REFGOV

Reflexive Governance in the Public Interest

Theory of the Norm Unit

Law, the State and Discourse Theory

Klaus Guenther

Working paper series : REFGOV-TNU -3

European FP6 – Integrated Project
Coordinated by the Centre for Philosophy of Law – Université Catholique de Louvain – http://refgov.cpdr.ucl.ac.be
WP –IFM-

Law, the State and Discourse Theory[1]

Klaus Günther[2]

The discourse theory of law differs from well-know theories of law – advocated for instance by the liberal or Republican tradition – especially by the fact that it introduces the element of rational discourse. Lets briefly remind ourselves of the core content of this element here: accordingly, only such norms are valid that can be accepted by all those concerned in rational discourse.[3] However, the democratic constitutional state is no direct realization of the discourse principle. Rather, it emanates from entangling the discursive principle with a legal form. This legal form already incorporates the subjective right of freedom to act. By intertwining the discursive principle and legal form with one another, a system of rights is generated that consists of the fundamental individual rights to freedom of action (including the guarantee of access to the courts), to political and social participation. With the right to political participation, a deliberative-democratic procedure is institutionalized, which translates the initially abstract system of rights into individual concrete human and fundamental rights.

---

[1] This paper was published in French under the title “Droits, Etat et Théorie de la Discussion” in Raison Publique, 6/2007, p. 129-145, it will be published in English in the collected volume “Critical Debates on Habermas” Legal Theory, Christian Joerges/ Klaus Guenther/Camil Ungureanu (Eds.) Avebury: Ashgate 2008 (forthcoming) - it will be published in German in a modified version in: W. Brugger/U. Neumann (Eds.), Rechtsphilosophie im 21. Jahrhundert, Frankfurt/Main: Suhrkamp, 2008 (forthcoming).

[2] Prof. K. Guenther is “Professur für Rechtstheorie, Strafrecht und Strafprozeßrecht”.at the J. W. Goethe University Frankfurt

[3] Habermas, *Faktizität und Geltung*, p. 138.

Especially from the liberalist camp, a number of objections have been raised against this discourse-theoretical concept of democratic constitutional state rule, which I discuss in the following. My defense against these objections will at the same time work to introduce and explain the concept itself. I mainly focus on three objections: (1) The discourse theory of law cannot maintain the claim that human rights and the sovereignty of the people co-originate, rather human rights are subordinate to popular sovereignty. (2) The discourse theory of law cannot claim to provide good reasons for the assumption that decisions following a deliberative-democratic manner are to be seen as provisionally rational, as there is a gulf between reason and decision as well as between reason and procedure that cannot be bridged. (3) The discourse theory of law can neither justify nor sufficiently guarantee the distinctive law of the modern world, the individual right to negative freedom. Thus, from a discourse-theoretical view this right is only a necessary evil and at best a minimal functional pre-condition for democratic discourse itself.

1 Human Rights and Popular Sovereignty

The discourse-theoretical version of the principle of popular sovereignty embodies a problem that Kant and Rousseau were also confronted with – yet now in a more aggravated form. If the sovereign people deliberate and decide about the validity of law in discursive procedures, should one consequently not also fear that it could override human rights? Since Jean Bodin, political sovereignty includes the authority of legislative powers (legislature), which is itself not subject to any restraints by a higher authority. From this absolute capability arises a tension with human rights, which are primarily meant to protect the individual against political power. The absolute "capability" of the sovereign legislator should be bound to a human rights "ought". But if this in turn means that human rights take normative precedence over political legislation, then legislation would not be sovereign anymore. In the discourse-theoretical version, this tension is aggravated because deliberative democracy is meant to be the sole source for the legitimacy of law. One might therefore pit the inherently existing legitimacy of human rights against a deliberative legislature, which generates legitimacy itself. This tension coagulates into constitutional conflicts wherever there exists an institutionalized court in addition to a democratic legislature, which is empowered to review

European FP6 – Integrated Project
Coordinated by the Centre for Philosophy of Law – Université Catholique de Louvain – http://refgov.cpdr.ucl.ac.be
WP –TNU-3

acts of legislation for their constitutional conformity and particularly with the fundamental and human rights the constitution guarantees.

The assertion that human rights are a barrier for the sovereign legislative power of the people is one of the central positions of liberalism. It roots in the fear, known since ancient times, that the majority can democratically overpower a minority. As historical experience shows, this fear is hardly unfounded. This is particularly correct, if a legal community consists of structural majorities and minorities due to economic or cultural reasons. In that case, the gulf between majority and minority would be insurmountable. Any democratic majority decision would only work to confirm and deepen this separation. The majority could agree on democratic laws, which would be in its own favor and would disadvantage the minority. In these cases, it is important that the members of the minority possess at least individual human rights, which the majority is not allowed to infringe or to erode.

The concept of human rights, as an insuperable barrier and thus primarily as a restriction to democratic legislation, raises yet another problem. The well-known codifications of human rights possess a quality, which Napoleon once acknowledged as the attribute of a good constitution: they must be short and dark. Their brevity renders human rights evident and establishes a close relationship with basic moral intuitions mostly rooting in negative historical experiences. Thus preceding the American Declaration of Independence of 1776, the human rights declaration states that it only reflects "self-evident" truths ("we hold these truths to be self-evident..."). In the preamble to the French "Déclaration des droits de l`homme et du citoyen" of 1789 these are "principes simples et incontestables". The human right to freedom finds its evidence in the negative experience of arbitrary arrests without any legal guarantees (*habeas corpus*), state repression of non-tolerated religious confessions and arbitrary state intervention in the private autonomy of economic activity – the human right to property in the negative experiences of arbitrary seizure and confiscation.

However, the price for this evidence resting in experienced injustice is the notorious indeterminacy of human rights in view of their present and future application. This is

especially due to their abstract nature in at least three respects: with regard to their addressees (against *whom* are the individual human rights directed?), with regard to their subject matter (which individual rights does the universal and equal right to freedom imply?) and regarding their barriers (what is the relationship of the general and equal right to freedom to other human rights?).[4] Given the wide range of conflicts and problems that arise in modern complex societies with their multiple forms of life, with functionally different social systems and their division of labor, it cannot be expected that the moral evidence of past negative experiences is sufficient, in order to derive from human rights concrete and clear answer to current cases of conflict. Human rights are not given once and for all; rather they require constant interpretation, concretization and development.

One reaches the same conclusion once one recognizes the fact that human rights never occur in an ideal pure form, but rather always in a concrete, codified and positive shape. As such, they are the result of a formal procedure, which usually is terminated by a majority decision. They exist either in human rights codifications, such as the United Nations Declaration of Human Rights of 1948, the two UN Human Rights Covenants of 1966 and the European Human Rights Convention of 1950, or they occur within national constitutions in the form of fundamental rights. As a result of a particular historical decision-making process, human rights are always linked to a particular community, its spatial experience and horizon of expectation.[5] These acts of positivization are always restricted by limited knowledge and the scarcity of time. Even with the greatest effort, a legislator will never succeed in acquiring all information necessary for a decision and in appropriately taking into account all available information, in order to eliminate all uncertainty. Apart, the knowledge horizon for foreseeing the future is always limited. So every decision is taken under the condition of uncertainty. A legislator cannot wait to decide forever; positive law is necessary, in order to respond to current conflicts - a postponement of the decision until the anyway unreachable point at which all the necessary knowledge is be available, would be a betrayal of justice as well as a swift

---

[4] Robert Alexy, 'Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat', in: Stefan Gosepath and Georg Lohmann (eds.), *Menschenrechte und Demokratie*, Frankfurt am Main 1998, pp. 244-64, 253-54.

[5] Albrecht Wellmer, 'Menschenrechte und Demokratie', in: Stefan Gospath and Georg Lohmann (eds.), *Philosophie der Menschenrechte*, Frankfurt am Main 1998, pp. 265-291.

decision would involve the risk of uncertainty.

However, this restriction is not only caused by the principle finitude and fallibility of our entire theoretical and practical knowledge. Due to this limitation, we can equipped with our knowledge frequently fail in the objective as well as in the social world and learn from these failures. In contrast to the world of physical laws and objective regularities, our practical-social world is characterized by the fact that we can fundamentally change this world ourselves. This can be seen when people use a prediction about their future actions for a change in their current action plans - and therefore they are able to falsify the prediction of their actions themselves (this is a circumstance that, for example, prevents any prediction of prices at the stock market).[6] While the physical knowledge meets a given objective world, people themselves produce the cases for applying moral and practical knowledge. To put it into a grossly simplified example: the social conflicts and coordination problems of an agrarian society are of a different nature than that of a capitalist industrial society, while the laws of gravitation continue unchanged as long as the fundamental constants of nature remain unaltered.[7] The moral-practical world is genuinely historically constituted, and the future is *for humans principally open*, as far as they have to shape and change their future themselves. If people were able to predict their own future in the same way as natural laws determine natural events, then they could refrain from regulating their conduct through social norms and rather limit themselves to natural law-like reciprocal actions. This is one of the reasons why people are *free* concerning their future actions, yet within the frame of the laws of nature. Under the same circumstances, they could act differently as they actually have, if they had decided otherwise in the first place. It is primarily this circumstance that explains why even the best attempts to justify human rights discursively and under almost ideal conditions can only lead to decisions of a provisional character.[8] Justified moral-practical norms therefore

---

[6] This peculiar human ability falsifies any philosophy of history as Popper has shown. Cf. Popper, Das Elend des Historizismus

[7] We can of course be mistaken in our theoretical understanding of nature and therefore fail; yet this failure is of a different nature than the insight that a moral-practical norm is unjust.

[8] Klaus Günther, 'Ein normativer Begriff der Kohärenz für eine Theorie der juristischen Argumentation', in: *Rechtstheorie* 20 (1989), pp. 163ff., 182; Jürgen Habermas, *Erläuterungen zur Diskursethik*, Frankfurt am Main 1991, pp. 138-140; 'Richtigkeit versus Wahrheit', in: Jürgen Habermas, *Wahrheit und Rechtfertigung*, Frankfurt am Main 1999, pp. 271ff., 281-82.

European FP6 – Integrated Project
Coordinated by the Centre for Philosophy of Law – Université Catholique de Louvain – http://refgov.cpdr.ucl.ac.be
WP –TNU-3

depend on such an applicative discourse, while such a double-layer does not exist for natural laws.[9]

At the same time, the validity claim of human rights transcends any particular historical community and also its particular self-image, which emerges out of its actual situation and its take on its past and future. As the historical trajectory of human rights up to the present shows the scope of the rights-bearers has gradually been extended (a prominent example being the expansion of the initially only for men conceptualized rights to women). Insofar human rights act as a "door-opener" for those people who have been excluded and treated unfairly.[10] Furthermore, the previous history of human rights indicates that they gradually include more and more cases of discrimination and demand justification for any existing practice of discrimination.

Thus, human rights are also due to their abstract nature and indeterminacy in need of concretization. In positivized form, they are always bound to a particular realm of experience and horizon of expectation within a historically localized community. At the same time, their validity claim transcends any inevitable temporal, factual and social provincialism, as can be seen from their inherent dynamic. If these observations are true, then the liberalist argument that human rights should restrict the sovereignty of the democratic legislator turns at least in one aspect out to be problematic. The question remains open of which authority with what kind of reasons should be empowered to decide whether a legislator implements *properly* and interprets *appropriately* human rights.

This point can be answered from two different sides, from the part of human rights and the part of democracy. As universal rights, human rights have a self-referential structure. If they apply to *all* people, i.e. to all individuals, then not a *single* person can exist who grants these rights to all others and decides on their substance. In contrast to other positive subjective

[9] See Klaus Günther, *Der Sinn für Angemessenheit*, Frankfurt am Main 1988.

rights that are granted and potentially revocable by an authority, human rights have a strictly horizontal origin. Human rights can only be mutually granted and acknowledged by all people.[11] And only the people themselves can decide about the substance and scope of their human rights. The *self-empowerment* of the people to their own *self-determination* namely is in the spirit of human rights and concerns especially the latter's interpretation and exploitation.[12] Human rights are, however, limited by the aforementioned restraints and caveats, applicable to every moral-practical human knowledge. However, it would be possible - and in this manner Thomas Hobbes conceptualized the *Leviathan* - that the strict horizontality of human rights are limited to their beginning. People mutually acknowledge their human rights once and leave their further concretization and interpretation to a legislative or judicial authority. Accordingly, they would then return to a vertical relationship with this body, which interprets, positivizes and further develops the originally abstract human rights in the face of new cases of application. But then autonomy would also be lost. The alternative is to include the strict horizontality in the further process of the concretization of human rights itself. In the last instance, people then decide themselves about the concretization: "The irreversible link between human rights and popular sovereignty is therefore that only the rights-bearer themselves can decide on the very substance of their rights."[13]

Less obvious is in turn the dependence of democracy on human rights. Historically and even today, there have been forms of democracy that negate any relationship with human rights and therefore either constrain democracy through human rights or *vice versa* sacrifice the human rights of minorities to a populist majority democracy. The first instance stems from a liberalist

---

[10] Lutz Wingert

[11] Klaus Günther, 'Vernunftrecht - Nach dem versäumten Augenblick seiner Verwirklichung', in: *Kritische Justiz* 25 (1992), pp. 178ff., p. 188.

[12] Historically, it was less the substance of individual human rights, but rather the general empowerment of the people to make human rights that caused counter-reactions from conservatives and the Christian churches, as they feared the hubris of a god-like position and thus a repetition of the fall of mankind.

[13] Ingeborg Maus, 'Menschenrechte als Ermächtigungsnormen internationaler Politik, oder: der zerstörte Zusammenhang von Menschenrechten und Demokratie', in: Hauke Brunkhorst et. al. (eds.), *Recht auf Menschenrechte,* Frankfurt am Main 1999, pp. 276-292, p. 287.

conception of democracy according to which it is not more than an aggregation of individual preferences, which lead to changing majority decisions of which the human rights of the respective minority have to be protected. In the second case, democracy represents not more than the homogeneous ethos of a particularist community, which discriminates 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.

Here only the discourse-theoretical version of democracy allows deliberative democracy a productive linkage with human rights. Only the commitment to human rights renders the legal institutionalization of democracy possible in the first place, but in a manner that allows for both the openness and inclusiveness of the democratic process. Only under the condition of human rights, each person possesses the same "weight"; each individual has the same right to give its opinion with "yes" or "no". Vice versa, every individual has the same right to demand that any political decision is justified to him or her.[14] Only human rights guarantee the voluntary nature of political participation and the inclusiveness of the process. Habermas expresses this in the principle "D", according to which only those norm are valid to which all possibly affected can agree as participants in a rational discourse.[15] The discursive nature of deliberative democracy subordinates the individual preferences of individual citizens also to a mutual revision process, as no individual interest can be binding for all others without being examined in the light of argument and counter-argument by all others. By contrast, the procedure of merely accumulating individual preferences suffers from the well-known problem of measuring intensity and subjective emphasis. Wellmer summarizes the relationship between human rights and democracy like this: "While they *bind* the democratic discourse on the one hand, they must also first be repeatedly produced by it through means of re-interpretation and re-implementation; there can be no authority above or outside of this

[14] For the right to free statement, see Klaus Günther; zum Recht auf Rechtfertigung s. Rainer Forst

[15] Habermas, *Faktizität und Geltung*, p. 138.

discourse, which could ultimately decide what the correct interpretation and concretization of these fundamental rights is."[16]

2 Deliberative Democracy: Procedure or Substance?

If the interpretation and concretization of human rights is a matter of the democratic process, the legitimacy of the results depends upon the very nature of this process. Can deliberative-democratic procedures warrant sufficiently legitimate validity? Is there not enough historical experience so that a substantial insight could oppose a result gained through procedure? Are there any truths beyond discourse that should not be revised, even if the discourse is as rational as possible?

Behind these questions loom at least two objections to the discourse theory of law:[17] the tension between discursive *rationality* and *decision* (a) and the tension between rational *discourse* and rational *reason* (b).

(A) procedures end with a more or less arbitrary decision. But should "rightness" depend on a decision? Then there would be a gap between what has actually found agreement and what deserves agreement. What deserves consent would then be independent from what has found consent at the end of a procedure. This objection, however, neglects the particular discursive qualities of the proceedings, as the decision about consent is preceded by public criticism with

---

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

[17] Here I refer to an oral discussion between Jürgen Habermas and Ronald Dworkin in 1994 at an author's colloquium which took place at the Center for Interdisciplinary Research in Bielefeld; excerpts are documented in: Ronald Dworkin, Jürgen Habermas and Klaus Günther, 'Regiert das Recht die Politik?', in: Ulrich Boehm (ed.), *Philosophie heute*, Frankfurt/New York 1997, pp. 150-173. See also Habermas' reply to the objections by Bernhard Peters, in: Habermas, *Die Einbeziehung des Anderen*, Frankfurt am Main 1996, pp. 342f.

the mutual exchange of arguments. These discursive features justify the rational nature of the procedure. A decision that draws upon it is not arbitrary or accidental but rationally motivated. Then the will to consent is determined by rational insight and not by arbitrariness or coincidence. The consent would also not be the result of a mere summation of individual preferences. Rather, the procedure allows binding the will by the insight into *better reasons* – we assume this ability for every promise made in everyday life. Therefore, the rationally motivated agreement is more than the articulation of arbitrariness, but the result of a mutual interpenetration of will and reason. Then, however, the consent is no longer something that has to be differentiated from reason, but it can itself been measured (and criticized) against the yardstick of reason, as it claims to be reasonable.

(B) the second objection is of greater significance. If the rationally motivated consent is, in contrast to an arbitrary one, characterized by the fact that it is based upon insight into *better reasons*, then it remains to ask whether the quality of these reasons as better reasons stems from the procedure or from an authority outside of the procedure. In the latter case, we should just leave the procedure and discover a truth independent of procedure, which determines the quality of the *better* reason. Better reasons can perhaps be discovered faster within argumentative procedures, but this would only be an instrumental prerequisite for the discovery of reasons, not for their quality or validity - whether something is a better reason would not be determined by the fact that it is the result of a procedure. In the first case, on the other hand, better reasons would be simply substitutable by procedure. It would suffice that something is the result of a procedure, in order to assign it the quality of a better reason.

Procedures cannot replace reasons. Both do, however, not stand in a disjunctive relationship. In most practical conflicts of law and morality, there are hardly "knock down arguments", i.e. absolute truths, which are directly agreed upon by all; rather there are at best deciding reasons. On the other hand, we have the demand for normative rightness of a moral truth or justice. Our normative judgment shall express more than just a personal opinion or an attempt to manipulate others. This claim is built into our normative practice. Without this claim, we could not live; but at the same time, we also know that we do not posses convincing reasons, with which we could meet this standard in each individual case. In the face of this dilemma,

how can at least good and better, if not *the best* reasons be produced? The solution lies in a kind of temporalization, dynamization or proceduralization of the relationship between reason and claim. The claim unfolds a kind of pull on the permanent generation of better reasons. This pull can develop best in discourse. It urges the parties not to rely on the assumption that they have found the whole truth in the reasons they have already accepted. Rather, they must continue to be exposed to unlimited public criticism. Only then can bad reasons be corrected and turned into good or even better reasons through the process of continued revision. In this way, the demand for truth or justice is not satisfied, but we can presume that reasons that provisionally stand the test of public criticism are more reliable and reasonable than those which fail. In this sense, discourse is a kind of "bridge" mediating between the claim to truth, which always transcends our current practice, and our limited capabilities for justification and insight.

A democratic constitutional state with its deliberative procedures of public opinion- and will-formation is now exactly the procedure that temporalizes and dynamizes the relationship between substance and procedure in the above-described manner. It allows societal learning processes through the basic openness of the political discourse, i.e. the constant review and revisability of political decisions.[18]

3 Communicative and negative freedom

Another problem, arising out of the alleged co-originality of human rights and popular sovereignty, is the risk that the negative liberty of the individual could be relativized in view of the people's right to political participation, which constitutes popular sovereignty. Negative freedom is usually defined as the individual freedom of action. Above all, this includes the freedom to act as the individual sees fit - in a very basic sense, this encompasses the absence

[18] Rainer Forst, *Kontexte der Gerechtigkeit*, p. 195.

of external obstacles that oppose the realization of the respective will.[19] "Will" refers to what Kant defined as "arbitrariness", i.e. the capability to form intentions at all, regardless of the motives from which they emerge. In a positive sense, negative freedom defines the ability to form one's own interests and to choose the appropriate means according to one's own judgment. In a broader sense, negative freedom includes the freedom to decide for oneself about one's own life, about important values and how to reach them – as John Stuart Mill stated: "The only freedom which deserves the name is that of pursuing our own good in our own way".[20] In contrast, positive freedom refers to will-formation itself, in other words to the way in which the respective will constitutes itself.[21] Thus, according to Rousseau, only that will is free that matches the general will (volonté générale).

As a *right* of every individual, as an *subjective* right, there is negative freedom only under one condition: an individual has only a right to negative freedom as long as it does not violate the *equal* right to negative freedom of all others. In this form, the right to negative freedom or freedom of arbitrariness is, at least since the time of the Enlightenment, one of the most prominent human rights: it is represented in the American Declaration of Independence of 1776 as the inalienable right of every individual to seek its fortune ("pursuit of happiness"), in the French Human Rights Declaration of 1789 it is included as the right to do everything that does not harm others (Déclaration sect. IV: "La liberté pouvoir consiste à faire tout ce qui ne nuit pas à autrui."). Historically, this primarily meant the right to choose and practice one's own religious beliefs, to form one's own opinions and to express them publicly as well as the right to economic freedom. The latter aspect has primarily rendered the right to negative freedom an integral part of modern society. It refers to the ability of the individual to act according to its own interests, to education and to pursue subjective preferences regardless of their objective value and regardless of the preferences of others. It becomes the right of every individual to act in a manner best suited to its needs under given circumstances. In terms of economic goods, this means that everyone can maximize its benefits under conditions of a given income and prices. This model of the *homo oeconomicus* is a central element in modern

---

[19] Thomas Hobbes, *Leviathan*, Chap. 14. David Hume, *A Treatise of Human Nature*, Part I, Sec. 8.

[20] John Stuart Mill, *On Liberty*.

[21] Cf. Isaiah Berlin, *Two Concepts of Liberty* (1996).

market economies and is guaranteed by the right to negative freedom – especially in the form of the freedoms of contract and property.[22]

Is this right in threat to be relativized and reduced, if the political autonomy of the citizen decides what scope this freedom has?[23] In fact, the discourse theory of law claims that human rights – and thus the right to negative freedom – and popular sovereignty are co-original and that the right to negative freedom becomes a constitutive element of democracy by its legal form. The circular logical process, which generates the system of rights, therefore starts with the right of every individual to the largest degree of the same freedoms to individual action.[24] But is this right, at least with regard to the democratic right of participation and especially the related obligation to communicate, not relativized again? In the following, I develop a retort of this skepticism in three steps:

(a) The condition that negative freedom is always only possible as the *equal* right of *every individual* has already been mentioned above. The right to negative freedom is neither conceivable as the singular right of a single individual nor as an unlimited right of everyone. If just one had, compared to all others, the right to do what she wants to do, then all the others would only have the duty not to obstruct her; the right to freedom would then be synonymous with the right of an individual to enslave all others. If, however, everyone possessed a mutually unlimited right to freedom, it would destroy itself, as Thomas Hobbes demonstrated in his thought experiment of the natural state. As a right, it can always only be *the equal right* of all, under the two conditions of commonality and reciprocity. A person can always just claim so much negative freedom for himself, as he is at the same time ready to grant all others. What kind of negative rights is distributed to what degree cannot be decided paternalistically for all others by a rights-bearer. In establishing a right as well as in its

---

[22] Here I refer to the summary in Horst Eidenmüller, *Effizienz als Rechtsprinzip - Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts*, 2. Aufl. Tübingen 1998, as well as to the critical reconstruction by Jens Beckert, *Die Grenzen des Marktes - Die sozialen Grundlagen wirtschaftlicher Effizienz*, Frankfurt am Main/New York 1997.

[23] This objection is among others raised by John Rawls, in.

[24] *Faktizität und Geltung*, p. 155.

application and enforcement, each right-bearer is always judge in her own case, i.e. he cannot avoid unfair distribution and to reap the benefits from this decision. Individual rights can only exist as a "general law", as Kant in general defined the principle of law.

If the right to negative freedom depends upon a general law, then the additional question arises of how this law shall be constituted and how it is to be concretized in relation to individual freedoms. A discourse-theoretical interpretation of the law generally allows two things. First, it expresses the egalitarian-distributive nature of rights: "only with the help of the discourse principle, it becomes obvious that *everyone* is entitled to the greatest possible extent of *equal* subjective freedoms."[25] On the other hand, it makes obvious that the general law, which enables private autonomy in the first place, has to stem from the political autonomy of those concerned themselves. Only the deliberative democratic process has the advantage that each individual, affected by a distribution of rights, should have the right to participate in the establishing of the distributive rule. Hence, it is not only but *also* in the best self-interest of every individual to participate, at least once, in a discourse about the distribution of subjective freedoms and therefore to become involved in the conditions of intersubjective communication. Thus, deliberative democracy is itself an enabling condition for the right to negative freedom.

(b) The second dependence concerns the fact that subjective freedoms are a necessary condition for democracy to operate deliberatively and therefore fulfils the requirement of *rational* discourse. This includes the willingness to give reasons and the ability to demand reasons, but above all also the willingness and ability to acknowledge arguments and to base one's own consent with a standard on this very insight.[26] Therein lays, on the one hand, the freedom, which is the general prerequisite for rationality, i.e. for the intellectual process of voting, rational decision between alternatives as well as the weighing up of reasons. Furthermore, an agreement that is based on reasons is itself bound to freedom, without which the "unforced force of the better argument" cannot be conceived of at all. The rationale force

[25] *Faktizität und Geltung*, p. 157.

[26] For this internal relationship between rationality and freedom, see Wellmer, *Freiheitsmodelle*, p.39.

of the better argument is of a different type than the necessary force of a threat of violence. While the latter *bends* my will, the former encourages my will to determine itself by reasons and thus enables it to be free.

(c) However because of this dependence of the discourse of negative freedom, Wellmer insists on a continuing *tension* that *cannot be remedied*. Negative freedoms are "in a certain sense even rights *against* the claims of a communal rationality."[27] It also indicates the conditions "under which the individuals have a right, in the sense of a communal notion of rationality, not to be fully rational", and even to act "selfish, crazy, eccentric, irresponsible, provocative, obsessive, self-destructive, monoman, etc."[28] Only under this condition can "their communal rationality become their own achievement, their own work and their communal freedom can be a manifestation of their individual freedom."[29] This tension can be sharpened to the point, that the right to negative freedom also means to evade those commitments involved in the participation in a discourse, to exit a discourse or not even to enter one: "private autonomy stretches to the point, where a legal subject does *not* have to give a full explanation or does not have to provide publicly acceptable reasons for its planned actions. Subjective freedoms entitle to exit from communicative action and to refuse illocutionary obligations; they constitute a privacy that liberates from the burden of mutually granted and expected freedom."[30] From this tension, Wellmer draws the conclusion that the right to negative freedom cannot be justified discourse-theoretically, hence that "freedom and reason do not coincide in modernity."[31]

---

[27] Wellmer, *Freiheitsmodelle*, p. 43

[28] Ibid., p. 39.

[29] Ibid.

[30] Klaus Günther, *Die Freiheit der Stellungnahme als politisches Grundrecht*; Habermas, *Faktizität und Geltung*, p. 153.

[31] Albrecht Wellmer, 'Freiheitsmodelle in der modernen Welt', in: ders., *Endspiele: Die unversöhnliche Moderne*, Frankfurt am Main 1993, pp. 15-53, 48, 49.

This could, however, have problematic consequences for the thesis of co-originality. On the one hand, the right to negative freedom would only be of instrumental or functional value for the political autonomy of the citizen as far as they belong to the legal constitutive conditions of a deliberative democracy. This questions Habermas' assertion that negative rights do not become absorbed into the instrumental function they can have for the exercise of political rights.[32] Secondly, the right to negative freedom would be relative with regard to political participatory rights; at least, it ought only be approved to the extent, with which it does not disturb the functioning of the democratic process; they ought to be limited and kept to a minimum.[33] This, however, questions the "intrinsic value" of these rights claimed by Habermas.[34] At least it can be doubted, whether negative freedoms can be justified discourse-theoretically when it comes to their implications turning against discourse.[35]

On the other hand, however, it can be argued that the right to exit from the obligations of communicative rationality is at the same time one of its constitutive conditions. Only those who can principally refuse reasons can also adopt them. In order to be effective at all, reasons dependent upon this process of adopting, which encompasses a moment of irrefutable individual freedom. While reasons may cause actions, they are not the same as natural causes, because their causal effect has to be mediated by this process of individual appropriation. The phenomenon of individual ascription, stressed by Wellmer, also takes up this point. As far as people inhabit the realm of reasons at all, this quality of people is part of it. In this respect, the relationship between discursive rationality and negative freedom is closer than the above-mentioned doubts suggest.

The second objection, which can be raised against those doubts, is based on the different

---

[32] Habermas, *Der demokratische Rechtsstaat*, p. 139; ders. *Die Einbeziehung des Anderen*, p. 300.

[33] Armin Engländer, *Diskurs als Rechtsquelle?*, Tübingen 2002, p. 103, 107.

[34] Habermas, 'Der demokratische Rechtsstaat - Eine paradoxe Verbindung widersprüchlicher Prinzipien?', in: der., *Zeit der Übergänge*, Frankfurt am Main 2001, p. 139.

[35] Before the backdrop of a theory of a rational self-interest, this opposition is forcefully stressed by Armin Engländer, p.

contexts in which the right to negative freedom possesses its intrinsic value. Habermas himself has introduced the subjective right to negative freedom as a necessary element of the legal form. Habermas claims that this legal form is "absolutely no principle which could be 'justified', neither epistemically nor normatively."[36]

Rather, it is only *functionally explained* by its complementary relationship with the rational morality of the modern world.[37] The abstract rational morality, as exemplified by Kant's categorical imperative, pays a price for the universal application of a formal moral principle. This price consists of the fact that morality remains cognitively indeterminate, i.e. it no longer provides single concrete norms for action. Furthermore, it ignores the motivational conditions for its compliance, i.e. it does not provide a bridge between moral reason and its realization in individual action. Finally, the rational morality cannot fulfill the organizational task of ensuring that moral requirements are enforced generally and uniformly. Modern law can compensate these deficiencies, but only at a complementary price: it does without moral insights as a prerequisite for the compliance with norms – law is satisfied with heteronomous motives for compliance. It restricts itself, accordingly, to ensure the external compliance with norms by means of coercion. This opens at the same time a sphere of freedom for private-autonomous living arrangements. With the aspect of coercion, law provides an "expectation stabilizing addition to morality" and is "constitutive of a variety of morally relieving interactions."[38] What is legally not prohibited is not allowed to be hindered by coercive law, even though it may be morally illegally.

The right to negative freedom is the result of a lengthy and contentious historical process, in which the Christian religion gradually lost its significance as the integrating moment of morality, ethics and law. The medieval cosmos of the Christian occident encompasses law and the state, as well as individual living arrangements and the relationships among people. To the extent that this universe collapses and becomes secularized, morality falls back on those

---

[36] Habermas, *Faktizität und Geltung*, p. 143.

[37] Ibid.

[38] Habermas, *Faktizität und Geltung*, p. 151.

formal and procedural rules of abstract rational morality. Neither law nor morality provide orientation for the choices of both aims in life and ways of life. This task is devolved to the individual itself; it alone is responsible for its life and happiness. This change can be paradigmatically followed when inquiring the semantic transformation of those behaviors of self-interested rational calculation branded as "greed".[39]

In consequence, all this leads to a de-moralization of one's own affairs. It is no more objectifiable, what the good life is – everyone chooses her idea of a good life. This implies the pursuit of one's own goals, of self-interests and of individual happiness, resulting in an important aspect of negative freedom: the defense against paternalism by others, especially by the state or a particular political community. This point roots, on the one hand, in a cognitive component of the good life: the individual itself knows best what is good for itself, i.e. for a successful, not failing life. On the other hand, there is also a moral reason for the de-moralization of ethics. Questions about the individual choice of aims and ways of life do not touch the context of moral claims, as long as they do not overlap with the ethical identity of other persons and patronize them. Morality only comes into play once the equal rights of all others are affected. The area, in which I create my own life, without infringing the right of all others to create their life in private autonomy, is not even impacted on by a rational morality, which has become abstract. As Rainer Forst has shown, this means *vice versa* that morality is not allowed to intervene in this area, that it is morally demanded to protect the individual realm of private-autonomous living arrangements. Negative rights are therefore also "rights to freedom, which cannot be restricted by reciprocal and generally justifiable norms - and that means that they are protected by them."[40] Negative rights therefore guarantee protection against a false moralization of ethical identities. Subjective rights act as a "*protective cover* for ethical conceptions of the good. Subjective rights provide the communally constituted,

[39] Albert O. Hirschmann, *Leidenschaften und Interessen. Politische Begründungen des Kapitalismus vor seinem Sieg*, (1977), dt. Ausg. Frankfurt am Main 1980.

[40] Forst, *Kontexte der Gerechtigkeit*, p. 133

ethical self with a free realm for development and also the formal opportunity to review this identity."[41]

The right to exit from communicative obligations makes especially sense in the context in which the ethical identity of each individual is concerned. Only when my ethical claims come in conflict with those of other persons – if I break into their protective cover, in order to impose my beliefs of a good life on them – the obligations begin for a moral discourse or deliberative-democratic legislation. However, due to the above-discussed reasons, I still have the subjective right to refuse these obligations. But I have to pay a price: as far as I want to permanently withdraw from the obligations of discursive rationality and moral discourses, I need to pay by a general social withdrawal; what remains is just the possibility of an exclusively instrumental and strategic interaction with others. As far as I refuse to participate in democratic procedures, I can legally be forced to refrain from violating the equal rights of all others. The law then occurs to me alone as a coercive order, whose justification remains alien to me.

[41] Rainer Forst, *Kontexte der Gerechtgkeit*, p. 51.