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POWER AND POWERLESSNESS OF HUMAN RIGHTS. THE INTER-
NATIONAL DISCOURSE ON HUMAN RIGHTS AND ITS CRITICS

In the early nineties, as George Bush, President of the United States, declared the Cold War to be over, many still believed that a new world order and a regime of human rights and peace-keeping could be permanently established under the auspices of the United Nations. However, in the meantime, shortly before the Universal Declaration of Human Rights commemorates 60 years of existence in the year 2008, the promises of an effective and democratically legitimated human rights policy have faded considerably. At least *three* grounds can be offered for this.

First, the legitimation of a human rights policy that depends on binding standards has been discredited more than once. A prominent example is a domestic policy carried out against all agreements, often precisely in decisive cases without consultation with the United Nations. *Second*, we are confronted with the paradoxical phenomenon that more and more states ratify human rights agreements while human rights practices do not improve, but in many cases even deteriorate.[1] According to the most recent studies, if there is any connection at all between ratification and the state of human rights, it lies in the fact that with ratification a gain is indeed achieved in the international esteem; however, the disregard for duties has a barely noticeable or no unfavorable effect at all. Optimism regarding world political decisions oriented by human rights is shaken by

yet a *third* ground, connected to the previous one. A sort of counter-human rights movement' against international human rights regimes, composed of African and Asian countries, and countries moulded by Islam, has sprung from agreements and conventions binding according to international law. These have undoubtedly put their particularistic imprint on the more recent human rights accords.

Against the background of these developments it is more than ever necessary to take seriously the objections of critics, sceptics and despisers of universal human rights in the international human rights discourse, and to confront them with the arguments of the supporters. The core of the present study is the question of the legitimacy of human rights in a world distinguished by a hegemonic human rights policy, by processes of transnational legal regulation and deregulation, and by a plurality of clashing values – in order to come back once again to the three developments sketched above.[2] To be more precise I will address the following questions: how can human rights be grounded in a plural world society? And, if they can, what does one thereby appeal to? The answers to these questions will decidedly determine which functions human rights play or should play in international relations.

The goal of this article is to reconstruct the arguments brought forward in international political discourse and political theory discourse, and to present a suggestion for the conditions of a *context-sensible foundation* and juridification of human rights. In this course neither the objections of opponents of a universalistic human rights conception are overlooked, nor claims to universally valid human rights, equally effective for all humans, are given up.[3]

I proceed in four steps. First, I will briefly characterize the current, predominant notion of human rights (I). On the basis of this reconstruction, I will discuss two models of human rights justification, the 'Model of Bargaining' (II) and the 'Model of Deliberation' (III), mainly with the intention of determining which of the two recognizes different convictions

most appropriately and, at the same time, identifying those arguments that support human rights-violating practises. As we will see, human rights are the result of a fair, context-sensible procedure that can, but *need not* be legitimized through shared and generalizable, moral arguments. A just agreement can be reached despite a pluralism of reasons only if fair procedural conditions are given. Finally, I will point out that human rights understood this way are a political instrument fulfilling important functions in international relations (IV).

I. The Predominant Notion of Human Rights

Human rights activists and some theorists of international law, as well as philosophers, are convinced that nowadays there exists one correct human rights interpretation that rightly claims to be universal. Despite the theoretical shortcomings of the natural law approach which has been predominant for a long time, there is some continuity between this approach and today's predominant idea of human rights. Human rights are still described as being characterized by three elements: they are universally valid (or at least that is what they claim to be); they address the individual and not a specific group; and their content is very general. It is because of these elements that human rights claim to be valid independent of future historical developments and cultural diversity (Thomas Pogge 2002: 52-71.) For others, there is no doubt that this interpretation represents the typical 'western' idea of human rights, based on culturally biased notions of reason and the individual, which, moreover, are misused to pursue national interests. As a reaction to the dominant human rights interpretation, regional human rights declarations, such as the 'Bangkok Declaration' of the Association of South East Asian Nations (ASEAN), the 'Banjul Charter' of certain African countries and the 'Islamic Declaration' were developed. These declarations highlight the incompatibilities with the central concept of human rights, especially their universality and the protection and equal treatment of individuals.[4] So we are in fact con-

fronted with a variety of interpretations that claim legal and/or moral validity.

At this point, the question arises regarding how, in view of these conflicting interpretations, one can reach a just agreement. Which arguments are 'permitted' and which are not? And what are the criteria by which to judge the appropriateness of the arguments offered? Raising these questions has a long tradition in philosophy after Pierce's linguistic turn, and the assumption is quite common that what is characterized as a 'good' argument depends on the conditions under which it was raised. In the following section I will discuss two models of human rights justification, the 'Bargaining Model' and the 'Model of Deliberation', both of which offer different suggestions about fair conditions for the legitimation of law.[5] Both have in common that they propose ideal legitimation procedures. Furthermore, by definition, they maintain contact with different historical and cultural contexts, because, as procedures, they are open to all arguments that might arise in a debate. However, the models differ in some respects. First, they rely on different normative procedures. Second, they accept different kinds of grounds as legitimate in the norm-setting process. And third, they vary in the ultimate content and character of the agreements they produce.

II. The Bargaining Model

The Bargaining Model begins with the presupposition of irreconcilable interpretations and interests. Law-making procedures in the Bargaining Model aim towards achieving agreement, but the way thereto is hotly contested terrain. Against the background of plural representations of justness, the normative space that provides the foundation for the procedure obviously must be narrow. It is only the process itself that requires the agreement of the parties – that is why in the end the procedural arrangements turn out to be normatively modest. It is also advisable to avoid implanting in the conditions of the procedures and the rules of ar-

gumentation assumptions that are too starkly moralistic. The equal op-portunity of the parties to take part and be heard in the law-making proc-ess belongs to the normative presuppositions of the familiar *practice of bringing arguments* implied in the Bargaining Model. To hear out the opinions of the other side – *audiatur et altera pars* – is a fundamental, minimal principle of any form of procedural justice. By now this practice has been internationally 'naturalized'. Thus, one can speak of a universal normative principle of fairness with a view to the political practices of the 'demands' of the rights to co-determination, for instance in international economic procedures.[6] However, threats or constraints are not com-pletely shut out, that is, not all hypothetical constellations of power are excluded.[7] Material, but also social resources, as for example the prestige of the respective speakers, are allowed, as well as concealed-strategic ar-gumentations in the name of a professed 'general' interest. Excluded, however, are all executive measures that are exceedingly arbitrary. The appearance of impartiality already suffices as a criterion for legitimation.

Jon Elster has shown that these assumptions come close to political reality but not too close to be completely absorbed by power struggles. One can see in political debates that both norm-orientated action and strategic action are interconnected (Jon Elster 1998). Politics, according to Elster, is too complex to be reduced to a matter of efficient regulations and economic agreements. The main purpose of many political processes is to create living conditions appropriate for all members of society. Getting to this point is only possible for an adept perspective that is in the equal interest of everybody. Elster illustrates this pattern of deliberative process, in which different types of negotiation are combined, with reference to the historical constitution-making processes of Philadelphia 1776 and Paris 1789-1791 (Jon Elster 1998).

Social action is not based solely on strategic utility calculation – that is the fact Elster wants to show in his historical analyses and which he thinks represents a universal phenomenon. To portray society as the co-ordination of action on the basis of opportunistic utility calculation

betrays complete ignorance of the real world. Rather, social action is determined through social norms whose appropriateness is not accepted because of their effects but because they are justified.[8] Norm-oriented action that appears in political practice cannot be reduced to action oriented towards strategic rationality. A proof for this is that whether political deliberation is convincing as acceptable depends very much on the degree to which the speaker can show it satisfies the public interest and not merely his own interest. As long as the public is inclined to endorse ideas that aim at the general interest and to reject blatant self-interest, strategic action is possible only if it is subtle: 'The civilizing force of hypocrisy', according to Elster, 'is a desirable effect of publicity' (Jon Elster 1998: 111).

On the basis of the empirical assumption that normative and instrumental-rational types of arguments already shake hands in negotiations, the Bargaining Model believes it is able to do without an implicit normative pre-eminence of moral arguments. Here the types of arguments stand immediately opposed to one another; fair is the deal one agrees on under fair procedural conditions in a manageable time-frame. What the bargaining parties finally reach is not a consensus on the basis of shared grounds, but rather a *compromise* on which they can agree on different grounds. What the parties come to terms on is the *best possible agreement* that can be reached in light of a limited time-frame, incomplete levels of information of the participants, and existing constellations of power. A compromise is mostly a second-best solution, often reached on the basis of reasons they actually do not find convincing; but as they know that this agreement is better than none they accept.[9] Thereby it should not be excluded, for instance, that at the end of the bargaining regarding (legal) human rights agreements a regional (partial) agreement is reached.

To illustrate how under 'non-ideal' procedural conditions of the Bargaining Model ethical, religious and moral arguments are engaged in the process of coming to an agreement, let us look at a debate about

women's rights in Pakistan. This is not an imaginary example: after Pakistan had ratified the CEDAW (*Convention on the Elimination of all Forms of Discrimination against Women*) in 1996, a lively public debate emerged about what discrimination against women is, what women's rights are and how they can be implemented in an Islamic state. The American sociologist, Anita Weiss, describes how women's groups tried to win over the public by offering a not too radical interpretation of the Quran (Weiss 2002).

Let us assume then that we have three different interpretations on the table. Position 1 argues that men and women in society have different roles to fulfil, both very much respected, although according to the Cairo Declaration some rights are limited by reference to the Shari'ah. Under Shari'ah law, Muslim women are not accorded equal rights with Muslim men; it is the men who define women's responsibilities.[10] Position 2 argues that men and women are born equal and therefore have the same rights. Because of an ongoing discrimination of women, specific rights for women are necessary that address the areas of discrimination women experience. The equality of men and women, however, is an assumption barely prevalent in the Quran. Position 3 points out that women and men both have basic responsibilities: men work outside the house and women in the home. It is not forbidden for one to do the work of the other. But it would work out best when they are permitted to carry out the tasks of the other once they have fulfilled their own responsibilities.[11] What would probably happen in a debate under the conditions of the Bargaining Model? Whereas position 1 is rejected by a majority as it ignores Pakistan's obligation to somehow implement women's rights into the constitution completely, position 2 is rejected also as it is too marginally compatible with the Quran. Position 3 has under the Bargaining Model the highest chance to succeed. It is hooked up with women's rights, on the one side, and on the other it is considered as a progressive interpretation that does not violate traditional sentiments too strongly.

What we see by this is that the Bargaining Model is very much restricted. There are no arguments left to rebut the third position; rather this interpretation of women's human rights fits perfectly with the government's political strategy and seems to be a welcome compromise between diverging opinions by those in power.

Of course, if you want to win the fight, you have to learn about your opponents' strategies and to think about which arguments usually win, regardless of whether they will be the ones that pass the test of generalization. And sometimes in real political debates it is not helpful to argue that women should be treated as equals because they are born equal or possess the same cognitive competencies. In their abstraction, these claims are not very telling as they are not responsive to a social and political context. What the face of discrimination looks like, what opponents might say, what a change in law will mean for cultural identity, are important questions which cannot be easily sorted out, even by the local participants. However, the Bargaining Model cannot identify a difference between strategic but generalizable arguments that aim at strengthening the autonomous subject on the one side, and strategic arguments that aims at improving the standing of the subject but are not generalizable, on the other. The third interpretation of a fair division of labour between men and women reproduces a traditional notion of gender roles in society without assuming an equal right of women to articulate their interests and desires in public. The Bargaining Model has some other flaws.

It is not possible to demand equal consideration of all participants' arguments since it is accepted that powerful actors have more influence than others. This, in turn, means that it is not required of the participants to consider what arguments might be a good candidate to be accepted by all. The Bargaining Model does not aim at inclusion of all participants and by this does not aim at a universalization of arguments.

And finally, there is no *one* critical measure for the evaluation of the compromise-building; since law-making procedures are regarded as results of bargaining, they may also come about under minimal fairness criteria. In bargaining procedures there is no ground *not* to agree on a position that contradicts moral human rights. This is due to a missing 'connection', in this theoretical model, between moral and political legitimation. The critical claim of human rights will be completely 'absorbed' by the procedure: in the end the participants can appeal to an outcome that mirrors what the majority 'thinks'. In so doing, normative standards are posited that too quickly relinquish the perspective of the victims of human rights violations, those who are not in an explicitly politically influential position, to the interests of the politically established majority.

III. Deliberative Model

In contrast thereto, the Deliberative Model[12] suggests a constructivistic procedure, by which the outcomes of the procedure, as well as the procedure itself, are based on the hypothetical assumption of rational justification. On the basis of normative presuppositions, which concern the individual procedural conditions and the concept of person, the participants arrive at fair agreements through the orderly exchange of arguments.[13] The conception of human rights accepted in the end by all participants can be understood as the result of a 'discursive constructivism'[14]: the way towards the goal, the goal itself, as well as the different stages on the way there, are established by all the participants 'freehandedly', that is, without having further specifications of content determine the process of reciprocal exchange of arguments. In so doing, the participants stand with their feet on the ground of cognitive skills: it is assumed that all engage in the practice of arguing and possess adequate capacities to convince other parties through the exchange of the grounds of their conception.[15] This implies – and this assumption holds also in its generality for the Bargain-ing Model – that by now the 'habit of argument' has prevailed most extensively in the world.[16]

The procedure of legitimation is a two-level procedure, where a first step of moral justification logically precedes a second step of political justification (Jürgen Habermas 1996; Rainer Forst 1999: 151, 1999: 43).[17] In the first phase, the procedure is located in a moral context. The members of the hypothetical community of all human beings agree on those moral principles to which they in the end must submit. This includes that principles formulate conditions of norm-setting as well as norms (and moral rights), which are also the result of the discursive practise. Within the argumentative practise, all reasons are acceptable if they fulfil the following two criteria (Rainer Forst 1999a: 44): First, they must be 'reciprocally non-rejectable' (Thomas Scanlon), which means they must be agreeable on the basis of insight. This would prevent an author of a rule from demanding anything he or she would never submit to because he or she in fact finds the rule to be useless or inadequate. Therefore, part of the conception of a person within this model is that – along with being capable of adopting the perspective of the other – he or she must have a sense of justice that makes it clear that oppressing or dominating others is socially unacceptable. Secondly, reasons must be general, which means that they must be addressed to everyone who may be affected by the norms or by the actions that follow from those norms. Only those who have been the author of a rule are required to submit to it. The two criteria together make for a fair justification procedure. Forst calls this a 'basic right to justification' (Rainer Forst 1999a: ibid). This very basic moral principle allows every individual a veto towards all reasons she finds unacceptable according to the two criteria, and it obliges all participants to publicly explain proposals and actions. The right to justification is itself a normative presupposition that one cannot forego.[18] That means that agreements on the rules of procedure must also meet the normative assumptions of reciprocal justification.[19]

The second phase of legitimation requires a change of perspective: through the morally justified principles, the constructivist procedure is placed within the context of a political community of law. As a result, it is no longer the aim to come to an agreement on moral principles, but instead to arrive at a consensus on the political 'basic structure' (John Rawls), i.e., on the rights and other political rules that enable people to live together. The procedure is identical with the one for moral principles, but in addition to moral reasons, other reasons that reflect the social and political conditions are allowed (Rainer Forst 1999: 48.)

One could object that with this approach it is only fair that a (hypothetical) consensus regarding legal human rights should narrowly fail on the international plane due to the normatively demanding criteria that must be fulfilled in order to achieve a fair agreement. An agreement on this normative basis will not find the support of those philosophical traditions thoroughly human rights-friendly that stand sceptically opposed to deontological morality, for example, rule-utilitarianism. In addition, such approaches that indeed fundamentally undertake a defence of human rights, though not, however, relating to reason but instead to human need, mercy or sensibility, will not be advocated. These approaches offer grounds with which the list of human rights framed in the Universal Declaration can be supported, for example in relation to shared human needs or sensibility concerning human suffering. Yet none of them would pass the 'generalization test' since the participants cannot be convinced of this conception in the same manner and agree on shared grounds.

However, this objection cannot really affect the interpretation advocated here. For, this interpretation avoids the difficulties mentioned without giving up a critical normative standpoint. Here, namely, is a fair agreement that at the end of a dispute has come about under fair procedural conditions. Indeed the result reached by the participants in the discourse is still legitimate if it is not a matter of consensus on the basis of *shared* grounds, but rather the participants agree on *different* grounds, and which suggests speaking here of 'pluralism of grounds'.[20] Those are, how-

ever, in each case the best grounds at their disposal; they are accepted by them and are fitted into their other beliefs. They are their 'first choice'. At the same time, the outcome on which they agree likewise corresponds to their conceptions and presents the best solution for them, to which they agree out of conviction. Hence, this *polygenic* grounding variation, which admits different grounds, is significantly distinguished from a unanimous consensus (the latter is essentially easier to reach since it can achieve agreement from the perspective of comprehensive theories). It is nonetheless a 'stable' agreement since the outcome is a good choice for all participants. At the same time, the polygenic grounding variant is significantly different from compromise, which in contrast – at least for some participants normally the second best variant – oftentimes has resulted on the basis of arguments the participants do not find convincing, but which they nonetheless invoke since an alternative or even no agreement in the outcome would be worse for them.

The pluralism of grounds is a decisive element of human rights justification. Interpretations of law under deliberative conditions are not only open to the grounds of other, locally rooted positions that want the same; they are also in principle open to revision. In other words, they are *context-sensible*. With each renewed opening of the debate exists the possibility of converging on the actual 'correct' interpretation, that is, the one that embodies universalizable interests and on which all can agree.[21]

Let us again turn to the example of women's rights in Pakistan and see what difference the Deliberative Model makes. The participants involved in the deliberative process have to offer reasons acceptable by all the others, and secondly, all those affected by the results need to be the authors of these norms. This requires of all parties that they take up the perspective of all parties involved. We can imagine that under this condition neither position 1 nor position 3 passes the legitimation test. The first interpretation is rejected because it excludes women from the very first when it comes to determine the tasks of men and women in society. The third interpretation is not open for redefining gender roles but acts on the as-

sumption that societal roles are fixed forever. This neglects the voices of those who may be critical about these beliefs. I think it is difficult to reject the third position. Doing so would require giving reciprocally shared reasons why not everybody who is affected should have an equal chance to define gender roles and human rights. This claim cannot be denied to anybody.

In the Deliberative Model the interpretation of legal human rights is oriented towards the *one* correct interpretation of moral human rights. However, although it does not coincide with it, there is, on the one hand, a critical measure for the evaluation of the procedures, the political institutions and the outcomes; and on the other, political elbow-room for interpretations. Whereas in the Bargaining Model the danger consists in that the limits of the law-making procedures that disinterestedly face the approach of the participants, and those at the end of which stands an agreement based on the comprehension of the correct moral principles, become blurred, this is not the case in the version of the different grounds for the agreement on a generalizable result.

The struggle to gain rights arises at the local level, set off by the experience of injustice and struggles against oppression, and by the pursuit of a more adequate interpretation of human rights. On the other hand, already existing legally binding international agreements, their interpretation and implementation, can influence the understanding of human rights elsewhere, as in the case of Pakistan. The interpretation of human rights sometimes begins locally, triggered off by newly experienced violations, and later appeals to international agreements. The debate on human rights is characterized by an interplay between universal and local interpretations, as well as between international and local political requirements.

However, one could object that the deliberative model has some severe flaws. One oft-raised objection is that the concept of the individual is presumed in this model even though it is not compatible with the 'Asian'

ideal of acting responsibly towards the community, nor is it compatible with community-focused practices in some African cultures.[22] Moreover, the legal form of human rights itself prescribes an individualistic perspective incompatible with these traditions.[23]

It would be a misunderstanding to claim that the deliberative legitimation model contravenes the idea of community and presuppose a self-interested self. Rather, the deliberative model describes people as having the ability to see other people's points of view and to interact on a reciprocal basis [24] – necessary preconditions for social interaction. To deny people the chance to get their voices heard and to express their point of view is to deny them a fundamental right: the right to justify one's position and, in turn, to ask for a justification from those in power and who may be responsible for oppression and unjust rules. Nobody can be deprived of this 'right to justification' with good reasons. Moreover, to stress the importance of the community ignores the important social condition of 'pluralism' within and among societies. The 'fact of pluralism' is a rather 'realistic' assumption as a basis for justifying transnational principles.[25]

Human rights as in the deliberative approach, say some other critics, are 'Western' achievements that have come to the fore through the 'Occidental' idea of reason, but which can bring about its own contradictions and trigger unwanted effects. Whereas on the one side reason stands for the inclusion of all those endowed with reason, it has always disguised the exclusion of parts of the population, and worse, it has at times facilitated colonization and oppression in the name of alleged civilization.[26] Another aspect, namely the critique of reason through reason, also has a long tradition within Western philosophy. Martin Heidegger and later Richard Rorty defined what one can call an 'abstractive fallacy'.[27] Reason, originally based on Platonic thinking, 'forgets' its own local context of emergence by claiming universal validity, thereby ignoring that every historical or cultural context has its own ideas of what makes an action right or wrong. The practice of reason-giving, defenders say, is an integral part of communicative action, which itself rests on the idea of reciprocal com-

municative relations (Jürgen Habermas 2002: 212.) In international human rights discourse, participants who aim at a common understanding of interpretations have to orient their actions according to certain presuppositions. Among them is the idea of symmetrical relations between participants, which is expressed through reciprocal respect and taking over the perspective of others as well as the willingness to see one's own tradition from the perspective of the other (Jürgen Habermas 2002: 213). Taking these normative assumptions into consideration, it is possible to track down injustice in every cultural context; they undermine the normative preconditions that have to be fulfilled to come to a consensus.

IV. Final Consideration: The Function of Human Rights

In conclusion, it can be held that for the context-sensible human rights approach advocated here the discord over human rights is an integral part of the theoretical program, unlike perhaps as would occur with a natural law position. Controversies over how inclusion must look are reflected in irreconcilable beliefs regarding human rights. The grounding situation is 'impartial' since in the shared practices of justification it permits all arguments for and against human rights. Thereby it always already presupposes an individual demand for accountability. To abandon this demand itself would mean to misconceive the idea of human rights understood as lending a voice to the weakest vis-à-vis those in power. No conception of human rights can slide back without being delivered beyond recognition. Hence it is also misleading to say that human rights are 'neutral' since they do not rest on shared values and norms, produced through the reconstructive method of inter-cultural comparison. They seem to be characterized more suitably as a normative political instrument that aims towards inclusion. Inclusion itself is an ideal that in the global public sphere will be more and more difficult to reject.

However, what does this mean for the function of human rights in international politics? A conception of human rights that satisfies current in-

ternational relations is confronted with at least four tasks. *First*, human rights formulate political goals for the development of all societies. For this reason they potentially compete with international regulations concerning economic and finance relations, as well as other political relations among states and between states and international organizations. *Second*, moral human rights apply limits to the constitutions of states and to their other internal social regulations, as well as to international organizations (even to trans-national companies). These constitutional guidelines can pertain for instance to religious freedom and gender equality, but also to the adherence to social standards. *Third*, human rights are a measure that can give information as to the legitimacy of the political order of a state and, beyond that, of the international system of regulations. *Human rights are a form of political critique*. This is directed towards intra-societal, trans-national or intermediate states of affairs that make difficult or impossible an unhindered access to the resources to which one has a claim by means of human rights. Poverty, for instance, is not only an unbearable and also humiliating state for those affected. For purposes of social and economic human rights, it can also be criticized as deficient institutional infrastructure, whose negative effects prevent access to vital resources.

Fourth, finally, human rights formulate a concern that can be understood in its universality by all humans, regardless of the culture they belong to and the language they speak: they are directed against arbitrary rule and demand social inclusion in a political society and the implementation of the institutions connected to this membership. The demand for human rights is understood all over the world, for they speak the language of the oppressed. They are *placeholders* for the public condemnation of indignities, abuses, and injuries that humans force on other humans. Political human rights lend authority to the right to a public thematization of oppression. Human rights commit state representatives, citizens, and all other (international and trans-national) actors to establish policies that make membership possible. This also prevents human beings from remaining without virtual legal protection, thus avoiding

being held in detention centres or having to toil under degrading circumstances. *The lack of rights itself is a human rights violation.*

Human rights are the most appropriate norms we possess when we speak of *inclusion*. They formulate the institutional conditions that must be fulfilled for humans to be treated as equal members of a society. An important element of this membership is that the *needs and interests* are reflected in an adequate manner in the social institutions – both in the process of decision making, in the decision as regards content itself, as well as in its implementation. Membership is thereby not limited to a determinate territory, but can possess a regional or global dimension beyond a territorially defined political order. The scope of the membership is dependent on the affectedness through economic, financial, and political systems. Therein already lies the strength of this approach: the principle of affectedness is inclusive and prepares the ground for the political, social, and cultural membership on the basis of a possible or factual subjection to institutions.

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[1] For this see the comprehensive studies by, among others, Emilie Hafner-Burton and Kiyoteru Tsutsui 2005, Oona A. Hathaway 2002 and Andrea Liese 2006; see also the contribution by Anja Jetschke 2006

[2] This article is based on my book *Globale Politik und Menschenrechte*, published in February 2008.

[3] The juridification of human rights means here first and foremost 'legal regulation'. Thereby 'juridical' human rights are distinguished from 'moral' human rights that have not or have not yet been converted into legal form. The expression 'legal' human rights, which perhaps could be offered instead of 'juridical', contains a semantic closeness to 'legalization' or 'legalize', thereby having the connotation of expressing a demand for a legitimate legal claim. However, we will explicitly distinguish here between legality and legitimacy; a legal claim can be legal but not legitimate. The term 'juridification' or 'juridical rights' leaves the question of legitimacy also semantically completely open for the time being. For the distinction between legality and legitimacy see Jürgen Habermas 1996; for the concept of 'juridification' see Bernhard Zangl 2006 and Kreide/Niederberger 2008.

4 The Bangkok Declaration, together with the other two, share the fact that they emphasize obligations instead of rights, group rights and the protection of the family instead of claims of the individual, and, moreover, they underscore the importance of social rights by neglecting civil and political rights. Furthermore, they stress the 'right to development', which demands fair international trade relations among states – a right that addresses collectives and not individuals

5 The distinction between the two models is based on an ideal-typical reconstruction of different but similar approaches. For the Deliberative Model see Jürgen Habermas 1996 (1992); 1996a; Frank Michelman 2000; Rainer Forst 1999, 1999a. For the Model of Fair Bargaining see Jon Elster 1989, 1998; Stuart Hampshire 1999; Ingeborg Maus 1995; John Rawls 1993 and, although different in many respects, Jon Elster 1989; 1998. Similarities and differences with respect to the legitimation of rights in the theories of Ingeborg Maus and Jürgen Habermas have been very clearly presented by Peter Niesen 2002.

6 See also Stuart Hampshire 1999: 27, 77.

7 The threat can thereby be exerted also with an eye on the public: 'When you suggest curtailing the job protection in this way, then I cannot guarantee that the trade union workers will not strike'.

8 Examples of social norms shared among all members of a society are 'respect for human dignity' and the 'prohibition of cannibalism'.

9 A further type of agreement could be called the 'polygenic compromise': even though people can stick by their overall convictions and thus keep their 'first choice' reasons, the result does not express their first priority. Think of someone who defends a theory of needs and someone who is in favor of a neo-liberal theory, both wanting to come to an agreement on social security measures. They may agree that some basic subsistence is necessary for the poor. From a need-perspective this satisfies the idea that people who have needs and cannot satisfy them should get subsistence, whereas from the point of view of a neo-liberalist, supporting the poor helps to stabilize social peace. For the first party (need-theory), however, the measure does not go far enough, whereas for the second it already demands too much. So the result is a compromise (second best option for both), but they agree on the basis of their very own first order convictions.

10 This position is explicated in the Cairo Declaration of Human Rights in Islam. In this document all rights are seen as derived from God. Recently (March 2008), it has become more or less impossible for NGOs to discuss topics such as genital mutilation, forced marriage and stoning with the UN Human Rights Council. Representatives of Pakistan and Egypt intervened immediately, barring the participants from a debate about Shari'ah issues. Louise Arbour, former commissioner of the Council expressed her concerns about this development. For a written statement by some NGOs see: http://daccessdds.un.org/doc/UNDOC/GEN/G08/111/27/PDF/G0811127.pdf?OpenElement. For the Cairo Declaration see: http://www1.umn.edu/humanrts/instree/cairodeclaration.html. There is comprehensive literature on this topic. Let me mention three: Mayer (1991) denies the historical roots of human rights in Islam whereas Bielefeldt (1998) draws on similarities with Christian essentialism. For a critical approach from within the Quran, see Mernissi 1993 and Mahmoud Bassiouni 2008.

11 This was indeed the position of the director of the New Islamic Institute for Women in Islamabad, Farhat Hashmi, who offers an interpretation of women's rights, derived from Islam, that seems strange to most of us. See Anita Weiss 2002. Also, much effort has already been undertaken to derive context-specific notions of freedom, autonomy and individual choice out of the diversity of 'Asian value systems.' In the complex ideas of Confucius, for example, nobility of conduct has to be achieved in freedom, and in the Indian tradition one can find a variety of views on freedom, tolerance and equality (referring to the writings of Emperor Ashoka). The hope of some human rights theorists and activists is that a comprehensive political consensus can be reached by a local reconstruction of values that might pass the inter-cultural test of political agreement. Inoue Tatsuo 1999: 52.

12 Here I refer above all to Jürgen Habermas' theory of law, which has significantly shaped the concept of 'deliberative politics'. Habermas has worked out his ideas on the legitimacy of law for the democratic state of law in *Between Facts and Norms* (1996). Later works, which deal with, among others, the legitimacy of international law, are more demure with regard to the normative presuppositions. In *The Postnational Constellation* (Habermas 2001, above all pp. 164-167) Habermas suggests two criteria that at a minimum should be fulfilled: the rationality of processes of communication and decision, and the transparency of the processes of decision. Nevertheless, one can assume that the criterion persists, according to which on an international plane the outcomes of a legally binding human rights convention should not run counter to moral human rights.

13 See Rainer Forst, whose approach diverges in many ways from that of Habermas.

[14] Rainer Forst 1999a, p. 85 und 1999: 152.

[15] The discourse model was criticized since, due to its emphasis on cognitive assumptions, children, the mentally challenged, and animals possess no rights and cannot be considered full-fledged discourse participants given their lack of competence. See Angelika Krebs 1999: 349.

[16] See also Stuart Hampshire 1999: 37, who speaks of the 'habit of playing the game of argument'. Nonetheless, he adds that the rules of the game might in each case turn out otherwise locally.

[17] Frank Michelman distinguishes also between moral and political justification of human rights in Michelman 2000.

[18] Whereas in Forst's theory the principle of justification is of a moral nature, the very similar discourse principle in the theory of Habermas is based on a notion of reason.

[19] The principle of justification is a (transcendental) principle of reason, which cannot be justified without committing a 'performative self-contradiction' (Karl-Otto Apel). The question 'Why be reasonable in this practical way?' asks after the reason for giving reasons and presupposes what it asks for. The recourse to other authorities does not help either as the same question of legitimation occurs again. Rainer Forst 1999b: 192.

[20] For the concept of 'pluralism of grounds' see also Peter Niesen 2002: 44.

[21] Thus, for example, Hauke Brunkhorst, who refers to the fact that human rights without democracy can be neither interpreted, nor protected and altered: 'Anything else amounts to a mixture of paternalism and arbitrariness' (1999: 173ff.).

[22] See, for example, Rhoda Howard 1990: 159-184. At this point it is worthwhile noting that a similar argument has been given by the so-called 'communitarians'. They criticize – from within 'Western' discourse – the dominant liberal Western idea of a person, which expresses the possessive, individualistic striving for freedom of the individual. The 'unencumbered self' (Michael Sandel 1982) carries out actions according to rational calculation and neglects social ties and solidarity with others. See for the defence of the virtues in a 'Confucian' society Raimundo Pannikar 1982.

[23] This is also the interpretation of Charles Taylor who refers to a reformistic articulation of Theravada Buddhism. Taylor discusses the movement of the late Phutthathat (Buddhadasa), who tried to purify Buddhism by turning it away from rituals around heaven, hell, gods and demons, and focusing it on Enlightenment. Enlightenment here not only means to be concerned with one's own liberation, but also with that of others. Charles Taylor 1999:124-147. See also Sulak Sivaraksa 1992.

[24] For Michael Walzer, often misleadingly named a 'communitarian', the liberal self is not a pre-social but a post-social self. Michael Walzer 1990: 21.

[25] For a criticism of John Rawls' *Law of Peoples* see Kreide 2002.

[26] Poor workers, women, blacks, gypsies, and children were long excluded from the community of rights bearers. The rights of asylum seekers, homosexuals, and animals are still highly contested in Western countries. And the concepts of 'civilizing missions' and – already – 'humanitarian interventions' were used to legitimize the imperialistic politics of powerful Western states from the late nineteenth to the early twentieth century. Onuma Yasuaki 1999: 105; see also Jörg Fisch 1984; Norman Paech/Gerhard Stuby 2001: 102.

[27] For this expression see Jürgen Habermas 2002: 204; Richard Rorty 1993.