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"FROM A GUBERNATIVE TO A DELIBERATIVE HUMAN RIGHTS POLICY - DEFINITION AND FURTHER DEVELOPMENT OF HUMAN RIGHTS AS AN ACT OF COLLECTIVE SELF-DETERMINATION"

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I.

The many different globalisation processes have also globalised the public. Although the public currently only selectively express an opinion on individual human rights violations around the world and do not have the same weight in all regions, humanity now has worldwide communication facilities at its disposal that 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 have specialised in individual issues with their own media. However, one of the issues about which a global discussion has begun is human rights, especially violations thereof. It is clear that serious human rights violations that no one hears about or sees are taking place, and whether and to what extent a violation is made a subject of public discussion worldwide depends on the contingent circumstances. Kant's dictum, which was perhaps exaggerated for the age in which he lived, the Age of Enlightenment, that so much progress has been achieved among the peoples of the Earth that "a violation of rights in one place is felt throughout the world"[1], now appears to have become a reality, at least in electronic form. At the same time, human rights function as a language in which experiences of injustice, suffering and violence are spoken about in such a way that they gain general attention, because this is a language that everyone understands. Not everyone understands it in the same way, and in individual cases people disagree about reasons and interpretations and appropriate and inappropriate applications. 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 advance their reasons under the cloak of human rights – if they do not immediately resort to the force of arms. The more often and more intensively they do this, the more they get caught up in the net of human rights and the logic behind them. They find out 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 has expressed this experience as follows: "discourse of human rights [has acquired] in recent times… the status of an ethical *lingua franca*."[2]

Despite all the obstacles still faced by human rights and despite the serious violations that still take place, the confidence in progress being made on their implementation seems well-founded. It might be thought that the obstacles lie outside the legal dimensions of human rights 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, but not in human rights themselves[3], where everything seems to be in order. Joseph Raz thus begins his treatise on "Human Rights without Foundations" with the admittedly ironical 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."[4] If this impression is correct, however, it obscures the fact that a big danger lies in the ubiquity of human rights. Especially as everyone is talking about them and everyone keeps referring to them, it is to be feared that they will gradually lose a key element of their 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 simply passively consume without being involved in their production and without knowing their inner mechanism. We thus

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[1] Immanuel Kant, *Zum ewigen Frieden* (1795/96) (English translation: *Perpetual Peace*). German reference: Werke (ed. W. Weischedel), Bd. VI, Darmstadt 1975, p. 216 (A 46).

[2] John Tasioulas, quoted in Joseph Raz, *Human Rights without Foundations*, Ms., p. 1, http://josephnraz.googlepages.com/humanrightswithoutfoundations (last accessed on 18 January 2010).

[3] On these conflicting aims, see Anna Geis, Harald Müller, Wolfgang Wagner (eds.), *Schattenseiten des demokratischen Friedens. Zur Kritik einer Theorie liberaler Außen- und Sicherheitspolitik*, Frankfurt/New York 2007.

[4] Joseph Raz, op. cit., p. 1.

become dependent on those who make these products and on those who sell them to us without letting us into the secret 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: (1) human rights currently function as a legal pretext for a state or group of states to intervene in another state. These interventions may vary in nature so long as they are appropriate for protecting the citizens of that state against human rights violations by their own government. Military intervention is only one of a number of measures. Joseph 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."[5] 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, in so far as they acknowledge human rights."[6] 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. These keep an eye on one another to see whether or not each observes its own population's human rights and, in the event of a violation, interfere in the affairs of the foreign state, whose human rights violation means it has forfeited its right inherent in its sovereignty to resist interference by foreign governments. This 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."[7] It is in no way intended to deny that complex technical co-ordination problems 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 both in the past and in the future have provided and will provide sufficient grounds for intervening in a state. However, the procedure in 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 implementing their own citizens' human rights.[8] With this concept, legal justification is created for foreign interference with the sovereignty of a state in the event of it failing to discharge its duty to protect the human rights of its population. It spells out what Joseph Raz meant with his analysis that the primary

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[5] Raz, op. cit., p. 11.

[6] Raz, op. cit., p. 20.

[7] Ingeborg Maus, "Menschenrechte als Ermächtigungsnormen internationaler Politik oder: der zerstörte Zusammenhang von Menschenrechten und Demokratie", in Brunkhorst/Köhler/Lutz-Bachmann (eds.), *Recht auf Menschenrechte*, Frankfurt am Main, 1999, p. 282 f.

[8] Eckart Klein (ed.), *The Duty to Protect and to Ensure Human Rights*, Berlin 2000; Gareth Evans, *The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All*, Washington D.C., 2008; Christopher Verlage, *Responsibility to Protect. Ein neuer Ansatz im Völkerrecht zur Verhinderung von Völkermord, Kriegsverbrechen und Verbrechen gegen die Menschlichkeit*, Tübingen 2009. For a critical discussion, see Conor Foley, *The Thin Blue Line. How Humanitarianism Went to War*, London/New York, 2008 (pp. 145-170).

meaning and function of human rights is currently simply to constitute legal justification for foreign interference with the sovereignty of a state. Even if military intervention is only 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 mention the danger threatening human rights policy when governments become the key global human rights players that provide active human rights protection and at the same time themselves assume responsibility for the further development of human rights.

(2) By way of a complement to the gubernative human rights policy, an increasingly *individualised understanding of human rights* is emerging among individuals as holders of human rights. This danger is also developing 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. This possibility is not yet available everywhere and it is 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 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 and expect direct benefits for the pursuit of their own interests and objectives. “Worldwide and in the public perception, a development is being fostered in which the individual legitimation of human rights is supplanting the collective.”[9] The individual’s perspective is narrowed to his or her own 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. “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.”[10] 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.[11] All legal relationships between private individuals will, as it were, be rationalised in human rights terms. This horizontal effect will, however, become problematic where people assert their rights against one

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[9] Gret Haller, *Individualisierung der Menschenrechte?,* Ms. 2008, p. 13.

[10] Haller, op. cit., p. 13 f.

[11] See, as regards Europe, Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford 2006. As regards global developments, see Gunther Teubner, “Die anonyme Matrix: Zu Menschenrechtsverletzungen durch ‘private’ transnationale Akteure”, *Der Staat: Zeitschrift für Staatslehre und Verfassungsgeschichte, deutsches und europäisches öffentliches Recht* 44 (2006), pp. 161-187; Klaus Günther, “Menschenrechte zwischen Staaten und Dritten: Vom vertikalen zum horizontalen Verständnis der Menschenrechte”, in Nicole Deitelhoff, Jens Steffek (Hg.), *Was bleibt vom Staat? Demokratie, Recht und Verfassung im globalen Zeitalter*, Frankfurt am Main/New York (Campus), pp. 259-280.

another in the same way as private owners assert their property rights. The result will not only be that those involved understand the human right as boiling down to a private right analogous to a property right but, rather, 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 – ie, 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[12]: 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 (that are unfavourable to them).

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 law-making body. Both shortcomings are symptoms of the fact that the awareness of this connection is waning. As so often, the reasons for this lie not in the evil intentions of those concerned but, rather, in the unintentional, 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 at the same time 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 when an attempt is made 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 for a popular sovereignty that has up to now only existed in the plurality of nations, so that it is impossible at the moment to imagine what a global human rights policy resulting from collective self-determination might look like. The second difficulty results from the fact that human rights are being violated here and now, so that there is at least an urgent need for action in crucially important cases involving human rights. It cannot be denied that 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 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 suitable and 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 courts or through democratic public debate as a whole.
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.

[12] J.J. Laffont and J. Tirole, "The politics of government decision making. A theory of regulatory capture", *Quarterly Journal of Economics* 106 (1991), pp. 1089-1127.

II.

As universal rights, human rights have a self-referential structure. If they apply to *all* human beings, ie 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, which continued to cling to their traditions, especially the Christian churches. This provocation is continuing to this day. These institutions have always understood the self-empowerment of human beings to mean that they were denying their constitutive dependence on God, arrogating to themselves a God-like position and repeating and deepening the Fall.[13] For a political theology, this self-empowerment provides the reason to reject a political philosophy of human rights.[14]

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 a(n)(individual) 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".[15] 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 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".[16] 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.[17] 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.[18]

However, 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 yet become sufficiently clear. As Georg Lohmann has stressed, "it

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[13] Heinrich Meier, *Die Lehre Carl Schmitts. Vier Kapitel zur Unterscheidung Politischer Theologie und Politischer Philosophie*, 3r edition, Stuttgart/Weimar 2009, p. 133.

[14] Meier, op. cit., p. 135.

[15] Georg Lohmann, "Menschenrechte zwischen Moral und Recht", in: Stefan Gosepath and Georg Lohmann (eds.), *Philosophie der Menschenrechte*, Frankfurt am Main (Suhrkamp) 1998, pp. 62-95 (p. 86).

[16] Ernst Tugendhat, *Vorlesungen über Ethik*, Frankfurt am Main 1993, p. 345 f. (edited by K.G.).

[17] Rainer Forst, "Das grundlegende Recht auf Rechtfertigung. Zu einer konstruktivistischen Konzeption von Menschenrechten, in Hauke Brunkhorst et al (ed.), *Das Recht auf Menschenrechte*, Frankfurt am Main 1999, pp. 66ff.

[18] Jürgen Habermas, *Faktizität und Geltung*, Frankfurt am Main 1993, chapter 3.

does not yet automatically follow from the mere reciprocity of moral obligations that the persons involved regard one another as holders of rights".[19] 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 moral obligation would be asymmetrical.[20] There is only symmetry between the individuals involved to the extent that each not only receives the respect of each 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. "What change takes place when, assuming that they demonstrate the same moral behaviour, the citizens involved in these constructs accord each other rights?"[21]

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 right 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 will 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").[22]

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".[23] Jürgen Habermas has put this transition in a nutshell: "The morally necessary care and consideration afforded another, vulnerable person is replaced by the self-confident *demand* for legal recognition as a self-determined individual."[24] It is the element of being a human being with his or her own characteristics on which this claim of the right holder is based.

[19] Lohmann, op. cit., p. 86.

[20] This asymmetry seems to me to be implicit in the arguments put forward by Menke/Pollamnn for human rights: Menke/Pollmann, *Philosophie der Menschenrechte zur Einführung*, Hamburg (Junius) 2007, pp. 66 ff.

[21] Lohmann, op. cit., p. 88.

[22] 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: Georg Jellinek, *System der subjektiv-öffentlichen Rechte*, 2nd edition, Tübingen 1919, reprint: Aalen (Scientia) 1979, pp. 45-48.

[23] Georg Lohmann, op. cit., p. 88.

[24] Jürgen Habermas, *Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte*, Ms. 2009, p. 12.

III.

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 and to interpret and develop them in new situations under changed circumstances. The master would grant the slave the human rights as privileges that enable him to live and act in some areas of life as he sees fit. However, the master would always intervene if he concluded that his slave would exceed the limits of the original rights in exploiting his privileges. Would the slave not be just as free as before, even though he would be a merely passive recipient of those privileges and could not have a 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 master but only when they themselves, together with other individuals, determine and assert their freedoms as rights – and do so not only once but again and again.[25]

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”.[26] The concept of popular sovereignty is admittedly only a historical way of expressing the republican intuition that the human right to freedom presupposes independence 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 this competition 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 and lead to misplaced absolutisations. This distinction manifests itself in the dispute about human rights as barriers to democratic self-legislation.

Both historically and today, there have been and are certain forms of democracy that deny a connection with human rights and accordingly either limit democracy through human rights or, on the other hand, 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

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[25] Historically: Quentin Skinner; most recently: *Freiheit und Pflicht – Thomas Hobbes` politische Theorie*, Frankfurt am Main 2008, pp. 12 ff. and 49 ff.; systematically: Philip Pettit, *A Theory of Freedom*, Oxford 2001, pp. 65 ff.

[26] *Ingeborg Maus*, “Menschenrechte als Ermächtigungsnormen internationaler Politik” or “Der zerstörte Zusammenhang von Menschenrechten und Demokratie”, in: Hauke Brunkhorst et al (eds.), *Recht auf Menschenrechte*, Frankfurt am Main 1999, pp. 276–292 (287).

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 – and 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.[27] 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 processes. Habermas expresses this in the principle that only those norms are valid to which everyone who may be affected can agree as participants in a rational discourse.[28] The discursive character of democracy subordinates the individual preferences of individual citizens to a mutual revision process 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”.[29]

[27] On the right to freely express opinions, see Klaus Günther, “Die Freiheit der Stellungnahme als politisches Grundrecht”, in Peter Koller/Csaba Varga/Ota Weinberger (eds.), *Theoretische Grundlagen der Rechtspolitik*, Archiv für Rechts- und Sozialphilosophie, Beiheft Nr.54 (1992), pp.58-73; on the right to justification, see Rainer Forst, *Das Recht auf Rechtfertigung*, Frankfurt am Main 2007.

[28] Habermas, *Faktizität und Geltung* (fn. 18), p. 138.

[29] *Albrecht Wellmer*, “Hannah Arendt über die Revolution”, in: Hauke Brunkhorst et al (eds), *Recht auf Menschenrechte*, Frankfurt am Main 1999, pp. 125–156 (146); ibid., “Bedingungen einer demokratischen Kultur”, in *Endspiele: Die unversöhnliche Moderne*, Frankfurt am Main 1993, pp. 54–80 (60 ff.).