

PREFACE

Modern societies often claim to be democracies and, by virtue of their democracy, to enjoy greater legitimacy than would otherwise have been the case. Democracy has many meanings, but at a minimum it implies: 1) the rule by the people; 2) the Rule of Law; 3) the respect for Human Rights. Although these three concepts usually appear together, they are sometimes in tension.

The *XXVI World Congress of Philosophy of Law and Social Philosophy* sought to comprehend this tension that constitutes Democratic law. The Congress' meeting on *Human Rights, Rule of Law and the Contemporary Social Challenges in Complex Societies* took place at the Universidade Federal de Minas Gerais (Brazil) from July 21st through July 27th, 2013, and was attended by more than 900 scholars and students from 72 countries.

This book presents some of the Congress lectures¹. The keynote speakers, among the most important and respected scholars in their fields, showed in their papers how complex the relationship between Human Rights and the modern Rule of Law can be in democratic societies.

Stephan Kirste (Universität Salzburg – Austria) argues that the tension is due to a misunderstanding about what Democracy is. Since both Democracy and Human Rights are conceived as grounded on Freedom, at least in the Kantian tradition, Democracy should be understood itself as a Human Right, and cannot be taken in an instrumental way, nor can Human Rights be conceived as granted by the sovereign without people's participation. Democracy is thus, according to him, a kind of machine, which permits "the constant transformation of new rights into the laws under the eyes of the rational process" established by the Rule of Law.

In an almost autobiographical paper, Celso Lafer (Universidade de São Paulo – Brazil), former Brazilian Minister of Foreign Affairs, conceives Human Rights, in a somewhat similar analysis, as "the Right to have Rights". From his point of view, they are also connected to self-determination and to the resistance against the arbitrary violence that even the established power can perpetrate. Using some recent events (such as the Brazilian dictatorship in recent past and the persecution of Jews during the II WW) and with reference to Norberto Bobbio's and Hannah Arendt's thinking, he shows that an integrated comprehension of Democracy, Human Rights and Peace should be the goal of a general theory of Law and Politics.

In this path, Human Rights are seen as connected to the Sense of Justice, as Mortimer Sellers (University of Baltimore – USA) points out. One can assume that Legal Systems are justified, and therefore legitimate, only "when they give better answers to questions of justice and the common good than society could otherwise find or implement, without their intervention". We only need Human Rights if they, as a concept, can help us to provide a better society than otherwise. And we only need Democracy and the Rule of Law if they could advance justice.

1 Besides the lectures that are included in these proceedings, prof. Yasutomo Morigiwa presented a lecture on *The truth in 'Gesetz ist Gesetz'*, and Jan Christoph Bublitz, the winner of the IVR's Young Scholar Prize, presented a lecture on *Freedom of Thought in the Age of Neuroscience: A Plea and a Proposal for the Renaissance of a Forgotten Fundamental Right* (ARSP 2014, vol. 100, 1–25).

But, in order to do so, Human Rights need a better foundation. Norbert Horn (Universität Köln – Germany) thinks that, although Human Rights are enacted by policies and enforced by Law, one cannot understand them properly if one does not take into account their moral dimension. This moral foundation is so important because “the moral prestige of Human Rights helps their implementation in a world that is full of violations of Human Rights”.

Once we know what Human Rights (and Democracy and Rule of Law) are, we should ask how should they be implemented: through legislation (and constitutional provision) or through judicial review? According to Thomas Campbell (Charles Sturt University – Australia), democratic procedure tends to develop a kind of “one size fits all” policies and legislation that could threaten minorities rights, and, in an age when the list of Human Rights develops itself more quickly than the bills which protect them, judicial review has been used to advance Human Rights. This can be a problem, from a democratic point of view, since the Judicial Power isn’t legitimate in the same way as Legislative Power is in an elective democracy. And it can also be a problem when the courts relativize the Rule of Law.

As Sindiso Mnisi Weeks (University of Cape Town – South Africa) shows, Human Rights can be under threat when the Rule of Law (understood as “the supremacy of the law in a legal order”) is blocked by the courts, who argue to better understand people’s needs than the Legislative Power and even the Framers could do. This can be seen in South Africa, where the Judicial Power, and even Legislative Power, sometimes override the Constitution while looking to protect traditional communities and Democracy. This is a very tricky matter, when we face the conflict between universally recognized Human Rights and the self-determination of traditional communities, sometimes not so democratic ones.

Finally, Miracy Barbosa Gustin (Universidade Federal de Minas Gerais – Brazil) shows that the real problem with the Rule of Law and Human Rights is about their effectiveness, since in many countries, and particularly in Brazil, “the discourse that Human Rights are equally applicable to all and that they are constitutionally guaranteed as fundamental rights seems to conspire not only against statistical evidence, but also against the visible and unquestionable current injustices”. Thus, people who care about justice should also help to empower through social governance those who have their rights systematically denied.

How, then, should we understand Human Rights, Democracy and the Rule of Law? What should we do, when the Human Right to self-determination comes into conflict with other Human Rights, such as the right to equal protection under the Law? And how should the Rule of Law and Democracy help to protect the Human Rights? These challenges cannot be answered by Law itself, and that’s why the Philosophy must come to its aid, to make the law more coherent, and perhaps more just.

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I – HUMAN RIGHTS AND DEMOCRACY

THE HUMAN RIGHT TO DEMOCRACY AS THE CAPSTONE OF LAW

I. INTRODUCTION

The claim that persons should not only enjoy general freedom, but also actively participate in the creation of the various liberties, is a classic issue in political philosophy and in the philosophy of law. The struggle for this right to decide erupted in the 18th century revolutions and remained extremely competitive, theoretically and politically, throughout the 19th and 20th century; recently, it reappeared forcefully in the Arab Revolution. As a consequence of these struggles, the rights to free speech and thought, to free association and to vote were codified in many national constitutions. On a supranational level the European Union, e. g., implemented these rights in art. 11, 12 and 39 of the Charta of Fundamental Rights and in art. 20 II B of the Treaty on the Functioning of the European Union. Also, international law now acknowledges the collective dimension in right to self-determination of peoples (art. 1 II UN-Charta), the right to vote (art. 21 UDHR) and communicative (art. 19 UDHR) as well as associative freedoms (art. 20 UDHR)¹. Art. 25 ICCPR² in particular obliges the states to ensure the participation of the individual in public elections and presupposes other communicative and associative freedoms – including the freedom of information as a precondition of these elections³. The “United Nations Millennium Declaration” states: “Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. Democratic and participatory governance based on the will of the people best assures these rights.”⁴ Other human rights declarations also contain these freedoms; the European Convention for the Protection of Hu-

- 1 FRANCK, T.M. The Emerging Right to Democratic Governance. *American Journal of International Law*, 86, 1992, 46 ff., 57 ff.
- 2 *Article 25*: “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”.
- 3 General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 12.07.1996. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments), Adopted by the Committee at its 1510th meeting (fiftyseventh session) on 12 July 1996, <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/d0b7f023e8d6d9898025651e004bc0eb?Opendocument>, (30.11.2013): “Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant”. “8. Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association”.
- 4 Resolution 55/2 of the General Assembly of the United Nations, Sept. 8th, 2000, I, 6.

man Rights and Fundamental Freedoms, for instance, in art. 10 and in art. 3 of its 1. Additional Protocol. Similar provisions are to be found in the Inter-American Democratic Charter (OAS), where art. 26, 1 of claims that “democracy is a way of life based on liberty and enhancement of economic, social, and cultural conditions.” None of these acts, however, entails a unified individual right to democracy.

Whether there is something like a human right to democracy and if so, how it is justified, is still a matter of debate. There are roughly five positions: (a) general critique of this right, (b) liberal position, considering human rights and democracy as opposites, the idea of (c) democracy being instrumental for human rights, or (d) of human rights being instrumental for democracy and finally (e) of both being co-original.

In this paper, I will examine these positions, starting with those critical of a human right to democracy before presenting the positions in defense of it. These examinations will lead to the third part, the elaboration of my own conception. I will develop my understanding against the background of the concept of law and the relationship between law and freedom. Finally, I will explain the interplay of human rights and democracy and the justification of a human right to democracy. I understand the right to democracy as a right to free and equally participate in the deliberating, decision-making and interpreting procedures of general rights and duties. This positive human right to democracy can be justified by a common principle of human rights and democracy. This unifying principle is legal freedom. In order to justify human rights as legal rights on the basis of legal freedom, I will show that the legal form itself originates in freedom. The understanding of the interdependency of human rights and democracy based on law as an order of freedom ultimately replaces the conception of their co-originality.

II. THE CRITIQUE OF A HUMAN RIGHT TO DEMOCRACY

1. HUMAN RIGHTS AS EXTERNAL LIMITATIONS OF PUBLIC AUTHORITY

Conceptions that deny a human right to democracy assume an external relation of human rights and democracy – some of them in the tradition of *Carl Schmitt*⁵. They hold that the French Revolution merely replaced the Ancien Régime’s monarchic legitimation of the absolute sovereign by a democratic legitimation; the people as a collective replaced the monarch in the legitimation of public authority, or so they argue. In both forms of government, human rights served as external limitations of public authority. Accordingly, these scholars reject the idea of an individual right to democracy.

This critique ignores, however, that the exchange of the subject of legitimation – namely the monarch by the people – is accompanied by an exchange of the mode of legitimation of power. The absolute monarch could rely on the objectives of the state and his inherited legitimation as a political person. In democracy, the people act as an entity of persons as well; doing so, however, they do not only express their traditional competences. Democracy cannot be justified with reference to the past

5 BIELEFELDT, Heiner. *Philosophie der Menschenrechte. Grundlage eines weltweiten Freiheitsethos*. Darmstadt, 1998, 103.

only; rather, it needs permanent reaffirmation through its present form of decision-making. In addition to this, democracy imposes a new form of responsibility for public power, namely the responsibility towards the governed. Accordingly, the idea that the change of the form of government from monarchy to democracy is a mere exchange of subjects violates the concept of democracy itself. In a democratic state under the rule of law the state does not only serve men and men do not only serve the state; the democratic state's very existence rests on the basis of men and their deliberations and decisions. The understanding of democracy as a mode of legitimation of the otherwise constant state authority necessarily yields the external relation of human rights and democracy: Human rights then serve as limitations of the state and enabling clauses for public action⁶.

2. MORAL FORM OF HUMAN RIGHTS AND THE INSTITUTIONALIZATION OF DEMOCRACY

The German legal philosopher and former justice of the Federal Constitutional Court, *Ernst-Wolfgang Böckenförde*, conceives human rights as categorical rights, which men have qua their humanity and independent of any positive legal institutionalization of these rights⁷. In contrast, "democracy means ... the concretely comprehensible, institutionally and procedurally secured exercise of power and political competence to make decisions by the people, signifying again the empirical, concretely existing people, not a people as a transcendental subject."⁸ Because democracy as a "form of political order" depends on institutional preconditions that do not exist for human rights, a human right to democracy would either relativize the validity of human rights or dissolve and atomize democracy, he argues.

The prevalent understanding of law and freedom relies on the liberal conception of law as being instrumental for individual freedom. Law has to enable and secure freedom. Böckenförde holds that law has to be "directed" towards freedom⁹. This "directedness," however, is not itself necessarily the result of a free decision *about* the law. When Böckenförde writes, "Law appears as a necessary form of freedom," he stresses the protection of freedom by law, but neglects the influence of freedom on the creation of law. "The relation between freedom and law remains a merely external relationship."¹⁰ This does not lead to the neglect of the importance of democracy for the legitimation of the state; the demand for democracy is an objective principle but no individual right. Democracy is thus not a right, but an

6 *MAUS* 1999, 279: "Das Problem besteht für die internationale Dimension, insofern eine globale Menschenrechtspolitik, die die Menschenrechte gegen ihren demokratischen Kontext isoliert, ursprünglich vorstaatliche Rechte der Abwehr gegen das staatliche Gewaltmonopol in Aufgabekataloge für ein globales Gewaltmonopol transformiert, das heißt Freiheitsrecht zu Ermächtigungsnormen umdefiniert".

7 BÖCKENFÖRDE, Ernst-Wolfgang. Ist Demokratie eine notwendige Forderung der Menschenrechte? In: *Philosophie der Menschenrechte*. Eds. v. Gosepath, Stefan; Lohmann, Georg. Frankfurt/Main, 1998, 236.

8 BÖCKENFÖRDE (note 7), p. 237, all translations of Böckenförde's texts by Stephan Kirste.

9 BÖCKENFÖRDE, Ernst-Wolfgang; ENDERS, Christoph (1991): Freiheit und Recht. Freiheit und Staat. In: BÖCKENFÖRDE: Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte. Frankfurt/Main, 1991, 44.

10 BÖCKENFÖRDE (note 9), 45.

“organized decision-making process amongst equals as a legitimizing source of all positive laws, including fundamental and human rights.”¹¹ Therefore the objectively conceived democratic process would be the *basis* of human- and civil rights not the other way around.

Since the principle of freedom remains outside law and state, law has a merely instrumental function for human rights and democracy is a mere objective principle that sets external constraints on the state and its laws. Law itself is not considered an active realization of freedom. This sort of critique of an independent right to democracy is often backed by historical arguments¹². Indeed, philosophy and politics seemed, first and foremost, to be concerned with negative rights. *Ernst Tugendhat* suggests that liberal human rights first unfolded in non-democratic states¹³. Well in the line of the Aristotelian tradition¹⁴ *Montesquieu* has it that freedom means to act according to the laws rather than the permission to act as one pleases. For him this excludes the right to voluntarily deciding about the laws themselves¹⁵. The 18th century revolutions indeed seem to have claimed this right of the people to decide about their laws, refrained, however, from codifying an individual right to democracy and concentrated on the negative liberal rights. Only later rights to public benefits and participation in them were included in the catalogues of fundamental rights. In the constitutionalist monarchies in Germany, for instance, the right to vote took a long way to go until it was fully codified and never served as a legitimation of the monarchical powers themselves. Like historical arguments in general, this is not a categorical argument against an individual right to democracy. In a democracy, however, law is not only an external warrant of freedom, but is itself an expression of the freedom of the people. Since law in the democratic state is the expression of the freedom of the people a human right to democracy could be justified if democracy itself is not only an objective principle but also an expression of individual freedom.

- 11 BRUNKHORST, Hauke. Menschenrechte und Souveränität – ein Dilemma? In: BRUNKHORST, Hauke; KÖHLER, Wolfgang R.; LUTZ-BACHMANN, Matthias (Eds.). *Recht auf Menschenrechte. Menschenrechte, Demokratie und internationale Politik*. Frankfurt/Main, 1999, 173.
- 12 HOFMANN, Hasso. Menschenrechte und Demokratie. Oder: Was man von Chrysipp lernen kann. In: *Juristenzeitung*, 2001, 7.
- 13 *Tugendhat* holds it, “daß der Liberalismus seinen Ursprung innerhalb autokratischer Ordnungen hatte; es gab daher Liberalismus ohne Demokratie, und es gibt die Idee der Demokratie ohne Liberalismus. Aber die einzig legitime politische Ordnung scheint die einer liberalen Demokratie zu sein, denn nur sie scheint die politische Macht so zu strukturieren, daß die Individuen erstens gemeinsam die Träger der politischen Macht sind und daß sie zweitens einen Spielraum als Individuen behalten”, TUGENDHAT, Ernst. Die Kontroverse um die Menschenrechte. In: GOSEPATH, Stefan; LOHMANN, Georg (Eds.). *Philosophie der Menschenrechte*. Frankfurt/Main, 1998, 52.
- 14 ARISTOTLE: *Politics*. With an Engl. Transl. by H. Rackham. Cambridge, Mass. 1967, 217.
- 15 MONTESQUIEU, Charles Louis de Secondat de: *Vom Geist der Gesetze*. Tübingen 1992, pp. 212 f.: “In der Tat scheint das Volk in den Demokratien zu tun, was es will. Aber die politische Freiheit besteht nicht darin, zu tun was man will. In einem Staat, das heißt in einer Gesellschaft, in der es Gesetze gibt, kann die Freiheit nur darin bestehen, das tun zu können, was man wollen darf, und nicht gezwungen zu sein, zu tun, was man nicht wollen darf.“

3. DEONTOLOGICAL JUSTIFICATION OF HUMAN RIGHTS – PRAGMATIC OR AXIOLOGICAL JUSTIFICATION OF DEMOCRACY

James Griffin objected to a human right to democracy that human rights would be expressions of human dignity, whereas democracy would aim at pragmatic goals like the stability of the political process¹⁶. Whereas the deontological justification of human rights would lead to definitive claims, democracy could only be established as an objective principle of state organization.

Griffin assumes that human dignity as the basis of human rights would also have to be understood as an objective value expressing the values of life, autonomy and freedom of the individual. But this is not necessarily so. Human dignity, too, can be understood as an individual right. One may argue that the content of such a right would be too vague. This may indeed have been true in the beginning of the legal development of the concept of human dignity after World War II. But since then, the principle of human dignity was included in many constitutions and international declarations – most importantly the human rights declarations – and specified by constitutional courts, human rights courts and jurisprudence. One can understand human dignity as the ability of a human being to be an end in itself or as the potential to act freely. It would then protect human beings in situations in which they are incapable to act¹⁷. This would secure the subjectivity of the individual in a Kantian sense and save it from being treated as a mere object. Consequently, human beings are not only protected by human rights against being treated as objects, but are also permitted to take an active part in the foundation of these rights. Otherwise they would be mere objects of others who grant the rights.

I will return to this aspect later. For the moment it is sufficient to assume that human dignity can be understood as an individual right and thereby as a fundament of other human rights. If human dignity is understood as men being an end in himself or herself, it may be taken not only as the basis of negative human rights (in *Georg Jellinek's status negativus*), as positive rights in the sense of a right to public aid (*status positivus*), but also in a participatory sense in the *status activus*¹⁸. As *Friedrich Müller* has put it: “Democracy is a positive right of all human beings.”¹⁹ This active

16 GRIFFIN, James. *On Human Rights*. Oxford, 2011, 249: “Human rights grew up to protect what we see as constituting human dignity: the life, autonomy, and liberty of the individual. Democratic institutions grew up in our need for a decision procedure for groups – a procedure that is stable, manages transfer of power well, appropriate to a society whose members are more or less equal in power or worth, reconciles losers in social decisions to the basic structures of the society, and tends to promote the commonweal – that is, order, justice, security, and prosperity”.

17 KIRSTE, Stephan. Das Fundament der Menschenrechte. In: *Der Staat*, 2013, 119–138.

18 KÖHLER, Wolfgang R. Das Recht auf Menschenrechte. In: Brunkhorst, Hauke; Köhler, Wolfgang R.; Lutz-Bachmann, Matthias (Eds.). *Recht auf Menschenrechte. Menschenrechte, Demokratie und internationale Politik*. Frankfurt/Main, 1999, 124: “Die Menschenrechte lassen sich nur durch einen Verweis auf den Status des Menschen als Zweck an sich selbst, das heißt als Person, begründen, der in der Freiheit, Gleichheit und Preislosigkeit des Menschen seinen Ausdruck findet. Die Begründung besteht darin, letztlich daraus ein Recht auf Menschenrechte abzuleiten – und damit auch ein Recht auf Demokratie”.

19 MÜLLER, Friedrich. *Demokratie zwischen Staatsrecht und Weltrecht. Nationale, staatenlose und globale Formen menschenrechtsgestützter Demokratisierung. Elemente einer Verfassungstheorie*, 2003, 72, translation from German, S.K.

status would be an expression of all rights that allow individuals to participate in decisions concerning the foundation and interpretation of their rights. Apart from a right to democratic participation, this status would also be the basis for rights in administrative procedures and trials. Since we can understand the concept of human dignity as justifying a human right to democracy – and I do not want to claim more at this stage – Griffin’s critical argument can be rejected.

Samantha Besson does not consider human dignity to be an objective value, but democracy: “There cannot be a right to a value and democracy is such a value”²⁰. On the one hand it is true that values and norms exclude each other. On the other hand it is not impossible that human rights transform values into norms. The so-called “objective dimension” of fundamental rights interprets the content of these norms as objective values, for example the freedom of opinion as a central value for the commonwealth. Conversely, it is also true that an objective value can be transformed into a norm and an individual right if it fulfills the respective formal criteria.

To sum up, the just examined positions present no principal objection against an individual human right to democracy.

III. CONCEPTIONS DEFENDING A HUMAN RIGHT TO DEMOCRACY

The refutation of objections against a human right to democracy is a first step towards such a right, but we still need a justification. There are roughly three attempts for such a justification: An instrumental conception, a theory of the co-originality of human rights and democracy and the assumption of an intrinsic connection of human dignity and democracy.

1. THE INSTRUMENTAL VALUE OF THE RIGHT TO DEMOCRACY TO HUMAN RIGHTS – A LIBERAL POSITION

Some authors justify the right to democracy as being instrumental to human rights²¹. “Democracy serves the realization of human rights, but human rights do not serve the realization of democracy.”²² This assumption does not – as the above mentioned conceptions – deny the justification of a human right to democracy; it rather justifies this right instrumentally because it serves other human rights. *John Stuart Mill* and *John Rawls* claim that democracy protects human rights better than any other institution²³. By means of democracy individuals have better control over the violation or infringement of their other rights.

John Rawls rejects the republican idea that political autonomy holds a central position in the people’s conception of the good. Directed against *Hannah Arendt* he

20 BESSON, Samantha. Demokratie als Menschenrecht. In: HALLER, Gret; GÜNTHER, Klaus; NEUMANN, Ulfrid (Eds.). *Menschenrechte und Volkssouveränität in Europa. Gerichte als Vormund der Demokratie?* Frankfurt/Main-New York. Besson, 2011, 78.

21 *Allen Buchanan* assumes that there should be a right to democracy to improve the enforcement of other human rights. BUCHANAN, Allen. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. Oxford, 2004, 142.

22 KÖHLER (note 18), 113.

23 RAWLS, John. *A Theory of Justice*. Cambridge, M. A, 1971, §36.