. As Robert Dahl puts it, judicial review either acts against the popular will, limits it, or even functions as a "quasi guardianship". If the protection of fundamental rights is not possible through the democratic processes, then the alternative is to ensure their protection by official means not subject to the democratic process. A consequence of this is that it is not the people that make the law but the courts.

On the other hand, judicial review can be an instrument which promotes the judicial definition and development of human rights. Paczolay mentions the 1954 decision *Brown v. Board of Education* in the USA, wherein racial segregation was declared to be unconstitutional, and he stresses the Hungarian example of the abolition of capital punishment through a court decision. And Paczolay, though hesitating because of the anti-democratic flip side of judicial review he has described so well, seems to be in favour of the idea that the constitutional court should be a substitute for popular sovereignty – at least in some cases.

That leads me to the first of my three comments:

(1) If my reconstruction is correct, then a question comes up that addresses the function of judicial review from a normative point of view: what are the social and political conditions that determine the function of the court? To be more precise: when should the courts control the lawmaking processes and their

618. Professor, Justus-Liebig, University of Gießen, Germany.

compatibility with the constitution; when should they be limiting the legislators' decisions; and when should they act as positive legislators, dictating to the people what should be law? My impression is that Paczolay believes that the last resort of substituting for the popular will depends on the historical and political context. So, for example, if in a given country Holocaust denial is not sanctioned by "civil society" or the parliament, then a court decision would be a correction of a somehow "defective" democratic culture. One could argue that if a democracy is highly developed then an interference of the court is not necessary, but this is part of the political culture. It only works if there is resistance from within the people against discrimination; if this is not the case, the court will step in.

So the question is whether the act of substitution is based on a distrust of democracy and the democratic competences of the people. If so, what social conditions are required to estimate that a democracy is stable enough and no longer depends on heavy interference through the courts?

(2) Do people really learn what human rights mean and how to interpret them if confronted with court decisions that, to cite Paczolay's example of Hungary, "shocked an unprepared parliament"? I don't deny that judicial review is an important instrument to formally control the legislative lawmaking processes. But can institutions trigger a "top-down" learning process that stimulates a belief in human rights and actions in line with such beliefs? I have my doubts. Democracy appears to be a meaningless argy-bargy without real decision competences.

The court as a controlling instance, in contrast, leaves room for democratic self-determination. For example in the German case where a Muslim butcher applied to be able to carry out halal slaughter, the court decided that a strict ban was not compatible with freedom of religion but that requirements, bans, and rules had to be decided by the parliaments of the different *Länder*. Here the case was returned to the regional parliaments, setting the limits of their self-determination but not doing the work for them.

(3) Finally, I am interested in Paczolay's notion of popular sovereignty. The German political scientist Ingeborg Maus argues – referring to Immanuel Kant – that popular sovereignty has an intrinsic value. Political autonomy, or the right not to be subjected to arbitrary rules but to be your own master of rules, is a claim that cannot be denied to anybody without good reasons. Having defined popular sovereignty in that way, it is difficult to legitimise a substitution of popular will by court decisions. That would be an unreasonable disempowerment of the citizen. Therefore popular sovereignty can be defined as a means to deal with social problems and find the best solution possible; if it turns out that these solutions do not work properly, then it seems efficient to turn to the courts. Popular sovereignty is thus legitimised in relation to its capacity to solve problems. I believe that this is what Paczolay is suggesting, but I would like to know more about it.

Venice Commission's Science and technique of democracy collection*

No. 1 Meeting with the presidents of constitutional courts and other equivalent bodies (1993) [Or]

No. 2 Models of constitutional jurisdiction (1993) [E-F-R]
by Helmut Steinberger

No. 3 Constitution making as an instrument of democratic transition (1993) [E-F]

No. 4 Transition to a new model of economy and its constitutional reflections (1993) [E-F]

No. 5 The relationship between international and domestic law (1993) [E-F]

No. 6 The relationship between international and domestic law (1993) [E-F-R]
by Constantin Economides

No. 7 Rule of law and transition to a market economy (1994) [E-F]

No. 8 Constitutional aspects of the transition to a market economy (1994) [E-F]

No. 9 The protection of minorities (1994) [Or]

No. 10 The role of the constitutional court in the consolidation of the rule of law (1994) [E-F]

No. 11 The modern concept of confederation (1995) [E-F]

No. 12 Emergency powers (1995) [E-F-R]
by Ergun Özbudun and Mehmet Turhan

No. 13 Implementation of constitutional provisions regarding mass media in a pluralist democracy (1995) [E-F]

No. 14 Constitutional justice and democracy by referendum (1996) [E-F]

No. 15 The protection of fundamental rights by the constitutional court (1996) [E-F-R]

No. 16 Local self-government, territorial integrity and protection of minorities (1997) [E-F]

No. 17 Human rights and the functioning of the democratic institutions in emergency situations (1997) [E-F]

---

* Letters in square brackets indicate that the publication is available in the following language(s): E = English; F = French; R = Russian; Or = contains speeches in their original language (English or French).

No. 18 The constitutional heritage of Europe (1997) [E-F]

No. 19 Federal and regional states (1997) [E-F]

No. 20 The composition of constitutional courts (1997) [E-F]

No. 21 Nationality and state succession (1998) [E-F]

No. 22 The transformation of the nation-state in Europe at the dawn of the twenty-first century (1998) [E-F]

No. 23 Consequences of state succession for nationality (1998) [E-F]

No. 24 Law and foreign policy (1998) [E-F]

No. 25 New trends in electoral law in a pan-European context (1999) [E-F]

No. 26 The principle of respect for human dignity (1999) [E-F]

No. 27 Federal and regional states in the perspective of European integration (1999) [E-F]

No. 28 The right to a fair trial (2000) [E-F]

No. 29 Societies in conflict: the contribution of law and democracy to conflict resolution (2000) [Or]

No. 30 European integration and constitutional law (2001) [E-F]

No. 31 Constitutional implications of accession to the European Union (2002) [Or]

No. 32 The protection of national minorities by their kin-state (2002) [Or]

No. 33 Democracy, rule of law and foreign policy (2003) [Or]

No. 34 Code of good practice in electoral matters (2003) [E-F-R]

No. 35 The resolution of conflicts between the central state and entities with legislative power by the constitutional court (2003) [Or]

No. 36 Constitutional courts and European integration (2004) [E]

No. 37 European and US constitutionalism (2005) [E]

No. 38 State consolidation and national identity (2005) [E]

No. 39 European standards of electoral law in contemporary constitutionalism (2005) [E-F]

No. 40 Evaluation of fifteen years of constitutional practice in central and eastern Europe (2005) [E]

No. 41 Organisation of elections by an impartial body (2006) [E]

No. 42 The status of international treaties on human rights (2006) [E]

No. 43 The preconditions for a democratic election (2006) [E]

No. 44 Can excessive length of proceedings be remedied? (2007) [E]

No. 45 The participation of minorities in public life (2008) [E]

No. 46 The cancellation of election results (2010) [E]

No. 47 Blasphemy, insult and hatred (2010) [E]

No. 48 Supervising electoral processes (2010) [E]

No. 49 Definition and development of human rights and popular sovereignty (forthcoming) [E]

Sales agents for publications of the Council of Europe
Agents de vente des publications du Conseil de l'Europe

BELGIUM/BELGIQUE
La Librairie Européenne -
The European Bookshop
Rue de l'Orme, 1
BE-1040 BRUXELLES
Tel.: +32 (0)2 231 04 35
Fax: +32 (0)2 735 08 60
E-mail: info@libeurop.eu
http://www.libeurop.be

Jean De Lannoy/DL Services
Avenue du Roi 202 Koningslaan
BE-1190 BRUXELLES
Tel.: +32 (0)2 538 43 08
Fax: +32 (0)2 538 08 41
E-mail: jean.de.lannoy@dl-servi.com
http://www.jean-de-lannoy.be

BOSNIA AND HERZEGOVINA/
BOSNIE-HERZÉGOVINE
Robert's Plus d.o.o.
Marka Maruliça 2/V
BA-71000, SARAJEVO
Tel.: + 387 33 640 818
Fax: + 387 33 640 818
E-mail: robertsplus@bih.net.ba

CANADA
Renouf Publishing Co. Ltd.
22-1010 Polytek Street
CDN-OTTAWA, ONT K1J 9J1
Tel.: +1 613 745 2665
Fax: +1 613 745 7660
Toll-Free Tel.: (866) 767-6766
E-mail: order.dept@renoufbooks.com
http://www.renoufbooks.com

CROATIA/CROATIE
Robert's Plus d.o.o.
Marasoviçeva 67
HR-21000, SPLIT
Tel.: + 385 21 315 800, 801, 802, 803
Fax: + 385 21 315 804
E-mail: robertsplus@robertsplus.hr

CZECH REPUBLIC/
RÉPUBLIQUE TCHÈQUE
Suweco CZ, s.r.o.
Klecakova 347
CZ-180 21 PRAHA 9
Tel.: +420 2 424 59 204
Fax: +420 2 848 21 646
E-mail: import@suweco.cz
http://www.suweco.cz

DENMARK/DANEMARK
GAD
Vimmelskaftet 32
DK-1161 KØBENHAVN K
Tel.: +45 77 66 60 00
Fax: +45 77 66 60 01
E-mail: gad@gad.dk
http://www.gad.dk

FINLAND/FINLANDE
Akateeminen Kirjakauppa
PO Box 128
Keskuskatu 1
FI-00100 HELSINKI
Tel.: +358 (0)9 121 4430
Fax: +358 (0)9 121 4242
E-mail: akatilaus@akateeminen.com
http://www.akateeminen.com

FRANCE
La Documentation française
(diffusion/distribution France entière)
124, rue Henri Barbusse
FR-93308 AUBERVILLIERS CEDEX
Tél.: +33 (0)1 40 15 70 00
Fax: +33 (0)1 40 15 68 00
E-mail: commande@ladocumentationfrancaise.fr
http://www.ladocumentationfrancaise.fr

Librairie Kléber
1 rue des Francs Bourgeois
FR-67000 STRASBOURG
Tel.: +33 (0)3 88 15 78 88
Fax: +33 (0)3 88 15 78 80
E-mail: librairie-kleber@coe.int
http://www.librairie-kleber.com

GERMANY/ALLEMAGNE
AUSTRIA/AUTRICHE
UNO Verlag GmbH
August-Bebel-Allee 6
DE-53175 BONN
Tel.: +49 (0)228 94 90 20
Fax: +49 (0)228 94 90 222
E-mail: bestellung@uno-verlag.de
http://www.uno-verlag.de

GREECE/GRÈCE
Librairie Kauffmann s.a.
Stadiou 28
GR-105 64 ATHINAI
Tel.: +30 210 32 55 321
Fax.: +30 210 32 30 320
E-mail: ord@otenet.gr
http://www.kauffmann.gr

HUNGARY/HONGRIE
Euro Info Service
Pannónia u. 58.
PF. 1039
HU-1136 BUDAPEST
Tel.: +36 1 329 2170
Fax: +36 1 349 2053
E-mail: euroinfo@euroinfo.hu
http://www.euroinfo.hu

ITALY/ITALIE
Licosa SpA
Via Duca di Calabria, 1/1
IT-50125 FIRENZE
Tel.: +39 0556 483215
Fax: +39 0556 41257
E-mail: licosa@licosa.com
http://www.licosa.com

NORWAY/NORVÈGE
Akademika
Postboks 84 Blindern
NO-0314 OSLO
Tel.: +47 2 218 8100
Fax: +47 2 218 8103
E-mail: support@akademika.no
http://www.akademika.no

POLAND/POLOGNE
Ars Polona JSC
25 Obroncow Street
PL-03-933 WARSZAWA
Tel.: +48 (0)22 509 86 00
Fax: +48 (0)22 509 86 10
E-mail: arspolona@arspolona.com.pl
http://www.arspolona.com.pl

PORTUGAL
Livraria Portugal
(Dias & Andrade, Lda.)
Rua do Carmo, 70
PT-1200-094 LISBOA
Tel.: +351 21 347 42 82 / 85
Fax: +351 21 347 02 64
E-mail: info@livrariaportugal.pt
http://www.livrariaportugal.pt

RUSSIAN FEDERATION/
FÉDÉRATION DE RUSSIE
Ves Mir
17b, Butlerova ul.
RU-101000 MOSCOW
Tel.: +7 495 739 0971
Fax: +7 495 739 0971
E-mail: orders@vesmirbooks.ru
http://www.vesmirbooks.ru

SPAIN/ESPAGNE
Díaz de Santos Barcelona
C/ Balmes, 417-419
ES-08022 BARCELONA
Tel.: +34 93 212 86 47
Fax: +34 93 211 49 91
E-mail: david@diazdesantos.es
http://www.diazdesantos.es

Díaz de Santos Madrid
C/Albasanz, 2
ES-28037 MADRID
Tel.: +34 91 743 48 90
Fax: +34 91 743 40 23
E-mail: jpinilla@diazdesantos.es
http://www.diazdesantos.es

SWITZERLAND/SUISSE
Planetis Sàrl
16 chemin des Pins
CH-1273 ARZIER
Tel.: +41 22 366 51 77
Fax: +41 22 366 51 78
E-mail: info@planetis.ch

UNITED KINGDOM/ROYAUME-UNI
The Stationery Office Ltd
PO Box 29
GB-NORWICH NR3 1GN
Tel.: +44 (0)870 600 5522
Fax: +44 (0)870 600 5533
E-mail: book.enquiries@tso.co.uk
http://www.tsoshop.co.uk

UNITED STATES and CANADA/
ÉTATS-UNIS et CANADA
Manhattan Publishing Co
670 White Plains Road
USA-10583 SCARSDALE, NY
Tel.: +1 914 271 5194
Fax: +1 914 472 4316
E-mail: coe@manhattanpublishing.com
http://www.manhattanpublishing.com

Council of Europe Publishing/Editions du Conseil de l'Europe
FR-67075 STRASBOURG Cedex
Tel.: +33 (0)3 88 41 25 81 – Fax: +33 (0)3 88 41 39 10 – E-mail: publishing@coe.int – Website: http://book.coe.int