Introduction

by Gret Haller[2]

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

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

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

1. The papers

1.1. Basic issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2. The Council of Europe

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

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

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

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

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

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

1.3. The European Union

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

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

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

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

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

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

1.4. The national level (examples)

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

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

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

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

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

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

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

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

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

2. Contentious issues

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

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

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

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

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

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

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

2.1. Genesis of rights

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

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

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

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

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

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

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

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

2.2. Power to transform into positive law

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

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

8. Ibid.,349 ff.

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

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

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

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

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

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

2.3. Multi-level aspects

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

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

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

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

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

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

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

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

2.4. The public political sphere and individualisation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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