II. Human Rights: Philosophical and Theoretical Problems

DISCOURSE THEORY AND HUMAN RIGHTS

R. ALEY
Professor of Public Law and Legal Philosophy
(Christian Albrechts University of Kiel, Germany)

In present, as well as in past and probably future discussions about human rights as generally in political philosophy, one can distinguish four basic positions: with reference to historical models they may be called «Aristotelian», «Hobbesian», «Kantian», and «Nietzschean». The Kantian conception will be defended herein.

The Kantian Position

There are several versions of the Kantian position. They all share the principles of universality and autonomy. The principle of the universality of human rights says that all human beings have certain rights. Instead of human beings, one can also refer to all persons, all rational beings or something similar. This does not have to be settled here. The principle of autonomy works in two directions. It refers to private as well as to public autonomy. The essence of private autonomy is the individual choice and realization of a personal conception of the good. Public autonomy is defined by a collective choice and realization of a political conception of the right and the good. In public autonomy, human rights and democracy are necessarily connected. To render possible and protect both forms of autonomy is the primary function of the human rights in the Kantian conception. Private as well as public autonomy can be fully unfolded only in a democratic constitutional State, in which human rights have taken on the character of basic rights. If below we should talk about «basic rights» instead of «human rights», it is this connection that is being referred to.

1 The article was originally published under the title «Discourse Theory and Human Rights», in Ratio Juris, vol. 6, no. 3 (1996), pp. 209–235; and R. Martin, G. Sprenger (eds.), Challenges to Law at the End of 20th Century: Right. Proceedings of the 17th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR), Bologna, 16–21 June 1995, vol. 1 (Stuttgart: Franz Steiner Verlag, 1997), pp. 81–104. The author’s thanks are due to Dr. Susanne Gaschke and Kirsten Bock for translating this article into English.
4 One has to distinguish between absolute and relative human rights. Absolute human rights are rights everyone has against everyone else. The right to life is one example. Relative human rights are rights that every member of every legal community has in her respective legal community. The right to vote can be named as an example. Such absolute as well as relative human rights are natural or moral rights. A constitution can only be justified if it contains the
The linking of the ideas of universality and autonomy leads to a liberal political theory. The Kantian conception of human rights is a liberal conception. The liberal conception of human rights is the central political idea of the Enlightenment and the civil revolutions. To this day it is the basis of all constitutions of Western character. Thus it is one of the most successful political ideas so far. Still, there has been dispute about the liberal conception of human rights from the very beginning, and criticism is increasing rather than decreasing.

The old objections of formalism, emptiness, abstractness, and absence of historical and cultural connections are repeated and sharpened by the communitarian camp. Not only the human rights' content, but also the category of the rights as such, is being called into question. Criticism turns on the aspeck of autonomy as well as on the aspect of universality. Autonomy is claimed to uproot the individual from concrete structures, to destroy naturally grown communities, and to promote the world's final destruction by unleashing greed for pleasure and possession. All is said to become karstic: the souls, the communities, and nature herself. Against the universality of human rights, communitarians argue that these rights in truth are only elements of certain, the Western, culture, and therefore only have a relative or particular validity. Any claim to universal validity is de-masked as imperialism dressed up as humanity.

The Kantian, and consequently the liberal conception of human rights have to counter these and many other objections. The basis of such a defense must be the substantiation or justification of the Kantian conception itself. The basic features of a certain version of such a justification are presented here: those of discourse theory. By employing this justification many objections are removed immediately, others can be invalidated on its basis.

Any justification of human rights must rest on something. Nearly everything possibly relevant has been tried. One can name eight examples: references to religious revelation, human nature, undeniable evidence, great traditions, existential decisions, individual interests, collective goods, and far-reaching factual consensus. The basis for discourse-theoretical justifications is formed by the rules of practical discourse. Any justification is only as good as the premises by which it is supported. The discourse-theoretical justification of human rights consequently has to face two tasks: On the first level it must substantiate the rules of practical discourse in order to justify, on a second level, the human rights on these grounds. I shall begin with the first level.

The Justification of Discourse Rules

1. Basic Ideas of Discourse Theory

Discourse theory is a procedural theory of practical correctness. According to it, a norm is correct and therefore valid, if it is or might be the result of a certain procedure that of rational practical discourse. A discourse is a procedure of argumentation. This is what distinguishes discourse theories from procedural theories belonging to

\[\text{absolute and relative human rights as basic rights. It such a constitution is valid as positive law, the human rights have become positive as basic rights. The catalogue of basic rights contained in a constitution can include further basic rights besides the human rights.}\]


the Hobbesian tradition, which refer to procedures of negotiation and decision making.\(^1\) A practical discourse is rational to the degree to which conditions of rational practical argumentation are realized in it.

The conditions of rational practical argumentation can be summed up in a system\(^2\) of discourse rules.\(^3\) Some of these rules formulate general demands of rationality which are also valid independently of discourse theory. They include freedom from contradictions, universalisability in the sense of a consistent use of the predicates employed, linguistic-conceptual clearness, empirical truth, consideration of consequences, and weighing. All those rules are also valid for monologues. We shall only look at specific discourse rules here. Those have a non-monological character. Their aim is the impartiality of the discourse. This aim is to be realized by securing the freedom and equality of the argumentation. The most important rules are:

1. Everyone who can speak may take part in discourse.
2. (a) Everyone may question any assertion.
   (b) Everyone may introduce any assertion into the discourse.
   (c) Everyone may express his or her attitudes, wishes, and needs.
3. No speaker may be prevented from exercising the rights laid down in (1) and (2) by any kind of coercion internal or external to the discourse.\(^4\)

On the level of argumentation these rules express the liberal ideas of universality and autonomy. If they are valid, that is, if everyone can decide freely and equally about what she is willing to accept, the following condition of universal agreement or consent is necessarily valid:

**UA:** A norm can only find universal agreement in a discourse if the consequences of its general observance for the satisfaction of everyone’s interest can be accepted by all.

It is a central assumption of discourse theory that consent in the discourse can firstly depend on arguments and that, secondly, there is a necessary connection between universal consent or agreement under ideal conditions and the concepts of correctness and moral validity.\(^5\) This connection can be formulated as follows:

«Correct and therefore valid are exactly those norms that in an ideal discourse would be judged correct by everyone».

With some softenings, this becomes Habermas’ abstract discourse principle: «D: Valid are exactly those action norms to which all those possibly affected could agree as participants in rational discourses».\(^6\)

At least in its basic intention this is congruent with Kant’s principle of the legislative power: «Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative».\(^7\)

---


\(^6\) J. Habermas, Faktizität und Geltung (Frankfurt am Main: Suhrkamp, 1992), p. 138.

2. An Argument Composed of Three Components

The idea of discourse isn’t neutral. It includes universality and the autonomy of argumentation as well as the conception of impartiality which rests upon them. The idea of discourse is therefore an essentially liberal idea. Therefore, the problems of substantiating a liberal position begin on the level of discourse.

There are authors like Nino who explicitly point out the non-neutrality of moral discourses\(^1\) and still regard the justification of its rules as impossible as well as superfluous. A justification or substantiation is claimed to be impossible because morality could not be justified by morality. It is said to be unnecessary, because «an explanation of how moral discourse evolves and why individuals tend to take part in it» was sufficient.\(^2\) Nino is right in stating that morality cannot be justified by morality, because such a justification would necessarily become circular. He is wrong, however, in declaring evolutionary explanations — as interesting and important as they may be the only alternative. In doing so, he underestimates the possibilities of transcendental arguments. A contrary view is held by Habermas. He considers a weak transcendental argument both necessary and sufficient. He calls it «weak», because it does not offer an infallible final substantiation but only a «fallible reconstruction of the normative content to be found in factually unavoidable preconditions for argumentation».\(^3\) As a transcendental argument which is weak in this sense he claims it to be strong enough «to substantiate the universal claim to validity obligatory for all subjects able to speak and act, which is raised by a procedurally formulated principle of morality».\(^4\) This is an overestimation of the power transcendental arguments have in practical philosophy.

The thesis here is that the universal validity of discourse rules can only be substantiated by one — but at least there is one — argument, which is composed of three widely different parts. The first part consists of a transcendental argument which forms the nucleus of the whole argument and essentially defines its universalist character. This transcendental argument is not only weak, as in Habermas, because of its fallible character, but also because of its limited validity. In order to strengthen that, a second part of the argument referring to the maximization of individual utility or advantage must be added. The Kantian and the Hobbesian line are joined in this way in the justification of discourse rules. In order to make this connection successful, an empirical premise about a general human interest in correctness is necessary as a third part. Only by such a premise can those who are merely interested in maximizing their advantage be bound sufficiently to the result of the transcendental argument with which we begin.

a) The Transcendental basis. What a transcendental argument is, is unclear and contested.\(^5\) Here, we shall call arguments «transcendental» which consist of at least two premises with the following structure: «The first premise identifies the argument’s starting point, which consists of things like perceptions, thoughts, or speech acts, and claims that this starting point is necessary in some sense. The second premise then says that some categories or rules are necessary if the matter or issue chosen

---

\(^2\) Ibid., p. 82.
\(^4\) Ibid., p. 194.
as starting point is meant to be possible. The final conclusion is that these categories or rules are necessarily valid».

In discourse theory, several versions of transcendental arguments have been suggested.\(^1\) What they all have in common is that the practice of argumentation or single speech acts form the argument’s starting point. Therefore, the transcendental argument of discourse theory belongs to a certain category of transcendental arguments: the category of transcendental-pragmatic arguments.\(^2\) Transcendental-pragmatic arguments are of language-philosophical or linguistic character, and their aim is to point out the necessary presuppositions of the argumentation or of single speech acts. These presuppositions are said to include freedom and equality of argumentation and consequently the discourse rules mentioned above. If this is correct, it only remains to be shown that, and in which sense, the argumentation or the speech acts which are meant to be the starting point for the justification are necessary. The question whether such an argument can be successful.

The speech acts of asserting, arguing, and asking are of special importance for the justification of discourse rules. As a starting point for that version of a transcendental-pragmatic argument to be suggested here, I choose the speech act of assertion. I shall start with some theses about the necessary preconditions of assertions.

There is hardly any argument about the fact that assertions are only possible if there are any valid rules of asserting at all. This means that assertions necessarily presuppose some kinds of rules. Disagreement focuses on the question which those rules are.\(^3\) If the transcendental argument is meant to succeed, these rules must be proved to be necessary preconditions for the possibility of assertions. There must not be any alternative to them.\(^4\) The problem would be unsolvable if «assertion» could be understood to mean just anything. Then, one could distinguish many concepts of assertion and define each of them by an individual system of rules.\(^5\) That this is not possible in an unlimited way can be shown by the fact that assertions are to be distinguished from other speech acts, for example, from expressions of emotional reactions or mere opinions.\(^6\) There is a central meaning of the expression «assertion».\(^8\) «To this belongs that only such speech acts are assertions, which raise a claim to truth or correctness.»\(^9\) My first thesis is therefore:


\(2\) A. Dorschel, M. Ketten, W. Kuhlmann, and M. Niquet (eds.), Transzendentalpragmatik (Frankfurt am Main: Suhrkamp, 1983).


\(8\) This is congruent with Kuhlmann’s thesis «that there is a central area of essential rules of argumentation and assertion», See W. Kuhlmann, «Reflexive Letzbegründung versus radikalen Fallibilismus», Zeitschrift für allgemeine Wissenschaftstheorie, vol. 16 (1985), pp. 357-374, at p. 373.

\(9\) Cf. D. Davidson, Inquiries into Truth and Interpretation (Oxford: Clarendon, 1984), p. 268: «Someone who makes an assertion represents himself as believing what he says, and perhaps as being justified in his belief. And since we
(1) Anyone who asserts something raises a claim to truth or correctness. This thesis is supported by the circumstance that its denial results in a performative contradiction. A performative contradiction is provoked by someone who, while carrying out a speech act, presupposes, claims, or implies something which contradicts the contents of that same speech act. Take the following assertion:

(1') I assert that it rains, and I emphasize at the same time that this is wrong. This assertion includes a performative contradiction, because part of what has been said («I emphasize at the same time that this is wrong») contradicts what is necessarily being presupposed in the actual making of the assertion: a claim to truth or correctness.

The second thesis links the claim to truth or correctness necessarily connected with assertions to the claim to justifiability. It says:

(2) The claim to truth or correctness implies a claim to justifiability.

Who claims that her assertion is true or correct, and at the same time says that there are absolutely no reasons for what she asserts, does perhaps not even make a genuine assertion. At least it is necessarily flawed. This mistake is easily avoided, however, because in order to raise a claim to justifiability one must not refer to good but just to any reasons. Thus, a reference to evidence, revelations, and authorities is sufficient. Decisive is whether reasons make an appearance at all.

That assertions raise a claim to justifiability does not mean that anyone at any time must justify every assertion to everyone. Quite often, the addressee of an assertion already disapproves of the assertion as such and under no circumstances wants to be bothered with reasons for it. On the other hand someone who has made an assertion might have sound reasons for denying substantiation; he might, for example, just not have time for it. If the addressee of an assertion, however, asks «why?» and demands a justification, and the person who has made the assertion does not have sound reasons for denying it, then the claim to justifiability implies an obligation to justify. The third thesis is therefore:

(3) The claim to justifiability implies a prima facie obligation to justify what one has asserted, if asked to do so.

Insofar, the utterance of an assertion is the entry into the domain of argumentation.

want our beliefs to be true, it seems right... that when someone makes an assertion, he represents himself as intending to say what is true».

1 Fusfield has suggested that the reference to performative contradictions could not really be a justification of discourse rules (W. Fusfield, «Can Jürgen Habermas’ “Begründungsprogramm” Escape Hans Albert’s Munchhausen Trilemma?», Jahrbuch Rhetorik, vol. 8 (1989), pp. 73–82, at p. 77). It is correct that the reference to a performative contradiction is no substantiation of a sentence by means of another, independent sentence, because a performative contradiction can only come into existence if the discourse rule in support of which it is mentioned is already valid. Performative contradictions are therefore only a means of showing that discourse rules are valid. They serve as an explication of what is considered a common presupposition. As any other explication it can, of course, be inadequate, and the thesis supported by it, wrong.

2 There are contexts in which one might doubt whether (1') actually does include a contradiction and even such contexts in which it certainly does not. There is, for example, certainly no contradiction in (1'), if A, after uttering (1') as an assertion addressed to B (thus committing a performative contradiction) repeats (1') – astonished, startled, or amused – to himself in a way of self-description. But then the «I assert» in (1') is no longer employed for the actual making of an assertion. Only this case is of interest here. A contradiction is doubtful, if someone wants to use the term «to assert» in the sense of «to say» and insists that this was the actual meaning of «asserting». Concerning this case we can state that the person in question has either not understood our meaning of «to assert» or intends a change of our language usage. No emphasis is needed that there are contexts in which no one would be accused of the contradiction in (1'). Anyone can utter (1') as a joke, and all could like her the better for it. But as a joke (1') can only be employed because it contains a contradiction.

Whoever justifies anything at least pretends to accept the other as an equal partner, at least as far as the justification is concerned. This can be shown by the flaws of an utterance like:

(4.1) Personally, I do not consider the reason R, which I name in support of my assertion, a good reason; but considering your low intelligence you should accept it as such.

This utterance contradicts the postulation of equality in the argumentation. A reason for an assertion is only a good reason if it can be a good reason for everyone. Furthermore, everyone who justifies something does at least pretend neither to employ force nor to rely upon force employed by others — at least as far as the justification is concerned. This can be shown by an example like the sentence:

(4.2) If my reasons do not convince you, you are fired, which is no substantiation.

It contradicts the postulation of freedom from force in the argumentation. Finally, someone who makes an assertion claims to be able to defend it not only against its respective addressee, but against everyone. Therefore, utterances like the following are wrong:

(4.3) If we exclude A, B, and C from our discussion and try to forget their objections, we will be able to convince ourselves that the reason R which I have named is a good reason.¹

Such utterances contradict the postulation of the universality of argumentation. The fourth thesis is therefore:

(4) Whoever gives justifying reasons for something raises claims to equality, freedom from force, and universality, at least as far as the justification is concerned.

To these claims correspond the specific discourse rules mentioned above, which guarantee everyone's right to take part in discourses, as well as grant freedom and equality in discourses. If my argumentation is correct, it has substantiated exactly those discourse rules which express the liberal ideas of autonomy and universality.

One could object that my argument was not anything but a definitory trick. The way from the concept of assertion to the specific discourse rules (with stops at the claim to correctness, the claim to justifiability and the prima facie obligation to justify) could be seen as a chain of definitions which did not necessarily have to take on this very form. One might say that I was merely introducing a strong concept of assertion which already implied the discourse rules. It might be regarded as easily possible to employ a weaker concept for which this need not be true. One can meet this objection by showing that assertions in the sense explicated here are necessary in some way relevant for the transcendental argument. That is the content of the transcendental argument’s first premise.²

Assertions, and the arguments connected with them would not be necessary at all if one could do without them at will. According to Apel and Habermas, a consequent refusal of argumentation is supposed to have fatal consequences. With reference to "clinical psychopathology" Apel talks about the loss of "the possibility of self-under-

¹ For a similar example see J. Habermas, "Diskursethik Notizen zu einem Begrundungsprogramm", in J. Habermas (ed.), Moralbewusstsein und kommunikatives Handeln (Frankfurt am Main: Suhrkamp, 1983), pp. 53–125, at p. 101.
² There is a close relationship between both premises of a transcendental argument. The more normative content is taken up in the second premise (in our case: the stronger the implications connected with the concept of assertion are) the more doubtful becomes the necessity of the starting point (in our case: the necessity of such assertions). Reversely, the normative content of the second premise is lowered if the certainty of the starting point's necessity increases. See A. Watt, "Transcendental Arguments and Moral Principles", The Philosophical Quarterly, vol. 25 (1975), pp. 40–57, at p. 43.
standing and self-identification>, even about «self-destruction», and Habermas about «schizophrenia and suicide». These are empirical assumptions one can argue about. Here, a weaker thesis shall be sufficient. It says that it is necessary in the following sense to undertake assertions and justifications:

(5) Who never in his life makes an assertion (in the sense defined in (1) – (3)) and never puts forward an argument (in the sense defined in (4)) does not take part in the most general form of life of human beings.

The transcendental argument is radically weakened in this way. It does not establish an argumentative obligation against everyone. In order to take part in the most general form of life of human beings it is not necessary to make assertions and to give reasons to everyone who demands them; it is sufficient to do this at all in some context and to someone. The stronger one does not have to justify what he wants to burden the weaker one with. He can utter a plain order and enforce it by violence, and still take part in the most general human form of life by exchanging assertions and arguments with members of his own group. Habermas may be right in saying that «to drop out of argumentation and action orientated towards understanding leads into an existential impasse.» A justification of discourse rules or of principles of discourse ethics, however, does not follow from this. Extremely particularistic communities can be ways out of such «existential impasses». The acceptance of universal principles is not necessary for this.

In spite of the radical weakening of the transcendental argument, there remains a systematically highly significant residue. Apart from extremely unusual circumstances, such as growing up in total isolation, it is probably factually impossible to opt out of the most general form of life of human beings by never making any assertion at all however trivial, never putting forward any kind of justification, and never asking the question «why?», this counterpart to assertions and justifications. In principle, everyone is able to ask, to assert, to argue, and everyone — leaving aside unusual circumstances — has at least some minimal practice with reference to these faculties.

The thesis about the most general form of life of human beings does not disregard the fact that there are very different concrete forms of life. It says, however, that all human forms of life necessarily include universals of argumentation, which can be expressed by the discourse rules. Those universals may be of ever so little impact in reality due to taboos, tutelage, or terror. They would, however, only vanish totally if the members of a form of life wholly and finally lost their ability to make assertions, to name reasons, and to ask «why?». The discourse rules therefore do not define any particular form of life, but something that is shared by all human forms of life, notwithstanding the fact that it is of vastly different importance in each of them. To this extent, discourse theory tries to find out potentials of rationality in human reality. In this sense it tries to promote enlightenment about human nature and is insofar, but only insofar, connected with the tradition of natural law.

5 Some might take this as an opportunity to come up with the classical objection of the is/ought-fallacy against discourse theory. This objection would overlook the fact, however, that the transcendental argument does not consist of
Nothing much is won so far for the justification of discourse rules. From the fact that someone has the ability to solve conflicts of interests by means of argument, and that he has at least a minimal or rudimentary practice with reference to this ability does not follow that he must make use of this ability in every conflict of interests and against everyone possibly concerned. Whoever is stronger might consider it more to her advantage to employ rituals of domination, orders, and force. This would only be different if one could presuppose an overriding interest in all human beings to solve conflicts of interests correctly that is justly. Experience tells us that such a presupposition would not be justified.

This finding can be described by distinguishing between real and ideal validity. A rule is really valid if and as far as there is an actually existing motive or interest for obeying it. It is ideally valid if it is valid for all to whom a regulative idea like truth or moral correctness is a positive value. Moral correctness has a positive value for exactly those persons who have an interest in it. The transcendental argument can show those who have an interest in correctness which rules they have to follow. Those rules, furthermore, have categorical validity from the ideal point of view of correctness. But no transcendental argument can generate interests or motivations. Under the aspect of reality or facticity the transcendental argument therefore leads only to a hypothetical validity of the discourse rules: It shows what is valid if there is an interest in moral correctness and if therefore the ideal point of view of correctness is taken up. That is a factually limited validity.

b) Maximization of utility and the interest in correctness. At this point the two further components of my argument in favor of the universal validity of discourse rules come into play, the maximization of individual utility and a thesis about human beings being equipped with an interest in correctness. Consider, for example, elite that is exclusively interested in exploiting a subjected population. With this population, it could only communicate through orders and the enactment of force. That however would not be optimal. Force is expensive, and an order formed by it is unstable and therefore a risk for the elite. Legitimating is cheaper and in the long run also more secure. This is true at least if one must suppose that there is a sufficient number of persons—both in the elite, especially in its younger generation, and in the subjected population—who have an interest in correctness. It is certainly unfounded anthropological optimism to expect an interest in correctness in every human being, or to judge this interest, if it happens to be there, as strong enough to unfold social effectiveness without being hindered by counter-interests. On the other hand, it is also unfounded anthropological pessimism to expect an interest in correctness in no one or in too few, or to consider this interest, where it can be found, as always or usually so weak that it cannot unfold social effectiveness. Tyrants, dictators, and despots have always known this and have usually attempted legitimations by employing arguments. That those arguments were regularly bad and mere propaganda is not important here. Decisive is the fact that they try to use arguments at all. In this way, the maximization of individual utility leads into argumentation and consequently into the field of discourse rules, because a sufficient interest in correctness has to be taken into account.

1 Such an interest in correctness is dangerous for tyrants, especially because it may lead to people taking risks they would avoid if they calculated only their personal advantage.
One could object that this did not suffice for a justification of the discourse rules. Whoever enters into discourses for mere strategic reasons would only have to pretend to recognize the freedom and equality of others as partners in the discourse. He could act according to a well-known recommendation by Machiavelli: «Who has best understood to be a fox has fared best! But one has to learn to hide the fox's nature and be a master of hypocrisy and disguise... A ruler therefore does not have to own all the good qualities we have mentioned in reality; but he must create the impression that he did».  

This would however only be an objection if one had to regard the generation of a motivation which in content corresponds to the discourse rules as a necessary part of any substantiation of discourse rules. But that is not the case. In the field of speech, too, one can distinguish between a subjective validity, which rests upon motivations, and an objective validity, which refers to external behavior.  

The justification attempted here only aims at the objective validity of discourse rules. Instead of an «objective validity» one could also talk about an «institutional validity». The human rights to be justified here belong to the field of law and therefore to the field of legality. That is why the objective validity of discourse rules can carry at least some of the burden of their justification.

Thus the first part of my argument in favor of human rights is closed. As an interim result we can state that the discourse rules can be justified in a triple sense. First of all, they express a competence belonging to the most general form of life of human beings. Secondly, everyone who has an interest in correctness must make use of this competence. And thirdly, to someone who has no interest in correctness the objective observance of the discourse rules is advantageous under the aspect of the maximization of individual utility.

The Justification of Human Rights

So far, we have been concerned with the discourse rules as rules relating to the realm of speech. Human rights are rules or norms for the realm of action. Human rights can only unfold their full power if they are guaranteed by norms of the positive law, meaning that they are transformed into positive law. That is the case, for example, if they are taken up as binding law into the catalogue of basic rights of a constitution. In justifying human rights one can therefore distinguish between a problem of form and a problem of substance. The problem of substance is concerned with the question which human rights are necessary. The problem of form is concerned with the necessity of transforming this content into positive law. I shall start with the problem of form.

1. The Necessity of Law

The transformation of human rights into positive law is only necessary if it is necessary to have positive law at all. There are three problems which lead to a necessity of the law: the problem of knowledge, the problem of enforcement, and the problem of organization. For discourse theory, the problem of knowledge results from the fact that it does not offer a procedure which always allows for just one right answer by means of a finite number of operations. This leads to the necessity of decisions in a

---

2 This distinction corresponds to Kant's distinction between morality and legality. See I. Kant, The Metaphysics of Morals (Cambridge: Cambridge University Press, 1991), p. 46.
legally organized procedure, for example on the basis of the principle of majority. The problem of enforcement comes into existence because the insight into the correctness or legitimacy of a norm is something different from its observance.\(^1\) Consequently, the unanimous judgment of a norm in a discourse as just and therefore correct does not necessarily occasion its observance by all. But if some are allowed to violate a norm without consequences, its observance can no longer be demanded of anyone. From the fact that discourses can generate insights but not always their corresponding motivations follows the necessity of rules backed by force and with that the necessity of law.\(^2\) The problem of organization is caused by the fact that many moral demands and desirable aims cannot be met by individual acting and spontaneous cooperation alone. Examples are the support of unemployed people or the help for a suffering country. The necessary organization presupposes law.\(^3\) To renounce the regulation of community life by law which is substantiated by the arguments of knowledge, enforcement, and organization would mean anarchy. But in anarchy, human rights would not be guaranteed. The necessity of law can therefore not only be substantiated by considerations of utility but also by human rights.

The necessity of the law’s form is, however, only one side of the matter. The other side is formed by necessary demands to its content and structure. That is the main theme of the discourse-theoretical justification of human rights. As human rights do not only refer to private but also to public autonomy, their justification necessarily includes the justification of democracy. The justification of human rights is therefore the justification of the necessity of a legal system with certain content and a certain structure.

2. Types of Discourse-Theoretical Justifications of Human Rights

There are two types of discourse-theoretical justifications of human rights: a direct and an indirect one. A direct justification takes place if it can be shown that certain rights are valid independently of actually carrying through real discourses, solely on the basis of discourse theory. Such rights are discursively necessary in the narrower sense. Their non-validity is discursively impossible in the narrower sense.\(^4\) We have a merely indirect justification if the decision about human rights is delegated to a factual political process which, however, has to meet certain discourse-theoretically founded demands.\(^5\) If those demands are met, the decisions made about human rights in the political process are legitimate and those rights are therefore discourse-theo-

---

\(^{1}\) This corresponds to Kant’s distinction between the «principium diiudicationis» and the «principium executionis»: «If the question is: What is morally good or not, it is the principium of diiudication according to which I judge the worthiness and depravity of actions. But if the question is, what moves me to live according to that law? That is the principium of motivation». See I. Kant, «Vorlesungen über Moralphilosophie: Moralphilosophische Collins», Kant’s gesammelte Schriften, vol. XXVII (1st ed.; Berlin: De Gruyter, 1974), pp. 237–473, at p. 274.

\(^{2}\) The problem of knowledge and the problem of enforcement basically correspond to Kant’s arguments for the transition from the state of nature to the civil state. See I. Kant, The Metaphysics of Morals (Cambridge: Cambridge University Press, 1991), p. 123f.

\(^{3}\) J. Habermas, Faktizität und Geltung (Frankfurt am Main: Suhrkamp, 1992), p. 148.

\(^{4}\) For the concepts of discursive necessity, impossibility, and possibility, see R. Alexy, A Theory of Legal Argumentation (English translation by R. Adler and N. MacCormick) (Oxford: Clarendon, 1989), p. 217f. Discursive necessity and impossibility in the narrower sense, which is related to the direct discourse-theoretical justification, are to be discriminated from the discursive necessity and impossibility in a broader sense. The latter are to be classed with indirect justification and therefore are to be relativized to persons and time (See R. Alexy, «Die Idee einer prozeduralen Theorie der juristischen Argumentation»), in A. Aarnio et al. (eds.), Methodologie und Erkenntnistheorie der juristischen Argumentation (Berlin: Duncker & Humblot, 1981), pp. 177–188, at p. 181; and R. Alexy, «Problems of Discourse Theory», Critica, vol. 20 (1988), pp. 43–65, at p. 60f.

\(^{5}\) The distinction between the direct and the indirect justification is largely congruent with Nino’s distinction between a priori and a posteriori rights. See C. Nino, The Ethics of Human Rights (Oxford: Clarendon, 1991), p. 253.
rhetorically justified.¹ Indirectly justified rights must never be discursively impossible in the narrower sense, but they do not have to be discursively necessary in this sense. It is sufficient that they are merely discursively possible as far as what concerns the discursive modalities in the narrower sense. Here only those rights shall be of interest which can be directly discourse-theoretically justified, that is, only discursively necessary rights in the narrower sense.

The question is how human rights can be directly justified on the basis of discourse theory. A direct conclusion from the discourse rules to human rights cannot be drawn. The discourse rules are merely rules of speech. To observe them means only to treat the other as an equal partner in the discourse. From this it does not automatically follow that the other as such, hence also in the realm of action, has to be treated as a person. From the language-pragmatic recognition a moral or legal recognition does not necessarily follow.² In order to get from discourse rules to rules of action further premises are therefore required. Those further premises must belong to discourse theory if one attempts a direct discourse-theoretical justification which leads to discursive necessity in the narrower sense.

Depending on which further premises are chosen, three kinds of direct discourse-theoretical justifications of human rights can be distinguished: the arguments of autonomy, of consensus, and of democracy. Those three justifications do not compete, but complement and strengthen each other. I shall begin with the argument of autonomy.

3. The Argument of Autonomy

The argument of autonomy says that whoever takes part in discourses seriously presupposes the autonomy of his partners, thus excluding the denial of certain human rights.³ An interesting version of the argument of autonomy can be found in Nino. According to Nino, anyone who seriously takes part in discourses accepts the following «basic norm of moral discourse»: «It is desirable that people determine their behavior only by the free adoption of principles that, after sufficient reflection and deliberation, they judge valid.⁴ This norm obviously goes beyond the rules and principles of discourse we have looked at so far. She, who accepts it, does not accept only the autonomy of her partner in a discourse, but also his autonomy in the realm of action.

a) The justification of the principle of autonomy. Nino’s basic norm of moral discourse shall be called «principle of autonomy» here. If the principle of autonomy was presupposed as necessary in every moral discourse, it would be discursively impossible to deny the other’s moral or legal autonomy in discourse. Whoever did this would commit a performative contradiction.⁵ With the moral and the legal autonomy one of the two central ideas of the liberal conception of human rights would then be justi-

¹ Into the realm of the indirect discourse-theoretical justifications falls everything Habermas leaves to the «self-governing practice of the citizens» as a development or concretization of his system of rights. See J. Habermas, Faktizität und Geltung (Frankfurt am Main: Suhrkamp, 1992), p. 160ff.
³ If one only makes the definition of the concept of the transcendental argument wide enough, this is another one of this species.
fied or substantiated. The question shall therefore be: Do we really have to presuppose something like Nino's basic norm if we seriously take part in moral discourses?

The answer to this question depends on what one considers a «serious» participation in a discourse. Two meanings can be distinguished. According to the first one, someone participates seriously in a moral discourse if he is interested in moral truth or correctness and in nothing else. Suppose this to be the case with A. A is uncertain whether the principle Pa he has defended so far, is correct or right and therefore valid or whether this is rather true for the principle Pb, which is defended by B. He engages in a discourse with B. After some time A is convinced that his principle Pa is, after all, the only right one and that no new arguments can be brought forward. He gives up the discourse with B and moves to the realm of action. There, he tries at first to induce B by persuasion and advantageous offers to live her life according to Pa. Then, when this does not help, A employs force. In this constellation, A has treated B as an equal partner in discourse for the time his uncertainty, and with it the discourse, lasted. But from the time when A became convinced of the correctness of Pa' with the end of the discourse he has also stopped recognizing B's equality and freedom. The principle of autonomy has not been accepted by A in any phase. This means that there is a way of participating in discourses which can be called «serious» in some sense and does not presuppose the principle of autonomy.

In order to get to the principle of autonomy the concept of serious participation must be understood in a second, stronger sense. According to that someone only participates seriously in moral discourses if he wants to solve social conflicts through discursively generated and controlled consensus. A discursively generated consensus is a consensus that has come into existence on the basis of a discourse. It remains discursively controlled if it can be called into question at any time. If this happens, a new attempt must be made to generate a consensus discursively. The first version of the concept of serious participation allowed A to resort to persuasion and force, as soon as his conviction was firm. This is excluded by the second meaning. Whoever wants to solve social conflicts through discursively generated and controlled consensus accepts her partners' right to orient their behavior only to principles they judge to be correct, and therefore valid, after sufficient deliberation. This is the recognition of the principle of autonomy. With this recognition, the separation of action and discourse is removed. Thus, the freedom and equality of the discourse are transferred to the realm of action. Discourse and autonomy become two sides of the same thing.

One could come to think that in the second meaning of seriousness, truth and rightness were replaced by consensus and autonomy. But that would be a misconstruction. Even for someone who is only or mainly interested in moral truth or correctness, the second meaning is in the end preferable. Only the permanent possibil-

---

1 We shall deal with the question whether this right and its corresponding principle of autonomy have a definitive or a prima facie-character below.

2 If one presupposes this concept of serious participation, the problem of the autonomous renunciation of autonomy can easily be solved. Suppose A could convince B in a discourse that it would be the best thing for him to subject himself to A in every respect and only to do what A tells him. The question whether such a conviction can be brought about in a discourse may remain open here. At least it has to remain under discursive control if the presuppositions mentioned above are to be valid. That can only be the case if the non-autonomous state can be called into question at any time, meaning that then a new consensus has to be sought in a new discourse and that any employment of force in order to maintain the status is excluded. So if a non-autonomous, near-slavery state can be founded in discourse at all, it can only be a status which can be removed with arguments at any time (R. Alexy, A Theory of Legal Argumentation (English translation by R. Adler and N. MacCormick) (Oxford: Clarendon, 1989), p. 132). Such a status would be something like a free slave status or an autonomous nonautonomous status. Thus, one would not really give up autonomy.
ity of discursive reflection of all norms of action on the basis of autonomy can be a protection against lasting moral errors.\(^1\) Therefore, one can say that a fully developed interest in moral correctness includes an interest in autonomy. Insofar, there is an intrinsic relation between moral correctness or truth and autonomy. Problems can arise, of course, if someone constantly irrational refuses to agree to a just solution and demands to maintain his autonomy at other people's expense. But that is a problem of limiting the right to autonomy and of the organization of democratic procedures. Both problems shall be treated below.

Whoever takes part in discourses with a fully developed interest in moral correctness can be called a «genuine participant in discourse». Genuine participants in discourse connect the interest in moral correctness and the interest in autonomy. In this way, they necessarily presuppose the principle of autonomy. A likely objection to this is that one could say all this in this way, but that it did not suffice as a justification, because it was circular. In the end, it was only shown that someone who wanted to solve conflicts by freely recognized principles had a positive attitude to acting according to freely recognized principles. An obligation to take part in discourses in such a serious or genuine way was not founded by it. One could not talk about a necessary validity of the principle of autonomy for all participants in the discourse. The whole justification is claimed to have only hypothetical character: «The principle of autonomy was only valid for someone who had decided to respect the autonomy of others. One could, however, take part in discourses without such a decision or such a will. Thus, everything points to the question whether the concept of genuine participation is in any way necessarily connected with the concept of discourse».

At this point, a second view has to be taken at the distinction between the subjective or motivational and the objective or institutional validity. As little as one could justify the subjective validity of discourse rules in a transcendental-pragmatic way, as little implies the participation in discourses the subjective or motivational validity of the principle of autonomy. One can take part in discourses without being the least bit interested in the autonomy of one's partners.\(^2\) There are many people who have neither an interest in moral correctness nor in other people's autonomy, or whose interest is so small that it retreats in each case of collision with the personal advantage, but who will still talk about moral questions. For these persons, the principle of autonomy has no or no relevant, motivational force and therefore no subjective validity. Still, one can justify or substantiate the principle's objective validity even for them.

We have shown above that an objective or institutional validity of the discourse rules can also be justified for someone who is only interested in the maximization of her individual utility or advantage. Whoever wants to legitimate her social position must at least pretend to observe the discourse rules. This can be extended to the principle of autonomy. Someone who wants to obtain legitimation through a discourse must, in this discourse, at least pretend to accept the autonomy of her discourse partners. She must — in the sense of Machiavelli's recommendation quoted above — at least feign a genuine participation in the discourse. If she does not do this, the interest her partners have in the discourse, and with it her chance of obtaining a

---

\(^{1}\) This is so not only because of the general possibility of errors, but also because of the dependence of moral correctness on communication (cf. R. Alexy, «A Discourse-Theoretical Conception of Practical Reason», Ratio Juris, vol. 5, no. 3, pp. 231–234, at p. 237f.).

\(^{2}\) Cortina rests her attempt at a discourse-theoretical justification of human rights on the thesis that human language was equipped with a telos of understanding (A. Cortina, «Diskursethish und Menschenrechte», ArchivfUrRechts- und Sozialphilosophie, vol. 76 (1990), p. 40f.). If this should refer to subjective validity, the thesis is wrong.
put the text here
R. Alexy

hunters. Autonomy does, however, have a prima facie priority over collective goods. In discourse this becomes obvious in the form of a burden of argument in favor of individual autonomy and against collective goods.\(^1\) To work out all this is the task of the doctrine of basic and human rights. Here, we shall only take an interest in the structure of the justification of concrete or special rights.

There are two operations which lead from a general right to autonomy to catalogue of concrete or special basic and human rights. The first one is applied if one tries to show that a certain concrete right is nothing but a special case of the right to autonomy and insofar conceptually contained in it. In this way, the whole catalogue of concrete rights to freedom can be substantiated. The second operation consists in explaining that certain rights are necessary means for acting autonomously. In this way, rights to protection through the state and basic social rights, like the right to the basic means of living, can be justified.\(^2\)

Both operations lead to rights which protect and render possible the private as well as the public use of autonomy. The general right to autonomy embraces one and the other. The rights belonging to the second group cover, e.g., the freedom of expression, the freedom of assembly, the freedom of the press, and the right to vote generally, freely, equally, and secretly. In this way, the direct discourse-theoretical justification of the basic and the human rights can be systematically linked with the indirect one. Only this connection leads to a fully developed system of basic rights. A direct discourse-theoretical justification principally\(^3\) allows only for prima facie rights and prima facie priorities. To the directly justified rights belong essentially those which are necessary for delimiting and developing the rights in the process of political opinion and will-formation in a correct and legitimate way. Thus the circle closes.

4. The Argument of Consensus

The argument of autonomy is based on the principle of autonomy and claims that this is a necessary presupposition of genuine participation in discourse. The argument of consensus, on the other hand, is based on assumptions about necessary and impossible results of discourses. These assumptions do not have to be so strong as to already imply or represent a fully developed system of rights. The argument of consensus is interesting already if it leads to some demands concerning the content or the structure of human and basic rights. In this respect, there is a structural parallel to the argument of autonomy.

The argument of consensus is a central element of Habermas' justification of a system of rights. Habermas formulates the aim of his justification as follows:

«This system should contain precisely the basic rights that citizens must mutually grant one another if they want to legitimately regulate their living together by means of positive law».\(^4\) The law's legitimacy is thus dependant on the universal consent to it. This corresponds to the principle of discourse mentioned in the beginning, which says that exactly those norms of action are legitimate to which all those possi-


\(^3\) An exception is probably the active right to vote generally, freely, equally, and secretly. Here, only marginal limitations would be possible.

\(^4\) J. Habermas, Faktizität und Geltung (Frankfurt am Main: Suhrkamp, 1992), p. 151.
From the connection of this principle with the form of the law result, according to Habermas, the principle of democracy and a system of rights which are said to be two aspects of one and the same thing. Habermas calls this the «logical genesis of rights». In this logical genesis of rights, the thought that the basic rights are not already given when the political process takes place, but have to be generated in this process by making public use of autonomy, which is: the idea of an indirect discourse-theoretical justification is of central importance.

But this is only one side of the matter. The other aspect is that in Habermas one cannot find only the reference to the necessity of concretizing the basic rights in a discursively organized democratic process, but also an abstract system of rights which consists of five groups of basic rights. The rights belonging to the first three groups aim at the protection of private autonomy and its «correlates» to which Habermas counts membership in a legal community and legal protection. Political autonomy is the issue of the rights belonging to the fourth group. The rights of the fifth group are designed to secure the social, technical, and ecological preconditions of private and public autonomy. In short: Habermas' system of rights is concerned with the protection and the rendering possible of private and public autonomy, that is, concerned with exactly what has been justified above by the argument of autonomy. The question is whether the argument of consensus is only a second justification of the same matter, or whether it adds something to the argument of autonomy which this alone cannot justify.

My thesis is that the argument of consensus leads to a necessary supplementation of the argument of autonomy. This supplementation consists in the introduction of impartiality, and with it, equality. In this way, the second main element of the liberal conception of human rights is brought into play. The autonomy is supplemented by universality in the form of equality and impartiality.

The discourse-theoretical criterion of impartiality has however one important weakness. It relies on a hypothetical consensus which real persons would reach under ideal conditions. Often one can only speculate about its content. Then, a solution can only be found in a political process which should be organized as discursively as possible, as the next argument, the argument of democracy, will show. But in some elemental cases one can say with sufficient certainty what would be discursively necessary or impossible results. The equality of the human rights belongs to these elemental cases. In a discourse defined by freedom and equality, it is a necessary result.

This is at least true under ideal conditions. Unequal human rights cannot be justified in an ideal discourse because under the ruling of freedom, equality, and rationality in argumentation, arguments for an unequal distribution of human rights will not last.

1 J. Habermas, Faktizität und Geltung (Frankfurt am Main: Suhrkamp, 1992), p. 138.
2 Ibid., p. 157.
3 Ibid., p. 160.
6 To this corresponds Habermas' thesis that there can be no legitimate law without the right to «equal subjective freedom of action» (J. Habermas, Faktizität und Geltung (Frankfurt-am-Main: Suhrkamp, 1992), p. 138), his postulation of «equal political basic rights» (Ibid., p. 161), and his demand that the «use with equal chance» of private and public autonomy be, among other things, secured by social rights (Ibid., p. 158f.).
7 An interesting parallel to this is found in Kant (I. Kant, «Perpetual Peace. A Philosophical Sketch», in H. Reiss (ed.), Kant: Political Writings (2d ed.; Cambridge: Cambridge University Press, 1991), p. 99): «As for the principle of equality in relation to the most exalted being I can conceive of, apart from God (e.g. a power such as Aeon), there
Three objections can be raised against the discourse-theoretical substantiation of the equality of human rights. The first is pointed against the argument of consensus as such, that is against the connection of moral correctness and validity on the one hand and universal consent in an ideal discourse on the other hand. In this way, the adequacy of discourse theory as a procedural theory of practical truth or correctness is denied in principle. This objection cannot be discussed in detail here. One should, however, point out its highly problematical preconditions. The ideal discourse is characterized by the greatest possible unfolding of clarity, knowledge, and impartiality. Whoever denies that a norm recognized as correct under these conditions is correct, either presupposes dubious alternative ways of the recognition of norms, or norms existing independently of human interests and human reason, or he has to deny in general that norms can be correct or legitimate and claim moral validity on that ground. All of this is not acceptable.

The second objection repeats what has already been discussed when dealing with the argument of autonomy: Just like the argument of autonomy, the argument of consensus can only found a subjective or motivational validity for someone who has an interest in correctness. One can meet this objection along the lines of the substantiation of an objective or institutional validity mentioned above.

The third objection one has to take rather more seriously. It is raised by someone who claims that it is possible for a person to observe the discourse rules and to be interested in correctness and still not to agree to the equality of the human rights even under ideal conditions. Thus the possibility of justifying the universality of human rights through the argument of consensus is denied. An example is the racist who claims that members of other races do not have the same human rights simply because of their race. If the racist has an interest in correctness and observes the discourse rules, he must name arguments for his assertion and expose them to criticism. Suppose the racist was a national socialist who considered his racial theory as a scientific theory. He would make the following attempt to defend his assertion: «On the basis of strict scientific insight, we know today that man, into the deepest subconscious movements of his psyche, but also into his smallest cerebral convolution, is determined by the reality and inescapability of his people and race. The race forms his spiritual face no less than his outward appearance. It determines his thoughts, feelings, powers, and desires, it is the essence of his being.»

In this way, he would fail to meet even the most elemental demands of empirical truth and conceptual clarity, that is, the most elemental demands of the discourse rules. The matter becomes serious, however, if the racist rests his theses on religious revelations, on unexaminable metaphysical assertions, or magical insights. Still, the justification of the equality of human rights is not overcome in this way. Discourse theory does not know any conversational restraint, but it demands that only arguments examinable by all they concern may be upheld against opponents, if, as with human rights, a solution to a conflict of interests is called for. Accordingly a racist...
who insists on denying the equality of human rights for religious, metaphysical, or magical reasons is by definition no participant in an ideal discourse. His existence can therefore not devalue the argument of consensus.

The question whether equality of human rights is a necessary result of an ideal discourse has naturally not been fully answered herewith. It could be that in an ideal discourse all come to the conclusion due to arguments that are examinable by all and in this sense rational that an unequal distribution of human rights is the right solution. An opponent of the argument of consensus could argue that this possibility can simply not be excluded because no mortal person has ever participated in an in every respect ideal discourse and no mortal will ever do so. But then, how shall one know which could be its result and which not? Therefore, it cannot be excluded that all decide on the reign of an elite which is defined by high intelligence and some other characteristics such as diligence and self-sacrifice. Such a decision for elite could include the majority's renunciation of rights like the right to vote, the freedom of expression, of religion, and the right to choose occupation or profession. The majority could want this renunciation, e.g., because they expect more wealth and peace and only favor an order of society right that ensures these two values.

Against this attack against the possibility to substantiate the equality of human rights with the help of the argument of consensus three arguments can be stated. All three arguments concede that no human being has ever participated in an in every respect ideal discourse and no one will ever do so. But they advance that simply from this it does not follow that in a case can it is said what would be the result of an ideal discourse.

The first argument runs that there are plausible empirical assumptions which—firstly cannot be devalued in an ideal discourse and secondly suggest certain results. There are, in order to stay with our example, undoubtedly people who are at the same time every intelligent, diligent and self-sacrificing. Experience teaches us, though, that every renunciation of equal rights in favor of the reign of persons with these or other qualities is more than risky. Participants in an ideal discourse are acquainted with history and know that uncontrolled political power is taken advantage of sooner or later. As long as they do not intend to become victims they will not disclaim their rights.

To this cannot be objected that the people can change during an ideal discourse in a way that the fundamental distrust against the holder of the political power is no longer justified. The ideal discourse is a construction related to speech. The temporal unlimitedness is only valid in this construction and in it only in speech. The action to which the result of speech shall refer is action in this world in which the ideal and the real mix.

Against the argument dealt with so far could be argued that it rests on unfounded preconditions. The supposition that participants in an ideal discourse would not leave all rights, especially not all political rights to an elite does not only base on the experience that uncontrolled political power is taken advantage of sooner or later but essentially also on their unwillingness to become victim of that elite. How could one know that after an ideal discourse exactly this or something similar is not the aim of all who do not have the characteristics of the members of the elite? The answer to

---

this question leads to the second and third argument against the possibility that an unequal distribution of human rights can be the result of an ideal discourse. Within both arguments autonomy plays a central role. But it has a different status in each case.

The second argument consists of a connection of the argument of consensus and the argument of autonomy. The argument of autonomy says that someone who takes part in discourses as a genuine participant assumes the autonomy of all participants in the discourse as a positive value. It furthermore says that someone who does not seriously take part in this sense at least has to pretend to accept autonomy as a positive value, if he wants to maximize his advantage in the long run. The latter is of no further importance here because it shall be assumed that the participants of an in every respect ideal discourse are genuine discourse partners. The question of results of an ideal discourse that is pursued here can therefore be based on genuine discourse partners.

The connection of the argument of consensus with the argument of autonomy leads to a considerable relief of the argument of consensus. Autonomy and the connected rights do not have to be substantiated any more within the scope of the argument of consensus. They have already been substantiated by the argument of autonomy due to the structure of discourse, in fact of every, and not just of the ideal, discourse. Now, the argument of consensus deals only with the equal distribution of the already established good, which is autonomy.

Once autonomy has been substantiated it is only a little step towards equality because there is a close connection between autonomy and equality. One may take political autonomy and from this as an example, the three-class-right to vote. In such an electoral law the members of the lower classes are not only treated unequally, they also have no complete political autonomy. The political decision of each separate member of the lower classes is dominated by the decision of each separate member of the higher classes according to the relationship of the imbalance of votes. This becomes quite obvious, once the right to vote is completely withheld from certain classes of society. The members of these classes are not only treated unequally; the unequal treatment is at the same time the denial of political autonomy. Whoever values political autonomy positively must value the unequal distribution of political rights negatively. This excludes a positive evaluation of the role of a political victim. The same is true for private autonomy and the corresponding rights. The connection of the argument of consensus and the argument of autonomy therefore leads to the result that principally only an equal distribution of human rights can be the result of an ideal discourse. Something different would only be valid if an unequal distribution of human rights could lead to more autonomy for all. Having all historical experience in mind, this is, besides extreme exceptions, not the case or at least very unlikely.

The third argument differs from the second one in being based on autonomy as subject of elemental human interests and not on the principle of autonomy as a presupposition of discourse. An argument of consensus based on this must work with assumptions about what interests the participants of an ideal discourse would judge as justified under conditions of argumentative impartiality. Such assumptions can, if at all, only be substantiated on the basis of a discourse-theoretical conception of the person. There is much in favor of the possibility to justify a conception of

the person with the help of discourse theory in which the interest in autonomy plays a central part. But this shall not be pursued any further at this point. It may only be mentioned that the variant of consensus argument based on the interest in autonomy in the case of its success would not only lead to a supplementation of the argument of autonomy but also to its strengthening. The thesis that the principle of autonomy finds approval by all in an ideal discourse would give a second foundation of this principle and therefore of the general right to freedom as well as of the special rights resulting therefore.

As an interim result we can state that the argument of consensus leads to the equality of human rights and in this way to the liberal principle of universality. For those who are interested in moral correctness it founds a subjective or motivational, for those who lack this interest, an objective or institutional validity of this principle.

5. The Argument of Democracy

The third discourse-theoretical argument in favor of human rights, the argument of democracy, shall only be roughly sketched here. It consists of three premises. The first says that the principle of discourse can be approximately realized by the institutionalization of democratic procedures of opinion and will formation, and only by that. If an approximation of practical correctness and legitimacy is possible in reality at all, this can only be reached in democracy. The second premise takes up from this point and says that a democracy, which approximately realizes the demands of discursive rationality, is only possible if the political basic and human rights are valid and can be exercised with sufficiently equal chances. The third premise says that the exercise of political basic and human rights with sufficiently equal chances presupposes the validity and realization of some non-political basic and human rights. To these belong, e.g., the right to life, to basic means of living, and a certain education. If those three premises are true, the following sentence is valid:

Whoever is interested in correctness and legitimacy must also be interested in democracy; whoever is interested in democracy must also be interested in basic and human rights.

This argument is not so much of interest because it adds a further justification of the basic and human rights to the two mentioned above. Its real significance consists in the fact that it directs the view from the basic and human rights to the democratic procedures and institutions and makes clear that the idea of discourse can only be realized in a democratic constitutional state, in which basic rights and democracy are inseparably connected in spite of all tensions. Discourse theory therefore does not only render possible a justification of basic and human rights, it also emerges as the basic theory of the democratic constitutional state.

Alexy R. Discourse Theory and Human Rights

Abstract. The author defends the liberal conception of human rights, based on the idea of universality and autonomy. The main thesis of the article is that human rights can be justified by discursive theory. The argument has two steps. Step one is the justification of the rules of discourse. The second step consists in the foundation of human rights, which includes the argument of autonomy, the argument of consensus and the argument of democracy. The author notes that the idea of discourse can only be realized in a democratic state in which fundamental human rights and democracy are inextricably linked.

Key words: human rights, rule of discourse, universality, autonomy, liberal ideas.

Алексій Р. Теорія дискурсу та права людини

Анотація. Автор відстоює ліберальну концепцію прав людини, в основі якої — ідеї універсальності та автономії. Головна теза статті полягає в тому, що права людини можуть бути обґрунтовані за допомогою дискурсивної теорії. Для її доведення автор робить два кроки. Крок перший — обґрунтування правил дискурсу. Крок другий — обґрунтування прав людини, який включає в себе аргумент автономії, аргумент консенсусу і аргумент демократії. Автор конструє, що ідея дискурсу може бути реалізована тільки в демократичній правовій державі, в якій основні права і демократія нерозривно пов'язані.

Ключові слова: права людини, правила дискурсу, універсальність, автономія, ліберальні ідеї.

Алекси Р. Теория дискурса и права человека

Аннотация. Автор отстаивает либеральную концепцию прав человека, в основе которой — идеи универсальности и автономии. Главная тезис статьи заключается в том, что права человека могут быть обоснованы с помощью дискурсивной теории. Для ее доказательства автор делает два шага. Шаг первый — обоснование правил дискурса. Шаг второй — обоснование прав человека, который включает в себя аргумент автономии, аргумент консенсуса и аргумент демократии. Автор конструет, что идея дискурса может быть реализована только в демократическом правовом государстве, в котором основные права и демократия неразрывно связаны.

Ключевые слова: права человека, правила дискурса, универсальность, автономия, либеральные идеи.