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Human Dignity as the Ground of Human Rights

A Study in Moral Philosophy and Legal Practice

Menselijke waardigheid als grond van mensenrechten
Een studie in morele filosofie en de juridische praktijk
(met een samenvatting in het Nederlands)

Proefschrift

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door

Marie Christine Göbel

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Promotoren: Prof.dr. M. Düwell
Prof.dr. R.J.G. Claassen

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Contents

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1. Moral Human Rights, Legal Human Rights and Human Dignity

1. Introduction

How do human rights, understood as a specific kind of moral rights, and human rights, understood as a specific kind of legal rights, relate to one another? And how may the concept of human dignity help us in making sense of their relationship? These are the two core questions of this study. The main aim is to show that and how a moral idea of human dignity and human rights bears upon a proper understanding of the nature and justifiability of legal human rights norms. I interpret moral and legal human rights norms as expressions of the practical self-understanding of human agents: of the necessary practical self-understanding of every human agent *as* a human agent (in the case of moral human rights norms); and of the socio-historically contingent practical self-understanding of the members of particular legal communities *as* members of these communities (in the case of legal human rights norms). Moral theory and legal practice then constitute two "hermeneutical contexts"[1] of human rights that are distinct yet point to one another in numerous ways. The main thesis of this study is twofold: The concept of human dignity plays a crucial role in both the moral and the legal understanding of human rights; and at the same time it constitutes the decisive link between these two understandings. It is therefore *via* the concept of human dignity that the relationship between moral and legal human rights norms will be interpreted in this study. In turn, thinking about the concept of human dignity in light of the links and tensions between a moral and a legal understanding of human rights allows us to comprehend its meaning and functions more thoroughly.

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[1] See Section 5.

In this first introductory chapter I give an outline of the main questions, theses and approach of this study as well as the structure of the argument as a whole. I begin by illustrating the practical relevance of the topic of this study by situating it in a wider context of public and academic debates *(2)*. Then I introduce the guiding conceptual distinction of this study, i.e. the distinction between human rights as a specific kind of moral norms ('moral human rights') and a specific kind of legal norms ('legal human rights') *(3)*. The importance of systematically employing this distinction as well as its further implications are then explained by turning to current philosophical debates *(4)*. After that I clarify my metanormative approach *(5)*. Then I briefly address some common doubts about the use of the concept of human dignity *(6)*. I end with a summary of the single argumentative steps of this study *(7)*.

2. Human Rights Law(s) and Moral Justification – A Prologue

On 22 May 2017 Manchester was hit by a terrorist attack. It was Britain's third major terrorist attack in that year. The suicide bombing at Manchester Arena caused the death of 22 people visiting a pop concert. More than 800 people suffered physical and psychological injuries.[2] The next day, in a speech owing to the event the British prime minister Theresa May proclaimed: "[L]et us remember those who died, and let us celebrate those who helped, safe in the knowledge that the terrorists will never win – and *our values*, our country and our way of life will always prevail."[3] Soon after May spelled out what political consequences she would draw from this series of attacks if reelected: She expressed her willingness to weaken human rights protections in order to expand the legal possibilities of fighting terrorism by means incompatible with the European Convention on Human Rights.[4]

[2] Http://www.bbc.com/news/uk-england-manchester-44129386, accessed 20 August 2018.
[3] Https://www.nytimes.com/2017/05/23/world/europe/theresa-may-manchester-arena.html, accessed 20 August 2018, emphasis added.
[4] See https://www.reuters.com/article/us-britain-security-may-rights/uks-may-says-ready-to-curb-human-rights-laws-to-fight-extremism-idUSKBN18X2JA, accessed 20 August 2018.

In the course of an election rally she stated regarding these counter-terrorist measures: "*If our human rights laws stop us from doing it, we will change the laws so we can do it.*"[5]

The journalist Martha Spurrier commented on May's reaction in an article for *The Guardian* entitled "Theresa May has said she'll rip up human rights. We should all be afraid"[6]. According to Spurrier, May's political intentions make plain that she has "abandoned those values"[7] that she had (allegedly) reaffirmed after the attack: "What she means is this: If the right to liberty or to a fair trial or not to be tortured gets in the way, she'll just scrap them – casually disposing with values set down to stop tyranny after the horrors of the second world war."[8] Spurrier further notes that "even if she wins, she has no mandate to do this"[9]: "Human rights are not there for the powerful to dispense with when it's politically convenient. They're there to protect ordinary people and uphold the basic standards of a civilised society."[10]

The German satirical magazine *Titanic* also commented on May's plans. The comment reads:

> **After Human Rights: Theresa May Wants to Let Rewrite Bible**
>
> On the day of the British parliamentary elections prime minister Theresa May one more time takes on the offensive: After she had already announced to restrict human rights, in as much as they might continue to stop human beings from the inhuman treatment of other human beings, she now also targets the Bible: "If the Ten Commandments stop us, then we will change them so that they don't do that anymore", May stated right before the elections.[11]

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[5] Https://www.reuters.com/article/us-britain-security-may-rights/uks-may-says-ready-to-curb-human-rights-laws-to-fight-extremism-idUSKBN18X2JA, accessed 20 August 2018, emphasis added.
[6] Spurrier 2017.
[7] Spurrier 2017.
[8] Spurrier 2017.
[9] Spurrier 2017.
[10] Spurrier 2017.
[11] Http://www.titanic-magazin.de/news/nach-menschenrechten-theresa-may-will-auch-bibel-umschreiben-lassen-8918/, accessed 5 September 2017, my translation.

These comments reflect how deeply entangled questions about the *legal* protection of human rights are with *moral* questions in public perception – about "values", the basic standards of "civilised" societies, fundamental moral claims of "ordinary people" that politics and law ought to respect, and so on. Changing or abandoning human rights laws, so the gist of the critique, is not like changing or abandoning just any laws. Rather, human rights are first of all *moral rights* that human beings have, independently of whether they are legally recognized or not, rights that *morally ought* to be respected and protected by politics and law. So human rights impose a moral standard of legitimacy upon politics and law rather than being at their disposal. Human rights *laws* are supposed to be based upon the political and legal recognition of this suprapositive, moral standard: They are *grounded* in the fundamental moral rights of all human beings, so a common assumption. This is why human rights laws, too, cannot (or rather: ought not) be changed just like that by politicians or judges, even if they are backed by a democratic majority ("even if she wins, she has no mandate to do this"). So human rights have a special moral authority. They are the "*doxa* of our time"[12].

This alleged subordination of human rights laws to objective moral principles or values raises the hackles of the critics. It puts the independency of law as a democratically legitimized and ideologically neutral social institution at risk, so the fundamental worry. Morality ought not dictate laws to those who live under their terms – legal human rights norms, just as any legal norms, cannot and ought not be "downloaded"[13] from a higher, independent realm of objectively true morality. They ought to arise out of a democratic process of self-legislation that is itself a fundamental precondition for the legitimacy of law.[14] Moreover, democratic legal systems ought not be based upon one specific, overarching moral idea of the good but offer legitimate ways how to mediate between a plurality of normative commitments and worldviews. The practical worry that underlies this critique is

[12] Hoffmann 2011a, 1. See, however, below.
[13] Isiksel 2013, 177.
[14] See e.g. Benhabib 2006 and Habermas 2010.

that the internal sovereignty of democratic legal communities as well as the respect for the plurality of human values might be undermined by some form of "moral (human rights) imperialism". The claim that human rights laws have a moral ground is therefore eventually politically dangerous. As political and legal norms, human rights require specific *political* forms of justification.[15]

However, in current human rights debates one also encounters an opposed worry. In want of a universal moral standard that guides our understanding of human rights, they might be interpreted in entirely "culturally relative"[16], particularist or eventually arbitrary ways. This worry is reflected, for instance, in recent debates about the Universal Islamic Declaration of Human Rights, which links the (allegedly) universal ideas of human rights and human dignity to the Islamic law, the Sharia, and thus to a particular religious doctrine.[17] Another concern in this context is the problem of the so-called "human rights inflation", i.e. the tendency to put all kinds of political, legal and moral claims into human rights language to lend substance to them.[18] These problems give rise to two specific practical concerns, among others: *Firstly*, the apparent arbitrariness of what counts as a human right might undermine the credibility of the human rights enterprise. *Secondly*, the possibility to provide all sorts of particular(ist) normative viewpoints with a universalist slant by expressing them in human rights language entails a significant potential for political and legal misuse of the human rights idea. Human rights may therefore not be interpreted however one pleases. As political and legal norms, they involve a claim to universal moral justifiability that suggests a firm and important place of universal moral principles in our understanding of these norms.

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[15] See e.g. Beitz 2009.

[16] I am aware that the concept of "culture" (as in "cultural relativism") is not unproblematic. Among other things, it suggests more homogeneity of interests and normative outlooks than we might actually encounter in any community (cf. Forst 2010, esp. 730-734), and it might (and frequently does) serve as an exclusionary category. Nonetheless, I use the term 'cultural relativism' from time to time in this study when referring to philosophical debates that are standardly framed in terms of "moral universalism versus cultural relativism".

[17] See Maróth 2014.

[18] See Griffin 2008.

The question about the relationship between moral and legal human rights norms that lies at the center of this study thus leads us directly to a conglomerate of (internally related) debates that have shaped moral, political and legal discourse in the last decades: debates about natural law and legal positivism; fundamental rights and democracy; about moral universalism and cultural relativism, "Western imperialism" and (for instance) "Asian values"; about the ideological neutrality of the state and the moral foundations of politics and law; about sovereignty and its limits; and so on. These debates, which concern fundamental questions about the modern self-understanding of politics and law, are both mirrored and carried on in debates about human rights. They have special and continuing practical relevance in this context for two closely related reasons in particular.

Firstly, human rights are not "just" a moral and political idea(l) but also a firmly politico-legally institutionalized practice – think, for instance, of the various United Nations-institutions, of regional institutions like the European Court of Human Rights or of the monitoring activities of NGOs like Human Rights Watch. This inevitably confronts us with the question how this practice ought to be shaped in the future and what its guiding principles ought to be. *Secondly*, human rights have (in)famously been labelled the "last utopia"[19] after the fall of previous "universalist" projects like socialism, Christianity and anti-colonialism. There seems to be, at the moment, no genuine global alternative to the belief in human rights as a guiding principle of emancipatory political action and a widely accepted standard for legitimate politics and law. Accordingly, some think that the human rights enterprise has just started and that the main question that remains at this point is how to further implement human rights in the future.[20] However, there is also a growing body of opinion that human rights are already past their peak and that their inefficiency and dangerous downsides should prompt us to think about alternative future ideals.[21] This reminds us that human rights are the "last" utopia only at this

[19] Moyn 2012. For a critique see McCrudden 2014.
[20] Cf. Hoffmann 2011a, 1.
[21] See e.g. Douzinas 2000 and Hopgood 2013. This is why one might wonder whether Hoffmann's claim that "[h]uman rights are the *doxa* of our time, belonging among those convictions of our society

point in time: Guiding moral and political ideas are superseded by new ones in the contingent course of history. Human rights might remain a (mere) "utopia" after all, and possibly a misguided one.

The question about the future development of the human rights enterprise is therefore inseparable from the further question about the justifiability and normative implications of the moral human rights idea: Are human rights a moral idea(l) worthy to strive for in the future or "a very bad idea"[22] to begin with? Are the downsides of current attempts to implement human rights a consequence of this idea (thus indicating its limits) or may they, by contrast, be diminished by pointing out its true normative consequences?[23] Finally, what follows from this for our understanding of the guiding principles of the politico-legal human rights practice: Should we regard it as a continued attempt to establish a (more) just world order that is based on the respect of the dignity and human rights of all human beings or rather as a "hegemonic" and pro-capitalist project of "the West"; or, as some kind of middle way, should we neither think of it in utopian nor in radically critical terms but regard it as a pragmatic and fairly efficient political answer to a number of contingent "modern threats"[24]?

These questions are complex, of course, and do not allow for a simple answer. This study contributes to these reflections by bringing more clarity to some central issues that are at stake in these questions what regards our understanding of the moral and legal dimensions of human rights – in a nutshell: I will propose an interpretation of the moral principle of human dignity as the common "ground" of moral and legal human rights norms that, I think, can accommodate most of the practical worries indicated above. Importantly, rather than to impose a moral idea onto law, this means to take seriously a moral standard that is presupposed in the legal practice of human rights itself.

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that are tacitly presumed to be self-evident truths and that define the space of the conceivable and utterable" (Hoffmann 2011a, 1), is (still) accurate.

[22] Geuss / Hamilton 2013.

[23] See e.g. Kennedy 2002.

[24] See Beitz 2009 and below, Chapter 3, Section 3.3.

The argument that I will develop in this study is motivated by a number of questions about the moral, legal and "practical" character of human rights that we encounter in current human rights debates. I will turn to this in Section 4. In order to avoid conceptual confusion from the start, to this end I first need to introduce the guiding conceptual distinction of this study, i.e. the distinction between 'moral human rights' and 'legal human rights'.

3. Human Rights as Moral and as Legal Rights

The Universal Declaration of Human Rights (UDHR) from 1948 is commonly considered a milestone of the modern human rights movement.[25] Together with its two partner covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, both 1966), it is often referred to as the 'International Bill of Rights'[26]. A large politico-legal institutional framework has been established in the wake of these documents and continues to be developed further up to the present day. Human rights provide a language in which, dominantly maybe, weighty moral, political and legal claims are raised today. Numerous NGOs pursue their goals in the name of human rights, as do other state and non-state actors all around the globe. 'Human rights' often serves as an umbrella term that includes these and other aspects of the "practice of human rights". This practice has a moral, a legal and a political dimension that closely intertwine and is not reducible to either one of them. The same holds for the modern concept of human rights.

The rise of human rights has naturally brought along an increased scholarly interest

[25] This is not to say that the modern human rights movement or the rise of the modern human rights idea started with the UDHR. The topic of the origins and genealogy of human rights is strongly disputed among historians. See further on this Chapter 2, Section 3.2.

[26] Although this term is commonly used, it is usually put in quotation marks because it "is not an official term in any international human rights instrument or other source of international law" (Gardbaum 2008, 750). Another reason is substantive, namely "serious [...] questions about the validity of the implied comparison with domestic bills of rights" (Gardbaum 2008, 750). See further on this Gardbaum 2008.

in them. Whereas initially human rights were almost exclusively studied by legal scholars, they now constitute an own field of research in various academic disciplines, among them philosophy. What distinguishes a philosophical approach to human rights?

The philosophy of human rights is chiefly concerned with two questions. *Firstly*, there is the question *what human rights are*, i.e. the question about their "nature". For instance, one might wonder how human rights differ from other kinds of rights, or according to what criteria X should count as a human right and Y not. *Secondly*, there is the question about the *justification* of human rights, i.e. the question about their normative foundation(s) or ground(s). For instance, one might wonder why one should assume that there are human rights at all, or more specifically whether there are good moral reasons to assume that there is a human right to free speech.

As is evident from this, philosophical human rights theories are often *moral* theories, i.e. they deal with moral questions about human rights (to put it broadly).[27] Because of this, philosophers often conceive of human rights as a specific kind of *moral rights* – for instance as the rights that all human beings have "simply in virtue of being human."[28] At the same time philosophers do not reflect about these moral norms *in vacuo* but in light of the fact that there is a global human rights practice and that there are politico-legally institutionalized human rights norms. In this respect the hermeneutic background of thinking about human rights in the 20th and 21st century differs fundamentally from the societal environment in which, for instance, philosophers thought about natural rights in the 18th century.[29] As a matter of fact, most or even all philosophers in our times *apply* their moral human rights conceptions *to* the human rights practice: They aim to say something morally

[27] This is meant as a characterization of systematic philosophical accounts of human rights, as different from historical accounts.
A note about terminology: I use the terms 'moral' and 'ethical' synonymously throughout this study. It should be clear from the context whether I use the terms in the sense of an academic discipline, as the characterization of a held belief, of a normative claim etc.
[28] Griffin 2001, 306.
[29] See further on this point Chapter 2, Section 3.

significant about it (to put it again broadly).[30] The reason why I emphasize this point will become clear shortly.

It is a fundamental assumption of this study that different *concepts* of human rights need to be distinguished. I shall stress right away that this is not a point about diverging interpretations of human rights, as mirrored in competing human rights *conceptions*.[31] The point is both more simple and more fundamental than this: It aims at *that which* we want to conceptualize in the first place, at the human rights "phenomenon" that we are trying to grasp. It concerns the *preunderstanding* of what human rights are that precedes any effort to understand their nature more thoroughly. Simply put, people mean different "things" when they refer to 'human rights' – they employ different human rights concepts that are not reducible to one another. Philosophical discourse in particular is affected by this ambiguity.

More concretely: As noted above, philosophers often understand human rights as a specific kind of *moral rights*. This is reflected in the kind of questions that philosophers typically ask, such as "Is there a human right to not be tortured?", which does not aim at the content of some legal code but at the justification of a moral norm. So the term 'human right' signifies a moral right (to not be tortured) here and not for instance a legal right. This is *one* concept of human rights: Human rights are rights in a moral sense or a specific kind of moral rights. I will refer to human rights so understood as '*moral human rights*'.

The term 'human rights' may also be used differently, namely as signifying a specific kind of *legal rights*. Roughly, human rights so understood are the human rights that are (actually) recognized in law. This understanding of human rights is especially evident from how the term is used outside philosophy: Legal scholars and sociologists for instance often refer to human rights without meaning moral rights. So this is a *different* concept of human rights: Human rights are rights in a legal sense or a specific kind of legal rights. I will refer to human rights so

[30] I am not claiming that this necessarily has to be so, just that it usually is as a matter of fact: Of course one might in principle develop a moral theory of human rights without relating it to the human rights practice.

[31] On the difference between terms, concepts and conceptions see Chapter 2, Section 3.

understood as '*legal human rights*'.[32] I will now first add three clarificatory remarks about this conceptual distinction and then explain in more detail why it is important. *Firstly*, I am not claiming that there are *only* these two concepts of human rights. Generally put, there are as many concepts of human rights as there are meanings of the term 'human rights'; the need to expressly distinguish these concepts depends on the relevant context. As noted above, 'human rights' might for instance be used as an umbrella term for the various institutions and practical implications of the modern human rights practice. The term might also refer to a certain element of this practice: e.g. the modern human rights *idea*, a widely shared *belief*, the international legal human rights *system*, and so on.[33] In none of these exemplary usages the term 'human rights' denotes *rights*, strictly speaking. In this study I am concerned with human rights *as rights*, i.e. as a specific kind of moral and of legal norms. This is why the distinction between a concept of moral and a concept of legal human rights is central in this context.

Secondly, by insisting that these two human rights concepts need to be distinguished I am by no means suggesting that there are no connections between them. In particular, I am *not* claiming that moral and legal human rights norms can be *understood* independently from one another. To repeat, my point is quite simply that the term 'human rights' might denote different human rights "phenomena" (a certain kind of moral and a certain kind of legal rights)[34] and that these phenomena are different in kind. So the two concepts are *not reducible* to one another. Any systematic study of their interconnections therefore presupposes their conceptual

[32] See further on these two concepts Chapter 2, Section 2. A similar conceptual distinction is made by Buchanan in Buchanan 2013. However, Buchanan distinguishes 'moral human rights' from '*international* legal human rights'. See also Buchanan 2015 and Chapter 5, Section 2. Moreover, his account differs from mine in that he suggests that (international) legal human rights can be theorized largely independently of moral human rights.

[33] Think of statements like "Human rights are a phenomenon of the 20th and 21st century", "Human rights are everywhere" or the abovementioned statement that human rights are "the *doxa* of our times".

[34] Conveniently, in what follows I frequently drop the prefix "a certain kind of". The characterization of human rights as "moral" or "legal" is supposed to capture the kind or category of rights that the relevant human rights phenomenon belongs to as a subclass (moral rights and legal rights). It is not meant to imply that all moral or legal rights are moral or legal human rights. With regard to legal rights this is self-evident. With regard to moral rights it requires further elaboration; see Chapter 2, Section 2.

distinction.

Thirdly and finally, 'legal human rights', on my understanding, are rights that are *actually recognized* as human rights in law. This is to some extent a contingent terminological decision: As I will explain in the next chapter, the assumption that there are moral human rights (however understood in detail) necessarily has moral implications with regard to the legal realm.[35] This is why one might equally refer to those human rights that *morally ought* to be legally recognized as 'legal human rights' – independently of whether they are in fact legally recognized or not. This is not how I use the term. As I will explain below, one of my goals is to shed light on the relationship between a *moral idea* of human rights and (legal) human rights in legal practice, i.e. as *actually practiced* rights. For this reason it is crucial that my usage of the term 'legal human rights' is correctly understood.

To some the conceptual distinction between moral and legal human rights might just appear as some conceptual pedantry that unnecessarily complicates matters: Is it not fairly clear from context whether scholars refer to human rights as moral or as legal norms? More than this, does the distinction not imply to artificially separate two dimensions that really belong together in our common understanding of human rights – their moral and legal dimensions, which constitute *two conceptual features* of *one* concept of human rights (as I myself pointed out above)?

In response to the *second* objection, it is important to see that the *actual inseparability* of the moral and legal dimensions of human rights is not beyond dispute. According to an influential strand in the current philosophy of human rights, we can and should conceptualize the nature and grounds of human rights, understood as a certain kind of legal and political norms, independently of an underlying moral dimension. On this view (which I firmly reject), moral and legal human rights are not only *distinct*, i.e. *irreducible to one another*, but *separate*, i.e. *independent from one another*. Against this background, part of what motivates the conceptual distinction between moral and legal human rights is that it allows us to address doubts about their actual inseparability in a systematic fashion. I will go

[35] See Chapter 2, Section 2.2 and in more detail Chapter 6.

further into this in the next section.

The *first* objection allows for a direct reply: Human rights debates evidently show that it is frequently *not* clear what scholars *mean* when they talk about human rights, on a basic conceptual level. The (avoidable) confusion that this causes frequently leads to pseudo-debates, where an alleged dissensus – for instance about the nature of "human rights", without qualification – could easily be resolved by clarifying the (diverging) human rights concepts that the respective parties employ. More importantly, this confusion may distract from actually controversial questions at stake. Let me illustrate the point with an example.[36]

In philosophical debates about human dignity and human rights one frequently encounters "false dichotomies" what regards their respective nature and ground. False dichotomies are made up of two claims that are presented as mutually exclusive and as exhausting the full range of options (there is no further possible answer to the question at hand) whereas at closer look they turn out to be either compatible or non-exhaustive or both. One particularly well-known dichotomy of this kind concerns the question about the nature and ground of human rights. According to one common view, human rights are the rights that every human being has simply in virtue of being human.[37] This is usually taken to imply that human rights are *necessary* or *absolute* (their possession does not depend on any contingent features like individual character traits or personal achievements – they are *given* not earnt) and *universal* (all human beings have them independently of when and where they live, of their socio-cultural background etc.). This again often results in the claim that human rights must somehow *inhere in human nature*, or that they must be grounded in some feature that in turn inheres in human nature. According to an allegedly opposed (and thus alternative) view, human rights are neither necessary nor universal but *contingent* and *particular*.[38] They were initially established as a concrete political response to a concrete socio-historical situation:

[36] See further Chapter 3.
[37] See e.g. Griffin 2008.
[38] See e.g. Beitz 2009.

essentially, the systematic in-humanity and de-humanisation during World War II and especially in the Holocaust. Overall they are an institutional reaction to a range of contingent threats that human beings face in our modern – and particularly Western – world. So human rights are a specifically modern phenomenon, and they are neither given nor inherent in human nature but *created*. They are a contingent product of human (politico-legal) action.

Leaving any details aside for the moment, the bottom line of this apparent contradiction can be resolved by relating each view to one of the two concepts of human rights that I distinguished above – in brief: *As* a specific kind of moral rights, human rights are necessary, universal and grounded in human nature (in some sense); *as* (part of) a contingent modern practice, or more specifically *as* legally institutionalized norms, human rights are contingent, particular and created. Once reformulated in this way, we see that to argue about the nature and grounds "of human rights" – without qualification – is prone to lead to misunderstandings and to obscure the real points of contention. These concern, *first*, the details of each view, i.e. the proper understanding of moral and legal human rights *each*. For instance, in what sense might moral human rights be "necessary", and does their necessity really imply that they are "given" or inherent in human nature? *Secondly*, the question arises how both human rights concepts relate to one another – again with a focus on the *legal* human rights practice: What role does the concept of moral human rights play *for* and *within* that practice? How does the (assumed) necessity and universality of human rights as moral norms relate to the contingency and particularity of human rights as legal norms? To what extent does the attempt to understand what human rights *are* as legally institutionalized norms itself presuppose a concept of moral human rights ("nature")? And in what way might moral human rights constitute an appropriate standard for assessing the legitimacy of legal human rights ("justification")?

As I will explain in the next section, the answers to these questions are strongly disputed. With a view to these controversies, it is important to see that the conceptual distinction proposed has a further systematic consequence: In the light

of this distinction, the questions about the nature and ground of human rights – the two core questions of the philosophy of human rights – are replaced by two *sets* of questions, one regarding moral and one regarding legal human rights norms. How do these questions *relate* to one another? It is striking that in current human rights debates this question is hardly addressed in a systematic and sufficiently nuanced fashion, which leads to onesided views about the relationship between moral and legal human rights. I will explain this in what follows.

4. Onesided Views about the Relationship between Moral and Legal Human Rights

I noted above that philosophical human rights theories typically pursue a twofold aim: to justify a conception of human rights, understood as (a specific kind of) moral norms, and to morally assess (some element of) the politico-legal human rights practice with the help of that conception.[39] In many philosophical theories (the majority maybe) this moral assessment centers around a question of the following kind: "Is the list of human rights in the Universal Declaration of Human Rights justifiable from a moral point of view?", or "Is the human right X as listed in the Universal Declaration of Human Rights justifiable from a moral point of view?". So the focus lies on a list of human rights in some central legal human rights document (typically the UDHR) or on some particular human right on that list, and the question is whether that list or right is morally justifiable. Importantly, judged from how this question is approached, this often implies two related assumptions about what moral justifiability means and requires in this case, namely: *(1)* The main moral-philosophical task is to consider whether the alleged human right really qualifies as a human right (whether it is a human right "proper"). *(2)* This is so precisely if it can be shown that the *content* of the relevant *legal human*

[39] I am aware that 'assessment' is a rather technical term in this context. I use it to indicate the difference between two tasks: the justification of human rights as moral norms and the assessment or evaluation of human rights as an existing practice or as currently institutionally recognized norms. See further on this point Chapter 2, Section 3.3.

right is also the *content* of a *moral human right*. In other words, legal human rights morally ought to be justifiable *as if* they were moral human rights. For instance, the UDHR proclaims a right to "periodic holidays with pay". On the view just sketched, this right ought to be included in the UDHR if and only if there is a moral human right to periodic holidays with pay – otherwise it should be taken from the list. Every single legal human rights norm morally ought to "mirror" a moral human rights norm in this sense. Accordingly, Allen Buchanan has coined the phrase "Mirroring View" for this justificatory model.[40]

One crucial consequence of this approach is that to assess the moral justifiability of some legal human rights norm does not presuppose any serious engagement with the legal human rights practice. The fundamental premise is rather that the main or even sole purpose of legal human rights is to "realise" moral human rights, *and* that this means that moral human rights norms ought to be "translated" into legal norms in the way just explained – a premise that is usually (implicitly) presupposed rather than argued for.[41] This view implies that whatever is taken to constitute the ground of moral human rights – autonomy, agency, personhood, human dignity and so on – also constitutes the ground of legal human rights, for every legal human right ought to be justifiable by reference to that same ground. Consequently, what I introduced as two related yet *prima facie* different tasks – to theorize the nature and grounds of moral and legal human rights respectively – now essentially appear as one task.

In the last couple of years this approach has fundamentally been called into question. The bottom line of the critique might be summarized as follows. The politico-legal human rights practice is first and foremostly an *institutional* fabric, and human rights are politically and legally *institutionalized* norms. Institutions are contingent human creations that serve certain functions. Consequently, we understand what human rights *are* as (a specific kind of) political and legal norms when we understand what *functions* they fulfill. A prominent claim in this context is that human rights essentially fulfill a sovereignty-limiting function within the

[40] See Buchanan 2013, 14-23.
[41] See again Buchanan 2013, 14-23.

modern state system, in the sense that they serve as international standards for legitimate intervention in the domestic affairs of a state.[42] So human rights have a specific *political* function rather than being "embodiments"[43] of moral human rights and should be normatively assessed in the light of this function. This suggests a plurality of normative standards that might figure in the normative assessment of these norms rather than just one overarching criterion (their justifiability as moral human rights).[44] Importantly, what functions human rights fulfill can only be learned by studying the (actual) human rights practice. Accordingly, philosophers should turn their attention to how human rights are "at work" in practice rather than to readily perceive them through the lens of a preconceived philosophical idea(l) (moral human rights).

Crucially, this "alternative approach"[45] to human rights has been coupled with a particular substantive claim: that the moral ideas of (moral) human rights and human dignity play none or at best a marginal role in such a "practice-based" account. In other words, the nature and normative grounds of political and legal human rights norms can be understood without recourse to an underlying moral dimension, and more specifically without a reference to these ideas. As a consequence, theorizing the nature and grounds of moral and politico-legal human rights norms respectively now appear as independent tasks that hardly have to do anything with one another.

The view just sketched stresses the need of studying human rights "in practice", and further the (legal-)political dimension of that practice. It has therefore been labelled a "*practical*" or "*political*" approach to human rights. The previously outlined approach stresses the central role of a moral idea of human rights for a normative account of the nature and justifiability of political and legal human rights norms. It has therefore come to be referred to as a "*moral*" or "*naturalist*" approach to human rights. Importantly, these two approaches are often presented as *opposed* and thus

[42] See Beitz 2009 and Raz 2010. For a critical discussion see e.g. Nickel 2006.
[43] Buchanan 2013, 11.
[44] See Buchanan 2013, 50-84.
[45] Beitz 2009, 96.

alternative approaches to human rights – in short: *Either* we regard legal human rights as "*embodiments*" of moral human rights *or* we conceptualize them in terms of their "practical *functions*". They are discussed within the context of an ongoing academic debate, or more accurately: a conglomerate of interrelated debates, which are sometimes summarized as *the* "Moral-Political Debate".[46] This dispute is considerably complex and will be discussed in more depth in Chapter 3. The argument that I will develop in this study is partly inspired by a critique of this debate – in short: While there is something right about both approaches (see below), they offer onesided and eventually simplistic conceptions of the relationship between moral and legal human rights norms. I will briefly explain this in what follows.

The *substantive* claim of the proponents of the "practical" or "political" approach that the nature of legal human rights norms can be understood independently of an underlying moral dimension, and in particular of an idea of moral human rights and human dignity, is deeply implausible for two main reasons. *Firstly*, it makes a mockery of any serious talk of moral (human) rights.[47] Even if one assumes that it is not the *sole* purpose of legal human rights to protect moral human rights, one cannot coherently maintain that there are moral human rights *and* that it is not a function of human rights laws whatsoever to protect these rights – in which case an idea of moral human rights *would* figure in a conception of legal human rights norms. One simply cannot have it both ways. It is a fundamental assumption of this study that human beings have moral rights,[48] which is why the "practical" approach, in the version just sketched, needs to be rejected.

Secondly, a strict separation between an idea of moral human rights and politico-legal human rights norms is not only untenable from the perspective of moral theory. It is also deeply at odds with the human rights *practice* itself, and the

[46] As I will explain in Chapter 3, this is not one coherent debate but comprises a large variety of substantive questions, positions and claims. Accordingly, the summary of the two views just given is simplified – there is, in fact, not one coherent version of each view. See Chapter 3.
[47] See on what follows Chapter 2, Section 2.2.
[48] I give an argument for this assumption in Chapter 6.

practical self-understanding of various agents within that practice. The "practical" approach is based on the deviant assumption that moral human rights are essentially something "outside" the human rights practice, something that merely philosophers are concerned with – they "exist" somewhere in an "independent moral realm" (if they "exist" at all), as opposed to the realm of politics and law. This view is not only unhelpful in terms of the false oppositions that it creates – moral theory and politico-legal practice; morality on the one hand, law and politics on the other hand – but also plainly inaccurate as a description of the human rights practice. Clearly, a commitment to human rights as a specific kind of moral rights constitutes an integral part of this practice – for instance in the form of a shared idea, claims raised, grounds of social criticism, reasons for political action, and so on. The "practical" approach is therefore built on an unduly abridged view of what constitutes the human rights practice in the first place. This holds also, and in particular, for the *legal* human rights practice: The assumption that (legal) human rights have a moral ground – human dignity – firmly belongs to the self-understanding of this practice and has normative significance in judicial interpretations of human rights in the light of their presumed moral purpose or "function" of protecting human dignity.

In order to see this more clearly, it is at the same time important to note that the "practical" or "political" approach touches a sore spot of moral theories of human rights. It makes plain a *methodological* desideratum: Moral philosophers need to invest more efforts in engaging with the actual legal practice of human rights, i.e. with legal human rights as practiced norms.[49] Why is this important? That is to say, why is it not sufficient to justify what moral human rights there are and assess central legal human rights documents on this basis (i.e. in the way indicated above)? There are two main reasons.

Firstly, it is clear that a moral principle of human rights expresses a moral standard of justifiability with regard to *any* action, social practice or institution: Disrespecting or violating (moral) human rights is always morally wrong. However,

[49] See Chapter 4.

this moral standard applies as much to the legal institution of human rights as to the tax authorities or the butcher next door: None of them may violate human rights. We would not, however, criticize the tax authorities for not actively protecting or "realizing" human rights for this is simply not what the institution is there for. However, as indicated above, moral theories of human rights are typically based on the implicit premise that this *is* the main or even sole purpose of human rights law(s). To many or even most moral philosophers this may seem self-evident. However, as the previous remarks show, this is plainly not so. Accordingly, what purposes legal human rights fulfill must not simply be presupposed: It requires an argument why and in what sense the moral idea of human rights is not just some moral standard that philosophers impose upon the legal human rights practice in an external fashion but a standard that internally belongs to the self-understanding of this practice. I will develop such an argument in Chapter 5 of this study.

Secondly, in want of an engagement with the legal human rights practice, a philosophical critique of legal human rights norms runs the risk of missing its target. Suppose (as I will argue in the course of this study) that, from the perspective of legal practice, it is one of the fundamental purposes of human rights laws to protect moral human rights (in a specific sense) – then we still lack any clear idea of what it means to morally assess human rights laws on this basis. For instance, why should it be at odds with this purpose if some particular human right that is stated in the UDHR is not justifiable as a moral human right? This is of course not to say that there are not more convincing philosophical justificatory models than the Mirroring View. However, this does not affect the fundamental point: In order to "apply" a moral standard to an existing practice, we need to be able to "connect" to this practice in some sense. This presupposes not only a basic idea of how this practice "works" but also of what the relevant moral commitment *means*, from the perspective of that practice. More concretely, we need to turn from a mere focus on legal *text* to the question how legal human rights norms are *executed* in legal practice, which crucially implies: how they are interpreted in legal practice. I will return to this point in the next section.

In a way then, a "practical" account of legal human rights needs to be significantly more "practical" than the "practical" approach itself suggests: It is precisely if we pay attention to how human rights are *actually at work* in legal practice that the place of a moral idea of human rights and human dignity in our understanding of these norms comes to the fore. The decisive link between a moral and a legal understanding of human rights does thereby not rely on some kind of Mirroring View but on the idea of human dignity as the moral ground of human rights.

5. The Metanormative Approach: Self-Understanding rather than Givenness

The preceding considerations motivate the three-part structure of the main argument that I will develop in Chapters 5 to 7 of this study. In Chapter 5 I focus on legal human rights: Starting from an account of what characterizes these norms in legal practice, I show that it is part of the self-understanding of the legal human rights practice that legal human rights have a moral ground, human dignity, and what this means, from the perspective of legal practice. In Chapter 6 I focus on moral human rights: I propose a certain moral-philosophical interpretation of human dignity as the moral ground of human rights and indicate its legal implications. In Chapter 7 I consider the main results of these analyzes in the light of the central tension that they have revealed: the *universality* of human dignity on the one hand, and the *particular* or context-specific interpretation of its normative content and implications on the other hand.

The argument that I will develop in this study is guided by a particular metanormative assumption: Normative principles – i.e. here: moral and legal principles – should not be regarded as given or factual, nor as being grounded in something given or factual. Rather, they are embedded in a *process of interpretation*, which can be further specified as a process of *self*-interpretation. On a fundamental level, the moral principle of human dignity (and human rights) is grounded in the (necessary) practical self-understanding of every human agent. The

legal principle of human dignity (and human rights) is grounded in the (contingent) practical self-understanding of particular legal communities. In both cases, this self-understanding is wrongly regarded as something that is essentially fixed: It is grounded in a self-reflexive movement of thought, i.e. in a continued reflection on one's *practical self-understanding*. The validity and substantive meaning of both moral and legal norms can therefore only be understood out of the larger hermeneutic context in which they are embedded. Once again, the relevance and further implications of this approach can best be illustrated by distinguishing it from certain tendencies in today's philosophical discourse.

The false dichotomy between two views about the nature and grounds of human rights as explained above is paralleled in debates about human dignity – briefly: Either human dignity is nothing but a contingent moral and legal construction that emerged in a particular socio-historical constellation; or it is a *metaphysical, subject-independent, absolute moral fact* that grounds universal moral rights (and correlative moral duties). Here I am not so much concerned with the alleged dichotomy between both views[50] as with the assumption that the second view represents the only way how to conceive of the morality of human dignity. In particular, it is sometimes presented as the sole option to account for its supposed universality and necessity (or "absoluteness"), and thus as the sole alternative to abandoning both in favour of moral relativism. A justification of human dignity would then presuppose a moral realist account. Moral realism is based on the assumption that moral judgments are truth-apt and that they are true precisely if they correctly represent subject-independent moral facts. Accordingly, what makes the claim that "human beings have human dignity" true is that human dignity "exists": There is a moral fact – human dignity – that verifies it. More specifically, human dignity is then often interpreted as an absolute value that inheres in human

[50] This dichotomy can be resolved in roughly the same way as suggested above: It is clear that every concept has a history – which in the case of human dignity is particularly rich and multi-facetted – and thus "came into being" at some point. It also depends on certain social and cultural presuppositions. See on this Lindemann 2014. Finally, it is clear that human dignity has only since recently played a role in institutional contexts. However, this does not mean that the moral idea of human dignity cannot be universal and necessary what regards its validity. See Chapter 6.

beings, as comparable to a natural property. In this sense human dignity is *given*: It is not *constructed in* but merely *detected by* human reason.[51]

This interpretation of human dignity fits together with the abovementioned assumption that moral human rights must be grounded in some fact or feature of human nature. Provided that human dignity were this ground, the justificatory relationship between human dignity and moral human rights were to be put along these lines: Human beings have an inherent moral value, "human dignity", and it is because they have this value that they also have moral human rights. To justify the assumption that "human beings have (such and such) human rights" would then equally require to prove the existence of a certain moral fact (human dignity). Understood in this way, moral human rights would be essentially "given" as well.

This study proceeds from the fundamental premise that moral realism is not a cogent metaethical position. However, a comprehensive discussion of moral realism and its critique, as it has been advanced especially in the Kantian tradition, is not in the scope of this study. I will further explain what I take to be problematic about moral realism in Chapter 6, but I will not criticize and discuss it extensively.[52] Rather, I presuppose that talk of moral facts represents a misguided way how to conceive of the nature of moral questions and claims. Morality is not factual; nor is it about facts; nor are the "truth-makers" of moral claims or the reasons why we hold them to be true to be found in some fact (of human nature). Rather, moral questions are, fundamentally, questions about *ourselves* as practical beings. Generally put, we ask moral questions because we want to understand who we are, want to be and should be as the kind of beings that we happen to be: vulnerable, finite, needy and socially situated beings with the ability to act and to reflect upon our actions. In other words, moral reasoning is at its heart a matter of *self-interpretation* and *self-reflection*. It is about *practical self-understanding*. This is why the moral principles of human rights and human dignity require a different justificatory strategy than moral realism to begin with.

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[51] See further on this Chapter 6, Sections 2 and 3.
[52] See Chapter 6, Section 2.

Methodologically, the self-reflective character of moral reasoning implies that it is in a strong sense "mind-*dependent*". All that is available to us when we think about moral questions is (practical) *thought*: (practical) judgments, principles, reasons, reflection, and so on. Clearly this does not mean that "mind-external facts", including contingent aspects of our nature and our social environment, do not *matter* for moral reasoning (this would be an absurd claim). However, moral judgments cannot be *validated* by something *outside* the reflective and interpretative process. Importantly, this does not mean to give up the claim that there are moral principles that are universal and necessary, just that universality and necessity need to be understood differently on such an account. To show that human dignity is a principle of this kind requires to move beyond the false alternative between moral realism and moral relativism and turn to a *self-reflective method of argumentation* instead. I will develop such an argument in Chapter 6 of this study.

Interestingly, the tendency to conceive of the *moral* concepts of human dignity and human rights as essentially given or factual and to disconnect them from the hermeneutic context in which they are embedded is mirrored in a certain way in philosophical approaches to *legal* human rights (the majority, I believe). Remarkably, this holds also for those rather recent approaches that (related to the "practical" critique outlined above) declaredly pay particular attention to the *legal* and *practical* character of human rights.[53] Overall, what characterizes philosophical accounts of legal human rights is an excessive focus on the *text* of certain central legal human rights documents – typically the UDHR or those documents that constitute the International Bill of Rights – and comparably little engagement with the legal human rights *practice*. This conveys the impression that to gain a proper understanding of legal human rights requires little more than to study what is stated in those documents: The nature, meaning and normative functions of legal human rights are more or less fully absorbed and fixed in legal text, as it were. This kind of decontextualization leads to an overly narrow understanding of what legal human

[53] See Chapter 4, Section 2.

rights are. Essentially, what gets lost in such an approach is the fact that legal (human) rights *are* rights in legal *practice*, or *practiced* rights, and that legal practice is an *interpretative* practice. This implies, *firstly*, that the *textual content* of legal norms is inseparable from their *legal context and form*. The meaning of legal (human) rights is not given or fixed. It is constructed in legal interpretation. *Secondly*, it implies that in order to gain an adequate understanding of the nature of legal human rights one needs to pay attention to how they are "at work" in practice. In other words, to isolate legal human rights norms from the legal-practical context in which they unfold their meaning and functions means to miss a decisive feature of the *legality* of legal human rights from the start. Rather, what they are and what they mean is intimately tied to a *process of interpretation*. As I will argue in Chapter 5, this process can be specified further as a process of *self-interpretation of legal systems*.

The main methodological consequence of the preceding remarks is that, when considered as normative principles, neither moral human rights nor legal human rights nor human dignity are adequately approached from a perspective that is external to their practical, i.e. interpretative context(s). If morality is essentially about practical self-understanding, then the question about the nature and grounds of the moral concepts of human rights and human dignity must be addressed from the perspective of the human agent who reflects upon herself – in other words, a first-person rather than a third-person perspective. If law is essentially about legal interpretation, and on a fundamental level about the self-interpretation of legal systems, then the question about the nature and grounds of the legal concepts of human rights and human dignity must be addressed from the perspective of the interpreter of legal norms – in other words, from a standpoint of legal interpretation. Moral theory and legal practice constitute two hermeneutical contexts of human dignity and human rights that are distinct yet not independent from one another. As indicated above, the decisive link between both contexts is the assumption that human dignity is the moral ground of human rights.

6. Doubts about the Use of the Concept of Human Dignity

The concept of human dignity occupies a prominent place in the moral, political and legal discourse of our times, especially in its relationship to the concept of human rights. According to a common view, human dignity is the "ground" or "foundation" of human rights.[54] Another view is that they are coordinate ideas that mutually point to one another. Both views are supported by central legal human rights documents.[55] However precisely their justificatory relationship is understood, it is clear that, in their modern versions, the concept of human dignity and the concept of human rights are intimately connected. It is thus unsurprising that the discourses about human dignity and human rights partly overlap. In this study I am concerned with the concept of human dignity only insofar as it bears upon our understanding of human rights. Furthermore, I always refer to a *normative* concept of human dignity, as different from a descriptive one.[56] By a normative dignity concept I mean an understanding of dignity as a certain kind of normative property, value, status or principle (depending on the relevant theory) that grounds certain rights (and correlative duties). So, to put this more concretely, I am eventually interested in the question how we can give a coherent interpretation to the claim that human dignity is the ground of human rights, and what this implies for our understanding of human dignity, human rights and the concept of a ground itself, in morality and in law.

Despite and because of its prominency, the meaning and theoretical as well as practical use of the concept of human dignity are highly controversial. On the one hand, scholars stress its importance in giving expression to the modern idea that every individual human being has an intrinsic moral status or worth and (relatedly) in providing reasons for the assumption that all human beings have human rights.

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[54] On the concept of a ground or foundation see Chapter 2, Sections 2.1 and 2.2.

[55] The latter view is expressed in the preamble of the UDHR that states: "Whereas recognition of the inherent dignity *and* of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (emphasis added). The former view is suggested by the preambles of the ICCPR and ICESCR that include the phrase: "Recognizing that these rights *derive from* the inherent dignity of the human person" (emphasis added).

[56] See further on this Chapter 5, Section 4.1.

On the other hand, it is claimed that the concept is utterly vague, entirely useless or dangerous.[57] Its vagueness or the fact that it leaves considerable room for interpretation (to put it more neutrally) seems to be the main reason for the other two charges. Once we attempt to pinpoint its meaning philosophically, so one line of critique goes, it turns out that it can be fully explicated in terms of other well-established moral concepts like autonomy, liberty, respect or humanity. So the concept of human dignity is reducible to these concepts; it is redundant and hence useless. In practical or applied contexts (for instance in law) the concept of human dignity serves as a door opener for arbitrariness and moral paternalism, so another line of critique goes: Due to its vagueness, especially those in powerful positions (e.g. judges and politicians) can interpret the concept however they please and thus hide the particularity of their moral, political or legal viewpoints under the veil of universalist dignity language. So the concept of human dignity is precisely not suitable to provide a determinate and reliable basis for specifying the normative consequences of human rights. Some claim that the best solution to these problems would be to get rid of the concept of human dignity altogether: It should be banished from our normative universe.

What these criticisms show, first of all, is that the concept of human dignity is interpreted in many different, sometimes arbitrary and frequently normatively problematic ways – which is beyond dispute.[58] A different question is what consequences one should draw from this. The concept of human dignity firmly belongs to our normative vocabulary, and has done so for a considerably long time.[59] In our times it is not only extensively invoked but also firmly institutionally established (e.g. in various national constitutions). Of course this does not add up to an argument that this is justifiably so. It does, however, suggest that we should not jump to conclusions all too hastily: Its widespread use, paired with its potential for misinterpretation and misuse, strongly indicate the need for more philosophical

[57] See e.g. Macklin 2003.
[58] Cf. Düwell 2014, 36.
[59] See Chapter 5, Section 4.1.

exploration. The crucial question is therefore whether it is possible to interpret the ontological status[60], content and normative consequences of human dignity in a justified, coherent and non-arbitrary way that counterbalances its abusive potential, including the danger of moral (and legal) paternalism. My assumption is that this *can* be done, as I will attempt to show in Chapters 6 and 7 of this study. It then also becomes clear that the claim that human dignity is "useless" is mistaken: The concept fulfills a central function in moral human rights theory and in the legal practice of human rights, and it plays an important role in mediating between a moral and a legal understanding of human rights.

7. The Single Argumentative Steps

The study is divided into two main parts. In the first part (Chapters 2 and 3) I develop a systematic basis for my main argument by clarifying its central conceptual and methodological presuppositions and by relating to a number of current questions and debates. Chapter 4 provides the systematic transition between the two parts of the argument. The main argument is developed in the second part (Chapters 5 to 7). Chapter 5 focuses on legal theory, Chapter 6 on moral theory and Chapter 7 on the relationship between the moral and legal dimensions of human rights and human dignity. More specifically:

In *Chapter 2* I develop the central conceptual and methodological presuppositions of this study. I clarify my basic understanding of moral normativity and legal normativity and introduce a first, preliminary definition of 'moral human rights' and 'legal human rights'. Then I address a number of methodological questions that bear upon the formation of a concept and a conception of human rights. I reject the common opposition between "bottom-up" and "top-down" approaches to human rights in favor of a more dynamic understanding of concept and conception

[60] By 'ontological status' I do not mean 'metaphysical existence'. So one might say, for instance, that the 'ontological status' or 'mode' of human dignity is that it is a transcendentally justified principle.

formation, and distinguish between three levels of practice-(in)dependency of a moral theory of human rights.

In *Chapter 3* I turn to the abovementioned "Moral-Political Debate". I argue that many alleged lines of dissensus in this debate disappear once we consider it in the light of the conceptual and methodological distinctions developed in the preceding chapter. I further argue that the alleged contrast between the "morality" and "practice" of human rights is misguided. Rather, the main question that arises from this debate is how we may arrive at a more nuanced understanding of the relationship between the moral, politico-legal and practical dimensions of human rights.

In *Chapter 4* I draw concrete systematic conclusions from the discussion in Chapter 3 with regard to the leading question of this study. I argue that the main task that arises from it is to develop a clearer understanding of what it means, from a moral-philosophical and from a legal perspective, that human dignity is the moral ground of human rights. I further argue that this requires to adopt a hermeneutical approach to legal human rights, i.e. to take seriously the fact that the legal human rights practice is an interpretative practice.

Following this hermeneutical approach, in *Chapter 5* I focus on the task to work out the moral implications of legal human rights in practice. I argue that legal human rights are domestic and international legal norms that are embedded in a transnational practical dynamic, which brings the question of the domestic (re)interpretation of human rights norms into focus. Then I analyze more closely what role constitutional "values" like human dignity play in the legal construction of the purposes of domestic legal human rights. Finally, I show how the legal recognition of human dignity as the moral ground of legal human rights has practical effects in the judicial interpretation of human rights with the help of the legal concept of human dignity.

In *Chapter 6* I propose a moral-philosophical interpretation of the moral concept of human dignity. Drawing on Kant's and Gewirth's philosophy, I argue that human dignity should be understood as a moral principle that is grounded in the necessary

practical self-understanding of human agents. I also indicate what legal obligations follow from this understanding of human dignity.

In *Chapter 7* I first focus on the question what human dignity means in legal context. This leads to the result that legal interpretations of human dignity are radically divergent in that no overarching substantive meaning of human dignity in law can be discerned. I then take up the question whether the complete interpretative openness of the legal concept of human dignity can consistently be defended from the perspective of legal practice. The result will be that judicial interpretations of human dignity should be guided by the core elements of the conception that I proposed in Chapter 6. Finally, I indicate the concrete practical implications of this for our understanding of the relationship between the moral and legal dimension of human dignity and human rights.

2. Conceptual and Methodological Presuppositions

1. Introduction

In the last chapter I have specified the main goal of this study: to show that and how a moral idea of human dignity and human rights occupies a firm place in a plausible conception of legal human rights norms. The pursuance of this task, I have explained, presupposes a conceptual distinction between two "kinds" of human rights norms, 'moral human rights' and 'legal human rights'. I have emphasized that by the latter I understand human rights that are actually recognized in law (rather than human rights that morally ought to be recognized in law). The more general task is therefore to develop a clearer understanding of what distinguishes and links these two kinds of human rights norms. This question is prompted in particular by a prominent claim that is raised in current human rights debates: that a normative account of politico-legally institutionalized human rights norms is independent of a theory of moral human rights (and human dignity). Essentially, this is the claim that I am arguing *against*: The concepts of moral human rights and legal human rights are distinct, i.e. *irreducible* to one another, but they are *not independent* of one another. Rather, as soon as we begin to spell out what legal human rights are, i.e. to develop a *conception* of these norms, the concepts of moral human rights and human dignity inevitably come to the fore. Likewise, and more obviously maybe, a conception of moral human rights points to their legal recognition.

This argument depends on several conceptual and methodological premises that I will unfold in the course of this chapter. To begin with, we need to have a first, preliminary idea of what the two concepts mean. This again leads to certain methodological consequences what regards a study of their relationship that I will spell out subsequently. The underlying assumption is that much of the confusion in

current debates about the "practice" and "morality" of human rights stems from insufficient reflection on the conceptual and methodological points I develop in this chapter. It therefore provides the basis for a systematic reconstruction and discussion of the main issues at stake in the so-called Moral-Political Debate in the next chapter.

The chapter is structured as follows. After a brief recapitulation of the basic features of rights I turn to the question what distinguishes different kinds of rights in terms of the different kinds of normativity that they imply *(2.1)*. Then I explain my basic understanding of moral normativity (or morality) *(2.2)* and legal normativity (or legality) *(2.3)*. On this basis, I propose a first working definition of the concepts of moral human rights and legal human rights *(2.4)*. In a next step, I reflect on the methodological problem how a working concept of human rights might be generated, which among other things reinforces the need to distinguish between different concepts of human rights *(3.1)*. Then I turn to further methodological questions what regards the further substantiation of these concepts *(3.2)*. Finally, I emphasize the need to distinguish between three levels of "practice-(in)dependency" *(3.3)*.

2. Moral and Legal Human Rights: A First Conceptual Approximation

2.1 Kinds of Rights – Kinds of Normativity

Whatever else they are, moral and legal human rights are *rights*. Their common rights-character constitutes a natural starting point for a first clarification of the two concepts. In what follows I will first briefly recapitulate some basic features of the concept of a right. As a specific kind of *norms*, different concepts or kinds of rights can be distinguished according to different kinds of normativity. I will explain this assumption subsequently. Against this background, I will clarify my basic understanding of moral and legal normativity in the next sections.

According to their most general definition, rights are "entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states."[61] As *entitlements*, rights differ from gratuitously or benevolently granted gifts or endowments. Rather, rights are *possessed* by individuals on the ground of some principle (e.g. a legal principle or a principle of natural law). A right thus *belongs* to an individual in the sense of, or as comparable to, a property or a title – it is "attached"[62] to him or her.[63] To have a right means that its object is *owed* to the right holder; rights can be legitimately *claimed*.

So rights are *relational* (one might also say: intersubjective) and *normative* properties. A statement or principle is normative if it expresses an ought, i.e. it is a prescriptive rule of action (or norm). The possession of a right presupposes two parties, the party of the right holder and the party of the right's addressee or corresponding duty bearer.[64] In this fundamental sense, all rights are Hohfeldian "claim-rights"[65], i.e. all rights correlate with duties by others. Generally put, these may be negative duties which prohibit or positive duties which command. By contrast, to assume that someone has a justified claim to something but that there is nobody to whom this claim is directed would be a *contradictio in adiecto*.

So rights are first of all a specific kind of norms that differ from "mere" duties in that somebody has a duty because somebody else has a right; the right is the ground

[61] Wenar 2015, introductory section. See on what follows Jones 1994, 12-44 and Stepanians 2008.
[62] Jones 1994, 36.
[63] This "attachment" to individuals, although it is not unique to rights, does not hold for principles or rules in general: "Rights necessarily have possessors. There cannot be a right without its being someone's right." Jones 1994, 36.
[64] This does not mean that there is only one duty bearer. It does mean, however, that there is *at least* one corresponding duty bearer *in addition* to the right holder: While duties might be directed towards oneself as well as towards others, a right towards oneself is conceptually impossible. Cf. Stepanians 2008. So the concept of a right is a relational or intersubjective concept. The relevant duty bearer does not necessarily have to be an individual but may also be an institution.
[65] Hohfeld 1917. I leave further Hohfeldian distinctions such as "powers" and "immunities" aside here.

of the duty. Different concepts or kinds of rights can be distinguished with regard to the different kinds of normativity that they imply.[66] What does that mean?

To begin with, two normative statements may have the same content yet differ in nature or kind. On a fundamental level, different kinds of norms can be distinguished by reference to the kinds of *reasons* that ground them. Take the norm "You ought not to kill" as an example. This norm might for instance be considered a moral, legal or conventional norm, depending on context and perspective. So, if I ask "Why ought I not to kill?", the answer may be given by reference to different kinds of reasons: "Because killing is morally wrong" (moral reasons), "Because killing is prohibited by law" (legal reasons) or "Because we just do not kill people in our society" (conventional reasons). It is clear that this distinction is rough and that the relationship between these reasons (and norms) is complex: For instance, one might follow a moral norm for conventional reasons, one might abide to the law for moral reasons, legal norms might be grounded in moral norms, and so on. Leaving such complexities aside for the moment, the first general point to be noted is that norms may be distinguished not only by reference to their *content*, i.e. the *kinds of actions* that they demand, but also by reference to their *underlying justifying reasons*, i.e. the nature or kind of the *ought itself*.

Starting from here, we observe that talk of the "underlying justifying reasons" of a norm is ambiguous (and of its "ground" and "justification" accordingly – see below). Three questions need to be kept apart. *Firstly*, one might ask about the reasons that *motivate*, or ought to motivate, abidance to the norm. They justify the motivational force of a norm in a specific context or its specific obligatory character. For instance, I may abide to the law because I fear legal punishment, I may respect a conventional norm because I want to be socially recognized, etc. So one distinguishing feature of different kinds of normativity is that they correlate with different sanctioning mechanisms, where it is a distinctive feature of moral norms that their motivational force does not rely on such "external" or

[66] It is clear that there are numerous ways how to classify norms. For an overview see for instance Koller 2008.

"heteronomous" motives but that one morally ought to follow them because of one's recognition that this is the morally right thing to do. *Secondly*, one may ask about the reasons that justify the *actual validity* of a norm: What makes the claim that there is this or that (moral, legal, conventional…) norm true? Under what conditions does the norm "exist"? For instance, one might argue that there is a moral norm to not kill anyone, but that does not make it true that there is a legal or conventional norm to not kill anyone. So the "existence conditions" of different kinds of (valid) norms differ. *Thirdly*, one may ask what reasons (if any) justify a norm content-wise: The question is not whether there is, for instance, a legal norm to not torture but whether this legal norm is *legitimate* or normatively justifiable.

The first two questions just explained – i.e. the questions about the motivating reasons and existence or validity conditions of norms – concern the nature, kind or concept of a norm: The question is not whether the norm is legitimate but what makes it a norm of this kind. The third question concerns the normative justifiability of a norm or the question about the justifiability of its content. Once again, it is clear that these questions are interrelated and that specifying their relationship is complex (and disputed) when it comes to details. In order to avoid confusion, in what follows when I speak of the justification of a norm I always refer to its normative justifiability in the sense just explained. Moreover, while the questions about the reasons for following a norm will play a role later on this study, for now the distinction between the validity or "existence" and the justification of a norm is central. This will become clear in what follows.

The need to conceptually distinguish between moral and legal *human rights* hence traces back to the more general distinction between moral and legal *rights*, which is itself a subdistinction of moral and legal *norms*. It is clear that any conception of moral and legal human rights relies upon some substantive view about the nature of moral normativity or morality and legal normativity or legality (and their relationship). Without going into any detail at this point, I will clarify my fundamental view on these matters in what follows.

2.2 Moral Normativity – Moral Rights

A moral right is a right that somebody has for moral reasons. This is what makes it a *moral* right. So, to say that A has a moral right to X is to say that A is morally entitled to X, or that he has a morally justified claim to X. What does this mean more specifically? In what follows I will merely explain the broad contours of the concept of a moral right as I understand it while leaving further-reaching questions about the nature and justification of moral rights for later.

The possession of a moral right does not depend on whether or not it is actually recognized – by political and legal institutions, by particular individuals or by society at large. Accordingly, disrespect or violation of a moral right, no matter how gross and common it may be, does not affect the validity or truth of the claim that human beings have this moral right. *In this specific sense*, moral rights are independent of contingent empirical conditions or societal circumstances: Their validity does not depend on their actual recognition. So, for instance, the assumption that A has a moral right to sufficient food implies that he has this right regardless of whether or not he can actually exercise his right (he is in a position to effectively claim his right, for instance because it is legally guaranteed to him) and whether or not he actually does have access to sufficient food. Rather, whatever the factual circumstances might be, A has – at least *prima facie* – a morally justified claim to sufficient food, which is why he morally ought to have access to it.

The qualifier "*prima facie*" points to two possible limitations of this moral claim. *Firstly*, a moral right may be (justifiably) *overridden* by some other moral right. So the claim that a right is moral does not necessarily imply that it is absolute (in the sense that it cannot be weighed). It is debatable whether there are any absolute moral rights but we can neglect this question for present purposes.[67] It is noteworthy, however, that moral rights may not be weighed against practical considerations that are not themselves (directly or indirectly) based on moral considerations. So, for instance, if we assume that all human beings have a moral

[67] See on this question Gewirth 1982b.

right to sufficient food, and that there is a sufficient yet limited amount of food for all, then it is morally wrong to let one group of human beings starve in order to provide a more various diet for the rest. It is one of the points of a "rights-based" morality conception that it imposes a limit on such consequentialist calculations. Of course this does not hold for all possible moral rights to the same extent: Some rights may be more important than others, and the respective duties may be more or less strict accordingly. Furthermore, the weighing process may be quite complicated when it comes to detail and it may be difficult to determine whether or not a moral right is violated in a concrete case. However, it is generally assumed to be a central feature of the concept of a moral right that it overrides concurrent (non-moral) practical considerations. It is based on the fundamental premise that there are certain objects or actions that are morally owed to all human beings, which is why any restriction of a moral right must be justifiable by reference to some other moral right. More precisely, it must be justifiable by reference to an underlying universal moral principle (see below).

A's moral claim to sufficient food (to stick with the example) may *secondly* be limited by so-called empirical "feasibility constraints": It might be *impossible* to effectively ensure A's access to sufficient food. In this case one might wonder whether it is meaningful to say that A has a moral *right* in the first place – because moral rights correlate with moral duties, and "ought implies can". So, for instance, if I realize that A is starving yet have no possibility whatsoever to help him get access to food, then I do not violate his right because I am not under a duty in the first place. Likewise, one might argue that it would be desirable that all human beings have access to sufficient food but that there just is not sufficient food for all so that it is wrong to say that all human beings have the relevant right. However, it is important to note that the burden of proof for justifying such a feasibility constraint might be considerably high (depending on the "urgency" of the right): In short, it is not sufficient to show that it is impossible to guarantee A's access to sufficient food under present conditions. It also presupposes to show that it is (strictly speaking) impossible to establish such conditions. The general point to be

noted here is that the respect of a moral right does often not require particular actions by individuals but institutional structures that guarantee an effective protection of that right. Accordingly, the moral duties that correlate with moral rights are often not only direct duties to respect that right – "I morally ought not steal food from A", "I morally ought to give food to A" – but indirect duties to establish and support certain political and legal institutions (e.g. institutional regulations that aim at global fair trade or climate justice).[68] A strong moral obligation with regard to such institutions is a direct implication of the concept of a moral right.

The last-mentioned point requires a further clarification. As noted above, the possession of a moral (claim-)right implies that there is a corresponding duty-bearer. On a fundamental level, the possession of a moral right constitutes a relationship between individuals: One cannot meaningfully speak of the possession of a moral right and a correlative duty if there is nobody to whom this right and duty applies. The assumption that *some* moral rights morally ought to be protected by political and legal institutions is implied in the concept of moral rights as claim-rights: To assume that there are moral rights but that there is no moral obligation whatsoever to establish a political and framework to protect (some of) these rights would be contradictory. However, this does not mean that all moral rights morally ought to be given institutional protection. For instance, one might hold that there is a moral right to not be lied to, but one may reasonably wonder to what extent this right should be legally claimable. So there are moral rights that morally ought to be recognized by political and legal institutions and others that do not. Moreover, what rights require this protection is not implied in the concept of a moral right but requires substantive reflection.

Let us next turn to the (alleged) universality of moral rights. It is often claimed that moral rights are universal – but are they, really? And if so, in what sense? Here I do not want to discuss the universality of moral rights in any depth but merely raise a

[68] It is clear that this general assumption raises difficult questions when it comes to identifying the relevant duty bearers and specifying the exact content of the relevant duty.

number of questions that I will return to later on in this study.[69] For a start, let us equate 'universality' with 'applicability to all human beings' (as is often done in current debates):[70] If there is a moral right to X, then all human beings have a moral right to X, independently of when, where and how they live (and maybe even if they don't live yet or anymore). Universality so understood (i.e. universality "in scope") implies spatio-temporal universality, i.e. human beings have human rights "independently of space and time". Now think, for instance, of moral rights that are ascribed to particular groups, or more precisely to all individuals who belong to the relevant group, e.g. women's rights, children's rights or rights of people with "disabilities". Clearly these rights are not universal in the sense just explained, for it is pointless to speak, for instance, of a right to have an abortion or a right to (not having to) work that belongs to all human beings (if one thinks there are such rights). Think next of moral rights that only apply in particular societal circumstances, like a right to have access to the internet, a right to have access to sanitary facilities or a right to join a labor union (again, if one holds there are such rights). Clearly these rights are not universal either, for they only apply under contingent societal conditions – it would not make any sense to say that people were morally entitled to have access to the internet unless there were internet. Should we conclude then that these are not moral rights "proper"? In response, it is often maintained that these non-universal rights are "derived" or "second order" rights: They are context-specific applications or "derivations" of more general, universal moral rights (e.g. the right to have an abortion is a specification of the universal right to bodily autonomy with regard to women). However, further difficulties aside, the question then remains: Should we assume that all those "derived" rights are not really moral rights, or should we conclude, by contrast, that there are many moral rights that are not universal?

The previous remarks point to a more fundamental question: Why should one think that all or at least some moral rights are possessed by all human beings equally? In

[69] See Chapter 6.
[70] See Chapter 3, Sections 2 and 3.3.

other words, why should human beings not have (radically) different moral rights? Instead one might wonder whether it is not more plausible to first of all think of the universality of moral rights in terms of their universal *justifiability* rather than (only) their universal *applicability*: The idea of moral rights implies that all human beings are equally subjects of moral concern, in a fundamental sense. This presupposes that moral rights cannot stand next to one another in an unrelated fashion but must be grounded in a universal principle (or principles, in the plural) that underlies these rights and offers an overarching perspective for specifying and weighing moral rights claims in concrete situations. Starting from here, one might then further wonder whether this idea of universal justifiability allows us to formulate, on a considerable level of abstractness, some moral rights that all human beings have, for instance on the basis of certain common anthropological conditions. I will return to this point in Chapter 6.

Let me finally emphasize two implications of the *categoricity* of moral norms that I will presuppose in the course of this study. Morality expresses what one categorically ought (or ought not) to do (where the relevant ought is of course a moral ought). The categoricity of moral norms is sometimes misunderstood so as to imply that all moral duties are "absolute" in the sense that they cannot be weighed against one another. This is obviously wrong: As already indicated above, moral rights and duties may and often do conflict with one another just like any other norms, which implies that they not only may but indeed need to be weighed. So the categoricity in question is first of all the categoricity of the *moral standpoint*: Moral duties are categorical in the sense that they are "duties that are overriding with regard to other action-guiding considerations"[71]. This raises, of course, complex questions with regard to the "application" of moral principles in a concrete situation or to political and legal institutions. Here I merely want to point out two general implications of the categorical or overriding character of moral norms: *Firstly*, to meaningfully speak about morality at all implies that moral norms do not stand next to other kinds of norms (e.g. political and legal norms) in an unrelated fashion. In

[71] Düwell 2014, 27.

other words, it cannot be the case that there are alternative, i.e. strictly independent and competing forms of justification next to moral justification (e.g. some kind of specifically "political justification"). Rather, morality expresses an overarching standard with regard to the justifiability of any action or institution. However, *secondly*, this does of course not mean that the "applications" of a moral principle, for instance with regard to the political and legal realm, can simply be "deduced" or "derived" from it without context-specific reasoning of various kinds. Once again, this is only for a start; I will come back to these questions later on in this study.

A moral right "exists" if it is justified by moral reasons. So we may think of these justifying reasons as the "existence conditions"[72] of moral rights (or of a particular moral right, or of moral norms generally). Throughout this study I will refer to them as the "ground" of moral (human) rights instead. This requires a number of clarificatory remarks.

It is sometimes claimed that the term 'existence condition' may be used interchangeably with the terms 'ground' and 'foundation'.[73] However, this only holds in a qualified sense. To begin with, as noted above the concept of a ground is ambiguous: It may signify what grounds the validity of a norm or what grounds its legitimacy or normative justifiability. In the case of moral norms, the conditions for their validity are at the same time the conditions for their moral justifiability: A moral norm is (morally) valid precisely if it is morally justified. So the reasons that ground its validity are at the same time the reasons that ground its (moral) justifiability. However, as I will explain in the next section, this is different in the case of legal norms: A legal norm also "exists" if it is (legally) valid, yet its legal validity does not necessarily presuppose its moral justifiability. So the concept of a ground is equivalent to that of an existence condition only when it is understood as the ground of the validity of a norm. Throughout this study I will refer to the "ground" of a norm as its underlying justifying reason instead: A 'ground', on my

[72] See Sumner 1987 and Griffin 2008.
[73] See e.g. Bagatur 2014, 13, endnote 2.

understanding, is nothing but a 'justifying reason' (or reasons, in the plural). So every norm has a ground: The ground of a norm is whatever justifies it.

Moreover, the terms 'existence' and 'existence condition' have a strong factual, "realist" connotation that I like to avoid. As explained in the last chapter, I proceed from the metaethical premise that moral norms neither are nor are grounded in some mind-independent, metaphysical fact. Rather, moral rights – and indeed all moral principles – are nothing but a specific kind of practical judgments, namely judgments that among other things involve a particular claim to validity and are moral in kind. The reasons that ground a moral norm are themselves not grounded in some fact but in the practical self-understanding of human agents. I will explain this in more detail in Chapter 6.

Similar problems apply to the concept of a foundation, although it is commonly used equivalently to the concept of a (moral) ground as I understand it. In current debates the concept is sometimes either associated with a certain metaphysical position or with debates about so-called "ultimate foundations" or with the epistemological theory of "foundationalism". Accordingly, we sometimes encounter the view that human rights have no foundations at all.[74] I am not claiming that the concept of a foundation necessarily has these implications. My impression is rather that the term 'foundation', just as the term 'existence condition', has the common tendency to carry such "metaphysical" connotations, which is why I stick with the term 'ground' instead.

2.3 Legal Normativity – Legal Rights

How do legal rights differ from moral rights? As indicated above, the more general question is what distinguishes legal norms from moral norms, and even more generally what distinguishes law from non-law. Again, in what follows I will explain my basic view about these matters while leaving any questions of detail aside at this point.

[74] See Raz 2010.

A "right is a legal right if it is recognized by law"[75], or "in law, i.e. by the legal institutions"[76]. For instance, the right to not be tortured is a moral right if it is justified by moral reasons; it is a legal right if it is recognized by law. To begin with, the "existence" of a legal right then depends on its (legal-)institutional recognition in a way the "existence" of a moral right does not: It does precisely not "exist" independently of its legal recognition but presupposes it.

Like moral norms, legal norms have a factual or empirical dimension: The application of a legal norm to a concrete case requires empirical considerations of various kinds. However, like moral norms, legal norms do not exist like some fact. A norm is a legal norm if it is *legally valid*. What does the concept of legal validity imply? What are the conditions for a norm to be legally valid?

A legal norm is (legally) valid if it has been generated by a valid legal procedure. This statement, in itself, is tautological ("Law is what counts as law"). It leads to the further question what counts, or ought to count, as a valid legal procedure in the first place, and how law should be distinguished from non-law accordingly. This question is the subject of the notorious dispute between legal "positivists" and "non-positivists". This dispute is complex yet none of its details need to bother us here. In the present context (and following the distinction stressed above)[77], it is crucial to keep two theses apart that one might associate with a "positivist" or "non-positivist" position respectively. A *first* thesis regards the *validity* of law or legal norms: Can one distinguish law from non-law without recourse to morality? A paradigmatic question in this context would for instance be: Is a legal norm that is deeply immoral still law? I answer this question in the affirmative. So my position with regard to the validity of law is that of a "conceptual positivist". A *second* thesis regards the *justification* of legal norms: Ought legal norms be justifiable by moral standards? Or is there a specific kind of legal normativity that constitutes an alternative normative standard with regard to the legitimacy of legal norms? So,

[75] Raz 1984, 14.
[76] Raz 1984, 16.
[77] See above, Section 2.1.

may a valid legal norm that is morally unjustifiable yet be (normatively) legitimate? I answer this question in the negative, adopting the position of a "justificatory non-positivist"[78]: Legal norms (morally) ought to be justifiable by reference to moral standards just as any other norms. I will further explain both theses in turn in what follows.

The distinction just made can be further explained with the help of Joseph Raz' reflections about the nature of legal rights.[79] According to Raz, "[a]ll legal statements can be expressed by 'It is the law that P' sentences where 'P' is replaced by a (non-legal) sentence."[80]. So 'P' signifies the *content* of the legal statement whereas the subclause 'It is the law that…' confirms that it has *legal status*. Raz notes about the relationship between these two elements of a legal statement or norm:

> The content of a legal statement may be true even if the legal statement itself is false and vice versa. It is true that one ought to keep one's promises but false that it is the law that one ought to do so. It is (in many legal systems) true that it is the law that one may kill one's pets at will but it is false that one may do so.

Accordingly, "[t]he sentence-forming expression 'it is the law that…' is not a truth functional operator"[81], in the sense that it establishes the truth or justifiability of the content of the norm:

> To establish the truth of a legal statement one has to establish not that its content is true but that it has legal status, that it has the force of law. Justifying a legal statement is not to be confused with proving or establishing its truth. It concerns the truth of its content.[82]

Against this background, I interpret the abovementioned claim that a legal norm is (legally) valid if it has been generated by a valid legal procedure in the following

[78] I will not further use these expressions in what follows in order to avoid confusion.
[79] Raz 1984.
[80] Raz 1984, 7.
[81] Raz 1984, 8.
[82] Raz 1984, 8.

way: A valid legal procedure is *any* legal procedure that is *defined* as valid within some legal code. If a legal system defines as a valid legal procedure that any (valid) law needs to pass the democratically elected parliament, then any legal norm that was not generated in this way is not a valid legal norm. Likewise, if a legal system defines that every law is valid that the king enacts on every second Sunday of the month, then every law that has been generated by this procedure is legally valid. Whether X counts as a legal norm or not is thus determined by conditions that are *internal* to law, i.e. the conditions of the (legal) validity of a legal norm are contained in the legal system itself. Whether a norm is legally valid does therefore not necessarily depend on whether its content as well as the legal procedure itself are morally justifiable. However, I should already anticipate here a possibility that will become relevant later on in this study, namely that a moral principle or standard might be *incorporated* into law so as to become an internal standard of law.[83]

Should legal norms be morally justifiable? The answer to this question is first of all "yes" – by which I do not mean, of course, that it is undisputed but that I fail to see how any other answer could be coherently maintained. However, this requires an important clarification. As explained in the preceding section, morality is about what one categorically ought to do. Consequently, one cannot hold that there is some other normative standard that constitutes an *alternative* to a moral standard. However, what this means more concretely about the relationship between moral normativity and legal normativity is, of course, a question of its own. All I want to point out here is that the justification of law cannot be completely independent of the question of its moral justification.

[83] See Chapter 4, Section 4, and Chapter 5.

2.4 'Moral Human Rights' and 'Legal Human Rights': A Preliminary Definition

The preceding reflections allow for a first, preliminary clarification of the concepts of moral and legal human rights: *'Legal human rights' are all human rights that are recognized in law. 'Moral human rights' are all universal moral rights that morally ought to be politically and legally recognized.* To stress this one more time, these are preliminary definitions (by which I always mean: conceptual clarification) that will be further substantiated and refined in the course of this study. However, because every reflection on human rights has to start somewhere, they will serve as working definitions to get the argument off the ground. Before turning to methodological difficulties with regard to generating a concept of human rights, let me add three clarificatory remarks about the concept of moral human rights just proposed.

Firstly, as noted earlier, according to a widely held view human rights are the rights that human beings have simply in virtue of being human. It is clear that this view represents a *moral* concept of human rights, for human beings do in principle not have legal rights "simply in virtue of being human". Moreover, it is often assumed that all human beings have the same human rights, so that human rights are universal in scope. The concept of moral human rights proposed above is supposed to capture this common understanding: Provided that not all moral rights are universal, and that human rights are supposed to be universal, only *universal* moral rights fall into the subgroup of moral human rights.[84]

The concept proposed entails a *second* qualification: Not all universal moral rights ought to count as moral human rights but only those that "morally ought to be politically and legally recognized". This is meant to capture another common assumption about human rights, namely that they are moral standards for politics and law. So, for instance, while one might assume that there is a universal moral right not to be lied to, I hesitate to call this moral right a moral human right because

[84] See, however, Chapter 6, Sections 4.2 and 4.3.

one might have some serious doubts about whether this right should be protected by politics and law. *What* moral rights morally ought to be politically and legally protected is a question of its own.[85]

Finally, the phrase "*politically and* legally recognized" is meant to stress that there are of course other kinds of institutional recognition than legal recognition only.

3. Methodological Reflections

3.1 Concept Formation and the Hermeneutic Circle

In the preceding section I have proposed a preliminary definition of the concepts of moral and legal human rights. In what follows I will reflect on certain methodological issues that bear upon the question how a concept and a conception of human rights might be generated. This will further support the need for this conceptual distinction. It also serves to make clear the status of these concepts and the methodological guidelines for their further substantiation throughout this study. Finally, this will put us in a position to analyze certain conceptual and methodological shortcomings in current debates in the next chapter.

In his *Theory of Justice* Rawls famously distinguishes between a *concept* and different *conceptions* of justice.[86] He holds that there is one commonly shared concept or basic understanding of justice as "a proper balance between competing claims"[87] – this is the core meaning of 'justice'. There is disagreement, however, about how to further interpret this concept, as mirrored in the variety of competing justice conceptions. So these conceptions are divergent interpretations of one consensual underlying concept of justice. Does the same hold for a concept and conceptions of human rights? In other words, while there is evidently a variety of different human rights conceptions, can we identify a common concept of human

[85] See also Chapter 6, Section 4.3.
[86] See Rawls 1999, 9.
[87] Rawls 1999, 9.

rights that underlies these conceptions? This question points beyond the conceptual distinction between *moral* and *legal* human rights that I have stressed so far (although, as will become clear shortly, it leads us back to this distinction). The difference between these concepts relies upon the irreducibility of the concepts of moral and legal norms to one another. The question is now whether, apart from this conceptual difference, there is a core meaning of '*human rights*' – just as, for instance, the concepts of a moral and a legal right rely on a common concept of a right (as explained above). My claim is that this is at least not evidently so. I will now first explain this assumption and then turn to the difficulties in generating a concept of human rights more broadly.

A concept (as distinguished from a conception) of human rights needs to meet two general conditions: It needs to be minimal or broad enough to bracket deeper theoretical disagreement – it should rather provide a common basis for (meaningful) disagreement (see below); and it needs to be determinate enough to clearly demarcate human rights from other norms and rights. In short, it needs to express a *basic idea* of what human rights are. James Nickel proposes such a concept.[88] He starts from the assumption that "[h]uman rights are norms that help to protect all people everywhere from severe political, legal, and social abuses"[89], and that "[t]hese rights exist in morality and in law at the national and international levels."[90] This is already disputed: Some doubt that human rights are moral rights (that they "exist in morality") and some maintain that, as legal norms, human rights are essentially *international* legal norms.[91] Nickel then proposes four defining features of human rights: Human rights are (1) rights, (2) plural, (3) universal and (4) have high-priority.[92] Only the third and fourth feature are distinguishing features of *human* rights. According to Nickel, human rights are universal in that "[a]ll living

[88] Nickel 2017.
[89] Nickel 2017, introductory section.
[90] Nickel 2017, introductory section.
[91] See Chapter 3, Sections 3.3 and 3.4 and Chapter 5, Section 2.2.
[92] Nickel 2017, Section 1.

humans […] have human rights"[93]. He adds – generally correctly – that this idea of universality implies "some conception of independent existence"[94], i.e. "[p]eople have human rights independently of whether they are found in the practices, morality, or law of their country or culture"[95]. This can only mean that it is one conceptual feature of human rights that they are universal *moral* rights – which, as we have already seen, is disputed. Nickel further notes that "[t]his idea of universality needs several qualifications"[96], for some human rights apply only to particular persons (e.g. only adults have a right to vote) or "vulnerable groups"[97]. So it is not only controversial whether human rights are universal at all but also (seemingly) uncontroversial that at least some human rights are not universal. The fourth feature – the special urgency or importance of human rights – seems less problematic. There is, of course, disagreement about how to interpret this importance but that is a matter of human rights conceptions. However, note that there is a meaningful way to refer to human rights as 'all universally justified moral claims', and not all of these claims are necessarily "urgent" or "important". Finally, Nickel lists several other features that are often attributed to human rights yet are (even more) obviously controversial (and hence not included in their concept): It is disputed whether human rights should be defined as "inalienable"[98], as "minimal"[99], as being "grounded in some sort of independently existing moral reality"[100] (i.e. as having a moral ground) and in terms of particular political functions that they fulfill.[101]

Nickel's proposal strikes me as representative of current attempts to articulate a common concept of human rights more generally: On the one hand, the conceptual features that he lists are of course not far fetched. On the other hand, even if one

[93] Nickel 2017, Section 1.
[94] Nickel 2017, Section 1, emphasis deleted.
[95] Nickel 2017, Section 1.
[96] Nickel 2017, Section 1.
[97] Nickel 2017, Section 1.
[98] Nickel 2017, Section 1.
[99] Nickel 2017, Section 1.
[100] Nickel 2017, Section 1.
[101] Nickel 2017, Section 1.

defines the basic idea of human rights in considerably minimal terms, their defining features will nonetheless be controversial. In short, while there is agreement that there is *something special* about human rights – human rights are a special kind of norms – it is not evident that there is any common view about what makes them special. Rather, it seems more accurate to say that there is a conglomerate of features that are commonly associated with human rights – including, arguably, the more controversial ones that Nickel lists – but none of these features is obviously consensual. It seems appropriate then to conclude that there is not one commonly shared concept of human rights as comparable to the concept of justice that Rawls identifies: While it is clear that the term 'human rights' has meaning, it has, at least *prima facie*, different meanings. This is not meant as a critique of Nickel: For practical purposes it is inevitable to define a working concept of human rights to begin with, no matter whether it is consensual or not (see below). And yet this prompts the question what practical conclusions one should draw from the lack of a common concept of human rights. I will further explain this in what follows.

On the one hand, it is clear that a concept of human rights is not a definition in the strict sense. In Nietzsche's famous words, "only what has no history can be defined"[102] – and, one might add, no future. So a concept of human rights is first of all a *working* concept: It does not (or should not) aim at fixing what human rights are once and for all. Rather, as noted above, it should provide a plausible (temporary) basis for meaningful discussion about further human rights-related questions. Accordingly, the initial concept may be revised in the light of future conceptions. This is why it is not necessarily a problem, for instance, to (preliminarily) define human rights in terms of their universality yet to recognize at the same time that some human rights are not universal (as in Nickel's proposal): Because every systematic reflection on human rights needs to start somewhere, one may begin with the assumption that human rights are universal, leading to substantive reflections about what the universality of human rights means and implies, which may eventually prompt us to revise the initial concept of human

[102] Nietzsche 1887, 13, my translation.

rights (e.g. by refining what universality means or by giving up the claim that they are universal). The general point to be noted here is that concept formation is always a process of moving back and forth between initial (pre)understanding and substantive reflection on this preunderstanding, possibly leading to a revision of one's preunderstanding, and so forth. I will say more about this point below.

On the other hand, we need to be aware of the practical problem that prompts the search for such a concept – or concepts, in the plural. In order for a debate to be meaningful and constructive, its participants need to have *some* shared preunderstanding of what the object under discussion is. It is a basic precondition for any reasonable discussion that the disputants – in simple words – "talk about the same thing". In want of such a shared preunderstanding, they will just talk past each other and the debate will not yield any results. How can we make sure that there is such a shared preunderstanding of 'human rights' in human rights debates if there is no commonly shared definition? Clearly, the use of the term 'human rights' is not enough, for a term might of course have different meanings.

The two points just raised are rooted in a deeper methodological difficulty. Unlike "natural facts"[103], "institutional facts"[104] (Searle) or "interpretive concepts"[105] (Dworkin) – like 'society', 'being', 'law', 'morality', 'human dignity' or 'human rights' – constitutively rely on a construction or interpretation of what counts as a human right etc. in a specific context. Plainly (and even though it is sometimes suggested otherwise – see below), there is no antecedent, empirically discoverable "fact" that one could point one's finger to as it were in order to make clear what one is talking about – there is no other way to clarify what human rights are than to conceptualize them.

This leads to a further point that is stressed in the hermeneutical philosophical tradition.[106] Any study of the nature of an object presupposes a preunderstanding or preliminary concept of that object even before the question what "it" is can be

[103] Searle 1969.
[104] Searle 1969.
[105] See Dworkin 1986, 45-86.
[106] Cf. Gadamer 1991, in particular 265-276.

meaningfully and systematically raised. This preunderstanding determines to some extent what is at stake in the question and what could possibly count as an answer. Every theoretical inquiry, or indeed any question that we ask, therefore eventually takes on the form of a "hermeneutic circle": Some interpretation of that which is interpreted is always already presupposed in the interpretative process.

Against this background, let us return to Nickel's proposed definition. The deeper problems with this definition lie not with the specific features that he lists but with the *preunderstanding* of human rights that he presupposes, i.e. with the "phenomenon" of human rights that this concept aims to capture in the first place: that human rights "exist in morality and in law"[107], or that they are inseparably intertwined as moral and legal rights. What regards this preunderstanding, Allen Buchanan has pointed out (correctly to my mind) that we encounter some form of "conceptual imperialism"[108] in current human rights debates:

> [M]ost philosophers have been conceptual imperialists when it comes to human rights. They have assumed, without argument, that there is only one concept of human rights (namely, theirs). Political or Practical theorists assert that human rights *are* rights that serve to limit sovereignty in the context of the state system. Orthodox or Moral theorists assert that human rights *are* rights that people have simply by virtue of their humanity and conclude that human rights do not presuppose a state system. They are both right and both wrong. […] It is equally implausible either to assert that the latter usage [i.e. a "moral" concept of human rights, M.G.] has completely replaced the former (so that there no longer exists a concept of human rights that does not presuppose the state system) or to assert that only the former usage is correct.[109]

We can disregard the question whether this view is rightly attributed to "most philosophers". As a description of at least a visible tendency in the philosophical human rights discourse at the moment, Buchanan's diagnosis strikes me as entirely correct. By contrast, to distinguish between different human rights concepts is clearly the exception rather than the rule. To accept that there are diverging yet

[107] Nickel 2017, introductory section.
[108] Buchanan 2013, 10-11.
[109] Buchanan 2013, 10-11.

equally meaningful ways to refer to human rights then seems like a more fruitful assumption to begin with: The term 'human rights' has *prima facie* different meanings that are not readily reducible to one another. To systematically take up the question how these concepts are connected to one another therefore presupposes first of all to distinguish them.

Let us now turn to further methodological questions what regards the substantiation of these concepts.

3.2 A Misleading Question: Where Should a Theory of Human Rights *Begin*?

The difficulty how to generate a plausible working concept of human rights is well-recognized. This holds less so for its methodological implications. In current debates this difficulty is frequently framed in terms of the question where a theory of human rights should "begin"[110]: Should it proceed "[f]rom practice to theory"[111] or the other way around? Should it begin by consulting the history of human rights or the current practice of human rights? Should it proceed "top-down", meaning roughly: should it start from philosophical theory, or "bottom-up", i.e. begin by studying the actual uses of the term 'human rights'? These questions are grounded in the same underlying assumption: When one attempts to define a working concept of human rights in the context of scholarly debates, one does not create a new term from scratch. Rather, the term 'human rights' already has a certain meaning, or meanings, attached to it, and its scholarly use should be sensitive to this meaning. While this is of course generally right, to frame the question in the way just indicated is misleading for two reasons: *Firstly*, it disregards the circular character of any process of concept formation; *secondly* and relatedly, it is based on a short-sighted view of how conceptual, substantive and justificatory questions intertwine in any normative account of human rights. I will now first explain these assumptions and then briefly turn to the question about the "practice-

[110] See e.g. Waldron 2009.
[111] Beitz 2013a.

(in)dependency" of a moral theory of human rights in the next section.

The history of human rights might appear as a natural starting point for developing a basic, preliminary understanding of what human rights are.[112] Accordingly, at least a brief look at that history belongs to the standard repertoire of most (systematic) theories of human rights – however, not out of "purely historical curiosity"[113] but "because of the widespread assumption that a genealogical reconstruction will tell us something about the meaning of this difficult concept"[114]. It is important to see that any attempt at such a genealogical reconstruction is immediately confronted with the question how one should *proceed* in studying the history of human rights.[115] Two questions arise more specifically – conveniently, we might call them the questions of *what to look for* and *where to look*. *Firstly*, "[o]ne crucial precondition of any historical reconstruction is a theoretical understanding of what one is actually looking for."[116] To merely search for appearances or express uses of the *term* 'human rights' in history is not enough, and potentially misleading: It is clear that the relationship between concepts and terms is asymmetrical, in that one and the same concept may be signified by different terms, and one and the same term may have (radically) different meanings. Think, for instance, of the disputed topic whether 'natural rights' in the tradition of natural law theories should count as 'human rights'. Clearly this question cannot be answered by reference to the (diverging) terms but only by reference to an underlying concept of human rights, i.e. the *content* of that concept and the *meaning* of the two terms. So a study in the history of human rights needs to search for manifestations of the *idea* of human rights in history, which presupposes a basic understanding of this idea to begin with. In other words, one already needs to have a (pre)concept of human rights *before* the genealogical reconstruction can even begin. This is why the question of genealogy is inseparable from the (substantive) question

[112] In this section I draw on Mahlmann 2013. Mahlmann's paper is about human dignity but his reflections apply *mutatis mutandis* to human rights as well.
[113] Mahlmann 2013, 594.
[114] Mahlmann 2013, 594.
[115] See on what follows Mahlmann 2013, especially 594-597.
[116] Mahlmann 2013, 595.

of content, which is again to some extent inseparable from the question about the justifiability of this content. The *second* (and related) question that arises is *what part* of history one should study. One might, for instance, learn something about the meaning of (the idea of) human rights from the history of *ideas* (e.g. by studying Locke and Kant), from the history of social struggles (e.g. against slavery or Apartheid) or from important historical legal and political documents like the United States Declaration of Independence or the French Declaration of the Rights of Man and of the Citizen. This point is related, of course, to the first one, for what part of history one studies depends also on what one expects to find there. Consequently, there is not "the" history of human rights but rather *histories*, in the plural.[117] Put the other way around, if history were meant to be authoritative for our current (pre)concept of human rights – under the reservations of the first point – then all of these historical facets of "the" idea of human rights would need to be taken into account.

In the light of these complexities, it is unsurprising that in historical scholarship the origins and genealogy of human rights are a deeply controversial topic.[118] Without going any deeper into these controversies, it is worth noting that the current historical debate centers around the question of the *continuity* or (radical) *discontinuity* of human rights: "[T]o what extent is our understanding of human rights a reflection of past uses or is it something new, representing a radical break from these past uses?"[119] So, for instance, while some historians locate the origins of the "modern" human rights idea in the 20th century (e.g. with the 1948 Universal Declaration or even later than that), other historians date them much earlier, arguing for instance that it traces back to the idea of natural rights or the Enlightenment or to the American and French revolutions. As I will show in the next chapter, systematic normative accounts of human rights rely upon these diverging historical narratives: It is no accident that "moral" accounts of human rights that

[117] Cf. McCrudden 2014.
[118] See McCrudden 2014.
[119] McCrudden 2014, 2.

conceptualize them as (a certain kind of) moral or natural rights draw on the continuous elements in the history of human rights, while "practical" accounts that attempt to largely decouple them from a moral rights-idea draw on historical narratives that emphasize the discontinuity of human rights as a specifically modern phenomenon. It is striking that the systematic onesidedness of these approaches is mirrored in the onesided historical narratives that they draw upon. By contrast, it is much more plausible from the outset to assume that our modern understanding of human rights entails *both* continuous and discontinuous elements as compared to historical understandings of this idea.[120]

The preceding reflections serve to make clear two fundamental methodological points. *Firstly*, concept formation is not a one way-street – nor is an attempt to develop a conception of human rights. So, while it is clear that every human rights theory has to start somewhere, it is secondary where it begins. Michael Rosen expresses this point well in a discussion with Jeremy Waldron, which concerns the question about a proper understanding of the concept of human dignity in morality and law. Rosen notes that Waldron

> proceeds […] from […] a false alternative: either we move from moral philosophy to law or from law to moral philosophy. But why should we not move backwards and forwards between the two; why give one or the other priority?[121]

This is precisely right. The attempt to develop an understanding of human rights (and human dignity) is more accurately described as a process of constant moving back and forth, not only between preunderstanding and substantive reflection but also between different hermeneutical *contexts*, contexts that are themselves not strictly separate: History and present, politics, law and philosophy, theory and practice, and so forth. The *second* point relates back to the hermeneutical point stressed in the preceding section: When we ask "What are human rights?", we do not start off from a blank page. Rather, we are always already in the middle of an

[120] See McCrudden 2014.
[121] Rosen 2009, 5.

interpretative process, or within a certain "hermeneutic horizon". For instance, it is sometimes suggested that as soon as we turn our attention to "the human rights practice", we will be able to point our finger at whatever counts as a human right within this practice – as is reflected, for instance, in Charles Beitz' frequently used phrase "the human rights of international practice"[122]. However, as should be clear by now, this already presupposes a certain (pre)understanding of what constitutes this practice, which again is inseparable from one's preconcept of human rights, and so on.

As a final step in this chapter, and with a view to the discussion in the following chapter, I want to point out a further implication of the preceding conceptual and methodological reflections with regard to the question of the so-called "practice-dependency" or "practice-independency" of a moral theory of human rights.

3.3 Three Levels of "Practice-(In)Dependency"

As mentioned in the beginning of this section, the question where a human rights theory should "begin" is often framed in terms of the opposition between "bottom-up" and "top-down" approaches to human rights, which again belongs into the wider context of discussions about the "practice-dependency" or "practice-independency" of moral principles.[123] These discussions broadly revolve around the question how (if at all) the particular nature of a practice or institution to which a moral principle is applied affects the content and justification of that principle itself. In the context of human rights debates, the opposition between top-down and bottom-up approaches to human rights frequently crops up when a more specific issue is at stake, namely: whether a moral principle of human rights is a suitable standard for assessing the moral justifiability of the human rights practice *at all* – the underlying charge being that a moral human rights idea has little to do with the internal standards of legitimacy of this practice or (more strongly even) is at odds

[122] Beitz 2009, 45.
[123] See Sangiovanni 2008 and 2016.

with its very nature.[124] In other words, the labels "top-down" or "practice-independent" carry negative connotations in the context of these debates, for they imply the charge that philosophers are insufficiently sensitive to the human rights practice as a practice with its own (internal) dynamic. This charge figures centrally in the critique of "moral" or "naturalist" approaches to human rights, as it has been advanced by proponents of a "practical" or "political" human rights conception. I will turn to this critique in the next chapter. With a view to this discussion, in what follows I want to briefly disentangle three levels of practice-(in)dependency, as a methodological tool for assessing the cogency of this critique.

As Andrea Sangiovanni notes, "[i]t is uncontroversial that existing institutions and practices are relevant in determining how best to *implement* a particular principle of political morality, such as a principle of justice"[125] or in the present context a principle of (moral) human rights. In other words, the *application* of a moral principle to an existing practice involves the justification of subprinciples, which again depend on the specific nature of the relevant practice. So, on the *level of application*, moral principles are always "practice-dependent" in this sense.

Let us next turn to the *level of justification*. Here it is first of all important to note that the question whether the justification of "human rights" is practice-dependent is ambiguous: One may *firstly* wonder whether the justification of *moral* human rights, or of a moral idea of human rights, is "practice-dependent" in some sense. What regards the validity of this idea, this is at least not obviously so. However, at the same time moral-philosophical reasoning is of course always embedded in a practical or hermeneutical context and thus not independent of this context – as is visible for instance from the plain fact that philosophical reasoning typically takes on the form of a reflection on particular societal problems. Whether and how this might affect the validity of moral principles is a question of its own. Here it suffices

[124] See Chapter 3.

[125] Sangiovanni 2016, 3. For instance, "[t]he set of courses of action, regulatory rules, and policies that best realise the demands of justice (whatever one thinks they are) in Geneva will be different from those required in Poland." Sangiovanni 2016, 3.

to note that the relevant concept of a "practice" would not be the concept of the human rights practice specifically but of "practical embeddedness" more broadly.

When we ask whether a justification of "human rights" is practice-dependent, we may *secondly* employ a concept of human rights as a specific kind of currently institutionalized legal or political norms. Importantly, "justification" then means moral or normative *assessment* or *evaluation*. The *justification* of legal or political human rights norms is then situated on the same methodological level as the *application* of a moral or normative principle: To assess them in the light of that principle means to apply a moral or normative principle to them. Accordingly, other than the justification of moral principles, the justification of an existing practice is also always (and obviously) practice-dependent in some sense.

Finally, in the light of the reflections in the preceding sections I want to stress that there is a *third* level of practice-dependency that is central to current debates, namely the question to what extent a *concept* of human rights should be "derived" from the human rights practice. It bears on the question of the justification (or assessment) of human rights in the following way: It is commonly assumed that the moral assessment of an existing practice should be sensitive to the nature of this practice. If a concept of human rights as moral human rights does not "derive" from an understanding of the nature of the human rights practice, then it might also seem dubitable to what extent an idea of moral human rights might constitute an appropriate assessment standard for this practice.

With these remarks as a background, let us now turn to the "Moral-Political Debate".

3. The "Moral-Political Debate"

1. Introduction

In current human rights debates one frequently encounters a comparison of two allegedly opposed (i.e. mutually exclusive) human rights conceptions: a "moral", "naturalistic" or "orthodox" (sometimes also "traditional" or "humanist") conception on the one hand, and a "political" or "practical" conception on the other hand. As a preliminary characterization we might say that they offer diverging interpretations of the nature and ground(s) of human rights in terms of their "moral" or "political" character, though as we will see this requires significant specification. Debates about these conceptions are sometimes summarized as *the* "Moral-Political Debate"[126]. However, other than the labels suggest, the "moral" (or "orthodox") and "political" (or "practical") approach to human rights do not represent two coherent philosophical positions. Rather, behind these labels we find a variety of claims, questions and arguments that concern different aspects of our understanding of the moral, political (or politico-legal) and practical dimensions of human rights and their relationship to one another. It is in no way obvious that these claims can be consistently conceptualized in terms of a "moral" and a "political" conception. Accordingly, there is not one coherent scholarly debate about the accuracy of the two conceptions but rather a large conglomerate of related debates that concern these different aspects, some of which I touched in the preceding chapters: e.g. debates about practice-dependency or -independency, bottom-up versus top-down approaches to human rights, ideal versus non-ideal moral theory, moral versus political justification, and so on. This does not only make discussions about the respective view(s) considerably complex but also often confused.

[126] See Etinson 2018. The book was not published yet at the time I wrote this chapter and hence could not be taken into account.

In light of this, a number of recent publications aim at clarifying what the debate is actually about, how the differences and commonalities between the two positions might be adequately put and what the real and productive points of dispute are. Most of these publications also show a clear tendency to mitigate the alleged contrast between both approaches in favor of their (partial) compatibility or complementarity.[127] While this clearly points into the right direction, my basic assumption is that the discussion yet suffers from insufficient attention to the fundamental conceptual and methodological distinctions as developed in the preceding chapters – in particular: the need to distinguish between different (pre)concepts of human rights and between questions about practice-(in)dependency on the conceptual, justificatory and application level. This causes a great deal of (avoidable) confusion and, more importantly, distracts from a number of central philosophical questions. Against this, in this chapter I will use the preceding reflections as a guideline to reconsider the central issues at stake in the debate. This will allow us to discard a number of alleged disagreements and to formulate the remaining points of dispute more clearly and constructively. In particular, it will become clear that, rather than to think about the moral and political and/or practical dimensions of human rights in *opposed* terms, the central questions concern a plausible understanding of the *relationship* between these dimensions. Against this background, in Chapter 4 I will draw systematic methodological conclusions from the following discussion with regard to the leading question of this study. This more specific question will thereby fade into the background for the time being. The focus of this chapter does not lie on the *morality and legality* of human rights but on the alleged contrast between the *morality and practice* of human rights, broadly understood as a *political and legal* practice.[128]

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[127] See for instance Bagatur 2014 and 2015, Etinson / Liao 2012, Gilabert 2011, Horn 2016 and Valentini 2011 and 2012.

[128] In the context of the Moral-Political Debate one sometimes encounters a seemingly parallel distinction to that between moral and legal human rights, namely a distinction between "abstract" and "specific" rights (Gilabert 2011, affirmatively taken up in Horn 2016). This terminology is misleading

The chapter is structured as follows. I begin with a preliminary characterization of the debate, based on how it is typically presented in the literature *(2)*. Then I consider more closely a number of particular arguments and positions *(3)*. As the “political” approach has essentially been developed as a counter-approach, I first look at the “moral” human rights theories by James Griffin *(3.1)* and Alan Gewirth *(3.2)*. After that I turn to the “practical” or “political” conceptions by Joseph Raz *(3.3)* and Charles Beitz *(3.4)*. On the basis of this reconstruction, in the fourth section I make a proposal of what the debate should be about if it is supposed to be meaningful and constructive *(4)*. I comment on secondary literature mainly in the footnotes.

A terminological remark before I proceed: Conveniently, in what follows I will frequently refer to “the (Moral-Political) debate”, even though what we are actually concerned with is a variety of debates as explained above. Moreover, I write the terms “Political”, “Moral” etc. in capital letters when I use them as fixed designations in the context of the debate. That is to say, I use these expressions independently of the question whether they are sensible and rightly ascribed to certain positions. I also largely disregard possible differences between these designations unless they are substantively relevant.

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and does not help to structure the debate: Both moral and legal (human) rights can be formulated on high or low levels of generality, so it is not the case that moral human rights are “abstract” and legal human rights “specific” or that moral theory is concerned with “abstract rights” and political or legal theory with “specific rights”. Moreover, the assumption of the alleged abstractness of moral rights is often connected to the critical claim that natural rights theories somehow imply an “atomistic” view of the individual that “abstracts” from the “concrete sociality” of human beings. (I should stress that Gilabert explicitly argues against this: cf. Gilabert 2011, 444.) I find this assumption mistaken but I cannot go into this matter here. In any event the distinction does not help to structure the debate either because the alleged contrast between atomistic and intersubjective or otherwise “contingency-sensitive” theories is equally encountered within the field of moral (human rights) theory.

2. A Preliminary Look at the Debate: Questions, Positions, Protagonists

What is the debate about? In this section I first explain how this question is typically answered in the literature. Based on the subsequent analysis of a number of particular arguments (Section 3), in Section 4 I expound my own diverging view about the matter.

It is usually maintained that the controversy is about the *nature* of human rights ("What are human rights?") or about the nature *and ground(s)* of human rights, i.e. "the considerations that establish the claim of a given norm to be a human right."[129] The first question concerns the proper conceptualization of human rights, the second their justification. This provided, what answers do the two approaches provide to these questions? Given its prominency, let us focus on John Tasioulas' reconstruction. According to Tasioulas, the Moral or Orthodox conception is characterized by two tenets.[130] The *first* tenet relates to the nature of human rights:

> [T]hey are moral rights possessed by all human beings simply in virtue of their humanity. They do not, like legal or conventional rights, owe their existence to some institutional norm or social practice. Nor, like moral rights grounded in desert, promises or marriage, does their existence depend on an accomplishment of the right-holder or a transaction in which they have engaged or a relationship to which they belong.[131]

The *second* tenet concerns the grounds of human rights:

> The second tenet […] holds that whether or not a candidate norm really is a human right is to be determined by ordinary (typically, truth-oriented) moral reasoning.[132]

Thus, "ordinary moral reasoning" is regarded "as either necessary or sufficient to establish the existence of human rights"[133].

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[129] Tasioulas 2009, 938.
[130] Tasioulas notes that these two tenets "receive widely divergent interpretations at the hands of their adherents" (Tasioulas 2009, 938), which is certainly right.
[131] Tasioulas 2009, 938, reference deleted.
[132] Tasioulas 2009, 938.
[133] Tasioulas 2009, 938.

Tasioulas now defines the Political conception negatively as rejecting at least one of these two tenets. The rejection of the *first* claim is based on the assumption that "it neglects the distinctively *political role* of human rights"[134]. The *second* tenet is replaced by the alternative assumption that

> it must be possible to justify human rights by appeal to a form of public reason that embodies distinctively political standards of justification, not by invoking the purported deliverances of correct or objectively true morality simply as such.[135]

This reconstruction accords, at least at bottom line, with how the main difference between the two approaches is often presented in the literature. To make this unequivocally clear, this is not how I would reconstruct it. This will become clear in what follows.

If we follow Tasioulas, then the defenders of the Moral approach *firstly* understand human rights as (a specific kind of) moral rights (1^M, "M" for "Moral"). They *secondly* attribute to them what are often taken to be the core features of moral rights, namely universality (in scope, space and time) and necessity or unconditionality (2^M). And they hold, *thirdly*, that they ought to be justified in the way moral rights are usually justified, namely by reference to (objective) "moral reasons" or "moral reasoning" (3^M). 1^M and 2^M summarize the Moral view of the nature of human rights, 3^M the Moral view of their ground (once again, on Tasioulas' reconstruction). Note that this leaves it open whether all or only some moral rights qualify as human rights on the Moral conception.

Proceeding in the reverse order, according to Tasioulas the defenders of the Political conception reject (3^M) in favor of the view that human rights ought to be justified by reference to "public reasons" or "public reasoning", including "distinctively political standards of justification". These reasons, however specified,

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[134] Tasioulas 2009, 938. This "political role" is spelled out in different ways (Tasioulas 2009, 938): For instance, it is maintained that the primary duties that correlate to human rights refer not to private individuals but to the state and its representatives or to political institutions; that human rights regulate "certain kinds of distinctively political status or activity"; that human rights serve as the "benchmarks of political legitimacy" or as "govern[ing] justifiable intervention"; and so on.

[135] Tasioulas 2009, 938.

are the ground of human rights on the Political conception (3^P, "P" for "Political"). This specific mode of justification is required because human rights play a distinctively "political role". *As what* do they play such a role? Put differently, if the Moral approach is based on a preunderstanding of human rights as moral rights, what is the preunderstanding of human rights by a defender of the Political approach? This question points to a significant gap in Tasioulas' reconstruction: He rightly underlines the functional understanding of human rights that Political conceptions employ – briefly: We understand what human rights are if we understand what (political) roles they play. However, clearly this presupposes a preconcept of whatever it is that plays that role or performs that function. If this something is not a moral right, what is it then? What is the Political alternative to 1^M (and, based on this, 2^M)?

The most general answer is that a Political conception attempts to elucidate human rights as found in "the human rights practice", understood (broadly) as a legal-political practice. Yet this still leaves open what human rights are taken to be within that practice: political claims, moral claims, legal rights, a moral idea…? For example, we might formulate 1^P as follows:

> Human rights are (a certain kind of) moral claims, raised by participants in the practice of human rights, with the aim that these claims ought to be recognized by political and legal institutions.

This would immediately render 3^P *prima facie* plausible because it is certainly possible to defend the view that moral claims require a different kind of justification once they are raised in the public realm, for instance some form of democratic legitimation.[136] For it is one question whether a moral principle is objectively true or justified and another question what makes its politico-legal implementation morally justified. This provided, it would also be clear why a defender of the

[136] I am not claiming that this is so, only that there are good reasons that speak in favor of this assumption. I cannot discuss this matter here.

Political approach would have to reject 2^M as a proper characterization of "her" human rights. Instead we might attribute to her the following view (2^P):

> Human rights, understood as (a certain kind of) moral claims raised in the practice of human rights, are *as such* particular rather than universal (in scope, space and time) and contingent or conditional rather than necessary and unconditional

– for instance because, *as claims being raised in a practice*, human rights depend on the contingent beliefs of those who raise them and on the contingent emergence of this practice at a particular place and time. Importantly, note that (re)constructing the difference along these lines would render it largely unclear why precisely this view should be in opposition to the Moral account. At the same time things would look differently if we substituted "moral claims" with "legal rights" in the above passage, or with "political claims", understood as *essentially different* from "moral claims" (and "political justification" as essentially different from "moral justification"). Yet all of this is merely speculative, given Tasioulas' reconstruction.

Why do I emphasize this point? As explained in Chapter 2, in order for a debate to be meaningful the participants need to have some shared understanding what the object under discussion is, what aspect of this object is considered and from what theoretical perspective, and what ought to be achieved with regard to that object. In other words, to consider two theories as *alternatives* that mutually exclude one another – and this is what the Political proponent claims – presupposes not only that they are fully developed yet mutually incompatible theories but also that these theories are concerned with roughly *the same object and goal*.

This point is rather trivial and yet crucial. Note that "conceptualizing the nature and ground(s) *of human rights*" is insufficient as a specification of what the Moral-Political Debate is about, and of the object under discussion. Unless the allegedly opposed theories attempt to elucidate *the same human rights phenomenon*, they might criticize or inspire one another in numerous ways but they cannot turn out to be alternatives.

In light of the central terms of the debate, I want to propose that contributions to it need to meet two minimal (and considerably broad) criteria if it is supposed to make sense at all: They need to (1) reflect normatively about (2) (some aspect of) the human rights practice.[137] This is only for a start, of course, and will require further specifications. The controversial issue is then (again, for a start) how we should understand the normative dimensions of that practice and what principles should guide its normative justification. I say "normative" instead of "moral" to keep open the possibility that the opposition between "moral" and "political" might concern the interpretation of the human rights practice itself (e.g. as an essentially political practice) and the normative principles that figure in its justification (moral or political justification). So I take "moral" and "political" as possible specifications of the "normative" and the "practical".

Having clarified this, who are the main protagonists in the debate? Because what is commonly referred to as "the moral" and "the political" conception of human rights do not represent two coherent positions, it is impossible to provide a clear-cut overview of the adherents of the respective view. Rather, the variety of scholars that are associated with the two views reflects the diversity of questions at stake in it. An exception to this are John Rawls, Charles Beitz and Joseph Raz who themselves coined the phrase of a "political" or "practical" approach to human rights. Moreover, Beitz and Raz explicitly consider their positions both as a further development of Rawls and as an alternative to "traditional" (Raz) or "naturalistic" (Beitz) accounts. Alongside them, scholars who have been put in the Political camp are for instance Joshua Cohen, Thomas Pogge, Jürgen Habermas and Andrea Sangiovanni. The most frequently mentioned adherent of a Moral conception is probably James Griffin, followed by Alan Gewirth, John Tasioulas, Allen Buchanan, Simon Caney, Martha Nussbaum, John Simmons and Ernst Tugendhat.

[137] It simply would not make any sense to criticize a moral theory of human rights as moral rights for conceptualizing these rights in a way that does not "fit the practice" if this was never the goal of the theory. Nor would it make sense to criticize a theory that merely aims at describing or reconstructing the human rights practice for not morally justifying it (properly), provided that it did never aim at moral justification in the first place. For a similar point see Mayr 2011, 74.

It is important to keep in mind that the debate started with the Political critique, so that only some of the scholars just mentioned regard their own philosophical positions explicitly as “moral”, as opposed to “political” (e.g. Tasioulas but not Griffin or Gewirth). With these considerations as a background, let us now turn to particular positions and arguments.

3. Particular Positions and Arguments

The considerations developed in the last section serve as a guideline for the subsequent reconstruction of several prominent positions and arguments in the debate. The leading question is in what ways precisely the two accounts differ, and in what ways – if any – Practical approaches might truly constitute an alternative to Moral approaches. As should be clear by now, to this end we need to pay particular attention to the preconcept of human rights that is employed, as well as to the way moral, political and practical elements relate to one another in each account and on what level (conceptualization, justification and application).

3.1 Griffin

In the context of the Moral-Political Debate Griffin’s human rights theory is commonly regarded as the prime example of a “naturalistic” or “orthodox” conception of human rights. In what follows I will bring two aspects of his theory into focus that are essential with regard to the debate: his method of concept formation, including his view about the history of human rights; and the way he applies his moral theory to the human rights practice. Together with the considerations about Gewirth in the next section this will enable us to assess some of the criticisms as raised by their Practical opponents subsequently.

Let me first briefly outline Griffin's account. He starts from the assumption that the term 'human rights' today is "nearly criterionless"[138]: "We agree that human rights are derived from 'human standing' or 'human nature', but have virtually no agreement about the relevant sense of these two supposedly criteria-providing terms."[139] Griffin's goal is to provide these criteria by establishing the "grounds for human rights". To this end he develops a normative conception of human nature ("expansive naturalism"[140]) and argues that the "typical human condition" is "normative agency" or "personhood"[141]: Human rights are "grounded in *natural facts* about human beings"[142] and at the same time "in a central range of substantive *values*, the values of personhood"[143] or normative agency. This ground of human rights is at once that which they protect: Human rights are "protections of our normative agency"[144].

This short sketch suffices to make clear in what fundamental sense Griffin's approach is "naturalistic". It is also important to note that Griffin proceeds from a certain preunderstanding of what a human right is, namely: "a right that a person has, not in virtue of any special status or relation to others, but simply in virtue of being human."[145] So Griffin understands human rights as *moral rights*, more precisely as *all* moral rights, which he equates with *natural rights*. His theoretical efforts serve to elucidate the concept and ground of human rights *in this sense*. (See, however, below.)

It is illuminating for present purposes how Griffin justifies his understanding of human rights as moral or natural rights. He asks explicitly how a working concept of human rights – i.e. the concept to be refined subsequently – might be generated:

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[138] Griffin 2008, 16.
[139] Griffin 2008, 16.
[140] Griffin 2008, 124.
[141] See Griffin 2008, 32-36.
[142] Griffin 2008, 36, emphasis added.
[143] Griffin 2008, 34, emphasis added.
[144] Griffin 2008, 2.
[145] Griffin 2001, 306.

> What content, then, should we attach to the notion of a human right? […] Clearly the content will be determined to some degree by the criteria for use, insufficient as they are, that the notion of 'human rights' already has attaching to it. *So the first part of our job is to consult the long tradition from which the notion comes and to discover the content already there.*[146]

Consulting history in this sense is part of the "bottom-up approach" to human rights that Griffin declaredly pursues, which he contrasts with the competing "top-down approach".[147] Griffin conceives of the difference between them as follows: The latter "starts with an overarching principle […] from which human rights can then be derived".[148] In contrast to this, a bottom-up approach

> starts with *human rights as used in our actual social life* by politicians, lawyers, social campaigners, as well as theorists of various sorts, and then sees what higher principles one must resort to in order to explain their moral weight […] and to resolve conflicts between them.[149]

Two aspects of these methodological reflections deserve emphasis. *Firstly*, Griffin holds that a philosophical concept of human rights ought to be consistent at its core with how human rights are commonly understood "in our actual social life". This is to say that a (preliminary) concept of human rights ought to emerge from the *practice* of human rights, or from the language use within that practice. Needless to say, Griffin further assumes that "his" human rights concept – "a right that a person has […] simply in virtue of being human" – meets this requirement. So, in short, we find a certain methodological premise (the bottom-up requirement) coupled with a substantive assumption about what makes up the practice of human rights, or the common understanding of human rights within that practice. This is important for two reasons. *Firstly*, it shows that there is a close connection between Griffin's *moral concept* of human rights and the *practice* of human rights on the level of

[146] Griffin 2008, 29-30, emphasis added.
[147] On this distinction see Griffin 2001, 308-309.
[148] Griffin 2001, 308.
[149] Griffin 2001, 308, emphasis added.

concept formation ("conceptual practice-dependency").[150] *Secondly*, as we shall see below, Griffin's Practical opponents equally combine a bottom-up premise with a particular understanding of the practice, though with a very different one. The resulting human rights concepts differ accordingly, which indicates that the substantive interpretation of the practice is crucial in this regard.

The *second* aspect of Griffin's methodological approach that deserves attention is that he assumes a large *historical continuity* between our present understanding of human rights and the history of natural rights thought, and within that history itself. His starting point for generating a (working) concept of human rights is "*the* 'historical notion'"[151] of human rights. The singular is no accident here, for he assumes that there is precisely one such notion: "a continuous, developing notion of human rights running through the history"[152]. According to Griffin, this historical development has its roots in the late Middle Ages when the term 'natural rights' first appeared "in its modern sense of an entitlement that a person has"[153]. The further development of the concept is then primarily characterized by three historical stages: *firstly*, the *secularization* of the idea of natural rights during the Enlightenment; *secondly* (and as a consequence of this secularization), a *re-naming* of the idea from 'natural' to 'human' rights; and *thirdly*, the fact that it began to play a role in *political practice*.[154] While Griffin concedes that there have been some rather negligible conceptual changes since then, his general conclusion is: "The secularized notion that we were left with at the end of the Enlightenment is still our notion today […]. Its intension has not changed since then: *a right that we have simply in virtue of being human*."[155] Therefore, in addition to what has been said above, we find that Griffin's (conceptual) bottom-up approach is paired with a specific perspective not only on the practice of human rights but also on their

[150] One might of course conclude that Griffin has gone wrong but that is a different matter.
[151] Griffin 2008, 2, emphasis added.
[152] Griffin 2008, 2.
[153] Griffin 2008, 1.
[154] See Griffin 2008, 1-2 and 9-14.
[155] Griffin 2008, 2.

conceptual history. Once again, below we will see that a different historical perspective correlates with a different concept of human rights.[156]

Leaving the methodological and conceptual level aside now, another aspect of Griffin's theory is central to the debate, an aspect that has been critically taken up quite extensively by his Practical opponents. As explained above, Griffin conceives of human rights as natural rights and argues that they are grounded in "personhood". However, he also claims that "[o]ut of the notion of personhood we can generate most of the conventional list of human rights"[157]. These are the human rights listed in "the most authoritative declarations in international law"[158], above all the Universal Declaration of Human Rights. Crucially, Griffin's justification of human rights as natural rights is therefore meant to be *at the same time* a justification of the human rights that one encounters in the legal practice of human rights. Accordingly, in Part III of his book Griffin *applies* his moral human rights conception to the legal human rights practice, and he does so by identifying "discrepancies between philosophy and international law"[159]. His procedure follows a simple pattern: He picks a certain right as stated in one of the core human rights declarations; then he examines whether it qualifies as a human right on his personhood account; based on this, he identifies "unacceptable cases", "debatable cases" and "acceptable cases", i.e. he argues whether or not the right should remain on the relevant list.[160]

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[156] Griffin's historical remarks also reveal another way in which his theory might be considered "orthodox": He does not only conceive of human rights as natural rights or in a naturalistic fashion. More than this, he regards his own philosophical reflections so deeply embedded in the tradition of natural rights thought that a notion of human rights as institutionalized rights (as different from a moral human rights idea) plays at most a marginal role in his historical and contemporary narrative. Put in a more pointed fashion, although Griffin's philosophical reflections take place in a socio-historical setting that is radically different from the setting of classical natural law thinkers in that numerous legal and political human rights regulations are in place – regulations that might be connected with but are irreducible to an idea of natural rights –, his (moral) human rights concept remains untouched by this.

[157] Griffin 2008, 33.

[158] Griffin 2008, 191.

[159] This is the title of Chapter 11 of *On Human Rights*: Griffin 2008, 191.

[160] See Griffin 2008, 191-211.

According to Griffin, the requirement that legal human rights ought to be justifiable by reference to the same ground as moral human rights (personhood) is found in international human rights law itself:

> The international law of human rights has been deeply influenced by both the natural law tradition and the Enlightenment. […] The Preambles of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights […] both contain the clause, 'Recognizing that these rights derive from the inherent dignity of the human person'. *So, here too the ground of these rights is said to be personhood,* though the exact significance of the idea is not at all spelt out.[161]

This passage is illuminating for two reasons. On the one hand, it shows that, on his own view, Griffin does not simply apply an "external" moral standard to the (legal) human rights practice when he criticizes it with the help of his personhood account. Rather, he takes this to be justified by an "internal" moral commitment of that practice itself: the affirmation of human dignity. So, in short: He observes that central human rights documents express a commitment to human dignity as the ground of human rights; he develops an argument for the claim that the ground of human rights, properly understood, is personhood; and then assesses the moral justifiability of legal human rights norms on this basis. So *in this limited sense*, Griffin's account is sensitive to the nature of the (legal) human rights practice: One does not do justice to his account when one presents it so as to apply his personhood conception in a merely arbitrary way. On the other hand, note what Griffin is *not* doing: He does not address the question what human dignity *means in legal context*, or how the claim that human dignity is the ground of (legal) human rights is *interpreted in legal practice*. In this sense, his account is not only insensitive to the legal human rights practice; one might even say that he does not study the legal human rights *practice* at all (but only certain legal documents). Therefore, when Griffin infers from the relevant claim that "here too the ground of these rights is said to be personhood", he commits a kind of category mistake: He

[161] Griffin 2008, 191-192, reference deleted, emphasis added.

mixes up a reconstructive interpretation of what human dignity means in legal context with a moral-philosophical interpretation of this concept. I will come back to this important point in the next chapter.[162] In the present context, the first-mentioned point is more important: Griffin's account is "practice-dependent" in the sense that he attempts to take seriously an internal moral standard of the human rights practice when he criticizes it with the help of his personhood account.

If we combine this observation with the preceding sketch of Griffin's justificatory procedure then we can summarize his view of the relationship between his concept of moral human rights and the legal human rights practice as follows. Griffin assumes (*firstly*) that a claim to moral legitimacy is inscribed in legal human rights (on his understanding), a claim that is (*secondly*) intimately connected to an idea of moral human rights. More specifically, he holds (*thirdly*) that the moral (and arguably also the legal) justifiability of legal human rights traces back to the same moral ground as that of moral human rights (personhood). Furthermore, he assumes (*fourthly*) that every single legal human right needs to be justifiable as a first- or second-order human right by reference to that ground ("Mirroring View").[163] Finally, he seems to assume (*fifthly*) that it is both a necessary and a sufficient condition for legal human rights to be morally justified that they "mirror" moral human rights (they are their sole justificatory ground).

It is important to note that there is no *necessary* connection between these five claims. For instance, one might hold that human rights law implies a claim to moral legitimacy but that it is not adequately captured by the idea of a moral human right; or one might affirm the latter yet deny that this requires that every single legal human right must be justifiable as a moral human right. Griffin therefore advocates

[162] See Chapter 4, Section 2.

[163] As explained above (see Chapter 1, Section 4), the Mirroring View is a specific view of what it takes for a legal human right to be morally justified, namely that it "mirrors" moral human rights: "[I]nternational legal human rights, when they are justified, are legal embodiments of […] moral human rights." (Buchanan 2013, 14-15) For instance, there should only be a legal human right to education if it can be shown that there is a moral human right to education. See further on the Mirroring View Buchanan 2013, 14-23.

one specific view of what it takes for a legal human right to be morally legitimate, a view, I should add, that he presupposes implicitly yet does not argue for.

3.2 Gewirth

Alan Gewirth is frequently mentioned in the same breath with Griffin as a holder of a "moral" or "naturalistic" conception of human rights. As with Griffin, in what follows I merely highlight those features of his account that are directly relevant with regard to the debate. Because I elaborate on Gewirth's philosophy in more detail in Chapter 6, I will keep the discussion brief here.[164]

Again, let me first indicate the broad lines of Gewirth's project.[165] Gewirth is concerned with the question how one can justify the assumption that there are universal moral rights, what these rights are and what moral duties they imply both with regard to the actions of individuals and with regard to societal institutions or the order of society at large.[166] He argues that it is possible to justify a highest universal moral principle, the so-called "Principle of Generic Consistency" (PGC). This principle states that it is morally obligatory for every rational purposive agent to act in accord with the moral ("generic") rights of his recipients as well as of himself. It is objectively and necessarily true in that it cannot coherently be denied by any rational purposive agent. More precisely, by employing a "dialectically necessary method" Gewirth shows that the assumption that every rational purposive agent is the holder of certain moral rights is logically implied in the self-understanding of every rational purposive agent as a rational purposive agent. The relevant rights are specified on the highest level as rights to "freedom" and "well-being".[167] Other than in Griffin, Gewirth's argument to the existence of universal moral rights is hence not based on a normative conception of (human) nature but on

[164] See Chapter 6, Section 4.3.
[165] See in particular Gewirth 1978 and Gewirth 1982.
[166] Other than Griffin, Gewirth defends the view that morality is rights-based. So moral (human) rights are not merely a part of morality (as e.g. Griffin assumes) but its very core, according to Gewirth.
[167] 'Well-being' has a specific meaning in Gewirth: It is a generic term for the conditions that are necessary in order to realize ends. See Chapter 6, Section 4.3.

the practical self-understanding of rational agents. It is therefore misleading to characterize Gewirth's theory as "naturalistic" and arguably also as "orthodox", though it is – of course – moral.[168]

In his later work Gewirth speaks of "human rights" instead of "universal moral rights". So the *first* point to be noted is that human rights are all and only universal moral rights, on Gewirth's terminology. However – and this is crucial –, we should also note that Gewirth does *not attempt* to elucidate human rights as found in the existing human rights practice (however understood in detail) in a way comparable with Griffin. This is simply not the goal of his theory. Put differently, the question underlying his approach is not (for instance) "How can one properly understand the nature and ground of the human rights of international practice?" but "How can one properly understand the nature and ground of universal moral rights?". Let me be clear about my point here: Gewirth sets forth the practical implications of his theory of human rights as moral rights for individual actions, political institutions as well as the legal realm. So he does assume that (moral) human rights are also the basis of political institutions: In short, the moral obligation to respect the (moral) human rights implies a moral obligation to establish institutions that protect these rights (see below). He further assumes that the human rights practice can be justified by reference to the Principle of Generic Consistency. However, Griffin applies his theory of human rights as natural rights to human rights law in order to assess its moral legitimacy. Gewirth, by contrast, does not develop an explicit account or critique of – for instance – the rights included in certain human rights treaties or other aspects of the current human rights practice. Accordingly, to critizice his

[168] I assume that the label "naturalistic" is ambiguous in the context of the debate: It refers to a certain method of the justification of moral rights, and to theories that understand human rights in terms of natural rights. As different from this, I assume that the labels "orthodox" and "traditional" first of all serve to single out theories that conceive of human rights in their modern understanding (whatever that means precisely) in terms of an older, traditional human rights idea (natural rights). Finally, the designation "moral" only makes sense when it is constructed as an alleged counterpart to "practical" and "political"; see on this Section 4 below.

human rights conception because it does in some way not fit the practice is beside the point.[169]

A *second* aspect of Gewirth's approach deserves attention before moving on to the Practical accounts. As indicated above, Gewirth considers quite extensively the political and legal implications of the Principle of Generic Consistency for a whole range of practical matters.[170] In this context he also elaborates on the question how moral obligation relates to political and legal obligation[171], and how political principles such as political justice and consent bear on the application of the (moral) PGC. On the one hand, the PGC offers a criterion – the principle of agency – which enables us to put rights claims in a certain hierarchy and to solve conflicts of rights. On the other hand, solutions to concrete practical problems that arise in society cannot simply be *derived* from the PGC. Rather, its "application" requires complex considerations and weighting and includes numerous empirical factors in every single case. At bottomline, the PGC serves as a (concrete and weighty) *guideline* with regard to those cases, not more and not less.

I cannot go into the details of Gewirth's account here. I am highlighting these aspects of his theory for two reasons. *Firstly*, it serves as a prime counter-example for the wrong and yet frequently uttered assumption that moral theory in general, and theories of moral rights in particular, are concerned foremostly or even exclusively with the actions of individuals rather than with questions of institutionalization and legislation. Some version of this view is also present in the

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[169] Valentini makes this mistake. She summarizes the Naturalistic view ("natural law-approach" on her terminology) which she attributes among others to Gewirth as follows: "Central to this view is the idea that the function of human rights is independent of the existing political reality of human rights. To establish whether something (X) qualifies as a human right we need not look at human rights practice, at the purpose human rights are supposed to serve in real-world politics. Instead, we need only consider whether X is a normatively salient interest attached to our status as human beings that is weighty enough to place duties on others to respect or protect it." (Valentini 2011, 180) Related to Gewirth's theory this reconstruction is both right and wrong: If we replace every appearance of "human right" in this quote with "universal moral right" then it is apt. If we replace it with something like "(currently recognized) legal human right" or "political claims to human rights raised in the current human rights practice" then the reconstruction is inaccurate. The problem is – once again – that Valentini does not distinguish between different human rights concepts, which to some degree undermines the otherwise clarifying and convincing arguments that she develops in her paper.

[170] See in particular Gewirth 1982.

[171] See Gewirth 1982a.

Moral-Political Debate. For instance, if Laura Valentini argues that "[a] view of human rights is political with respect to its *iudicandum*, if its principles are meant to evaluate political institutions […] rather than personal conduct"[172], then this means that Gewirth's theory qualifies as moral *and* political, and more generally that a proper distinction between "political" and "moral" approaches to human rights simply cannot be drawn on the level of the *iudicandum*.[173] *Secondly*, Gewirth's approach illustrates that arguing that a moral principle is "true" does not yet imply any particular view about how precisely it should be "applied" to concrete societal problems, for instance how its asserted truth relates to the demand of democratic legitimation (remember the contrast between "truth" and "public reason" in Tasioulas' reconstruction). These are complex questions, and the answers proposed differ from moral theory to moral theory (Griffin and Gewirth are cases in point). In

[172] Valentini 2011, 2. In the same vein Bagatur who summarizes the main difference between both conceptions by stating that under the Moral conception human rights are claims "that all individuals have against other individuals" whereas under the Political conception human rights are claims "that individuals have against certain institutional structures, in particular modern states" (Bagatur 2014, 5). I agree that this kind of opposition is maintained by some Political proponents, but for the reasons just indicated I find it plainly mistaken so I will not enquire into this line of argument further. Note also that as much as the second claim is supposed to describe human rights as political claims or legal rights as we currently encounter them in politics and law it is so plainly right that it could not possibly be a defining feature of some position (for certainly no natural rights theorist would deny this). So, once again this alleged opposition can only be maintained by either disregarding the difference between human rights as moral and as legal rights or political claims more broadly, or by defending some form of "conceptual imperialism" (Buchanan). See on the latter Valentini 2011, 3: "Whenever talk of human rights is in play, so they [i.e. the Political proponents, M.G.] argue, the relevant duty bearers are not other individuals but political institutions." (emphasis added, original emphasis deleted). For another example of how the mingling of both human rights concepts leads to misleading conclusions see the following quote: "For proponents of the natural-law view, persons have human rights solely by virtue of being human. For proponents of the political view, the existence of human rights requires the joint presence of human beings and (certain kinds of) political institutions." (Valentini 2011, 13, footnote 6)

[173] Here Gilabert is precisely right when he notes that "a humanist [i.e. "moral" or "orthodox", M.G.] perspective is crucial to recognize the significance of institutions, frame their shape and impact, and explain why their creation or transformation is needed. Political reasoning, to be normatively plausible, should itself draw on humanist considerations." Gilabert 2011, 441. Importantly, this also includes that the duties that correlate with moral (claim-) rights might relate to individuals as much as to institutions. This point – one ought to think that it does not need special emphasis – is again aptly summarized by Gilabert: "[H]umanism is not forced to reject the institutional allocation of responsibilities. […] The core idea is that individuals are the fundamental duty-bearers without necessarily being the immediate ones." (Gilabert 2011, 455)

other words, they presuppose substantive argument and do not simply follow from a theory being "moral".[174]

Here I merely want to indicate these points. I will come back to them below.

3.3 Beitz

In order to understand what is specifically "practical" or "political" about Beitz' theory we need to pay close attention to the question against what his theory is directed. As with the preceding accounts, let me begin by sketching Beitz' project in broad strokes. Beitz' book *The Idea of Human Rights* is "a contribution to the political theory of human rights"[175]. He is concerned with human rights as an *existing practice* which he understands as "international" or "global", "emergent", "normative", "political" and "discursive".[176] The declared aim of Beitz' book is to defend human rights against those skeptics who "doubt the meaningfulness of human rights talk or the practical significance or value of international human rights practice"[177]. His thesis is that this scepticism goes back, at least in part, to a (mis)conception of international human rights as universal moral rights. Accordingly, Beitz holds that the best strategy to weaken this skepticism is to propose an altogether different approach to human rights. This is Beitz' "practical" approach.

Beitz' account is "political" in the following fundamental sense: He regards the (international) human rights practice as an essentially *political practice* (as different from legal, moral, cultural etc.). Moreover, he takes human rights to be essentially

[174] A related question is how, if at all, the difference between Moral and Political conceptions of human rights can or should be framed in terms of "feasibility constraints". See on this Gilabert 2011, 458-460 and Valentini 2011, 10-12. I think that it should not be framed in these terms at all but for reasons of scope I cannot elaborate on this point here.

[175] Beitz 2009, 1.

[176] See Beitz 2009, 14-47.

[177] Beitz 2009, 6. See also Beitz 2009, 2-7 and 197-209.

political claims (again as different from legal or moral claims). There is more to it yet this presupposes to elucidate the "practical" character of his theory first.

What characterizes the kind of human rights theory that Beitz rejects, and why does he reject it? He gives an answer to the first question in the following passage:

> Some philosophers have conceived of human rights as if they had an existence in the moral order that can be grasped independently of their embodiment in international doctrine and practice […]. The usual view is that international human rights – that is, the objects referred to as "human rights" in international doctrine and practice – express and derive their authority from such deeper order of values. For those who accept some variation of this kind of view, the task of a theorist of international human rights is to discover and describe the deeper order of values and judge the extent to which international doctrine conforms to it.[178]

The passage that follows contains Beitz' answer to the second question:

> I shall argue that it is a mistake to think about international human rights in this way. These familiar conceptions are question-begging in presuming to understand and criticise an existing normative practice on the basis of one or another governing conception that does not, itself, take account of the functions that the idea of a human right is meant to play, and actually does play, in the practice.[179]

Against the background of the preceding reflections, we can reconstruct the main points of these passages as follows. According to "some philosophers", human rights are (a certain kind of) universal moral rights. As such they "can be grasped independently of their embodiment in international doctrine and practice" – for instance because they are conceived as natural rights in the natural law tradition (Griffin). Conveniently, let us again refer to human rights so understood as "human rights^{M}" ("M" for "Moral", which equals "Natural" here). There is nothing wrong with theorizing human rights^{M}, according to Beitz, nor does he regard it as problematic to call them 'human rights'.[180] What Beitz claims is that, whatever the

[178] Beitz 2009, 7.
[179] Beitz 2009, 7-8.
[180] However, he does assume a strict independency between both human rights concepts.

merits of a theory of human rights^{M} might be, it does not help us in making sense of "the human rights of international practice"[181] (call them again "human rights^{P}", this time "P" for "practice" or "Practical"). More precisely, he holds that we *should not* (rather than merely: don't need to)[182] resort to such a theory *at all* when we are concerned with human rights^{P}, and that we should neither do so when we attempt to *understand* nor when we attempt to *justify* them. These are two related yet different claims – about conceptualization and justification respectively – so they require to be treated separately.[183]

According to Beitz, conceptualizing human rights^{P} on a "model of natural rights"[184], as he puts it, "produces distortions"[185]. Why is that so? Naturalistic theories, as Beitz conceives of them, are typically committed to four features that make up "the conceptual space of natural rights"[186]. These features are: (1) that their "force does not depend on the moral conventions and positive laws of their society"; (2) that they are "preinstitutional" in that they might "exist" in a "pre-political state of nature"; (3) their time- and spacelessness; and (4) that they belong to human beings "simply in virtue of their humanity".[187] If the nature of human rights^{P} were properly understood on the basis of a natural rights idea then these conceptual features of human rights^{M} would also have to constitute (part of) the conceptual space of human rights^{P}. Beitz argues that this cannot be upheld. For instance, while human rights^{M} are universal in that they are possessed by human beings at all times and places, human rights^{P} are not (and cannot) be universal in this sense. Instead they are tied to particular conditions that are specific to modern societies: "for example, a minimum legal system […], an economy that includes some form of wage labor

[181] Beitz 2009, 45.
[182] See, however, Beitz 2009, 128.
[183] Beitz himself emphasizes the importance of keeping both levels apart: "The basic idea is to distinguish between the problem of describing human rights from the problems of determining what they may justifiably require and identifying the reasons we might have for acting on them." Beitz 2009, 11.
[184] Beitz 2009, 52.
[185] Beitz 2009, 52.
[186] Beitz 2009, 52.
[187] See Beitz 2009, 52-53. What regards the cogency of this reconstruction, it deserves emphasis that neither Gewirth nor Griffin would agree that all (moral) human rights are time- and spaceless. What regards Gewirth's view about this see Chapter 6, Section 4.3.

for at least some workers, some participation in global cultural and economic life"[188], and so on. The same argumentative move is employed with regard to the other properties as well – briefly: Human rights^{M} possess four main features at least three of which human rights^{P} lack. Therefore, by understanding human rights^{P} in terms of human rights^{M}, Naturalistic theories create a wrong or "distorted" picture of human rights^{P} because these, in contrast to natural rights, *are not* preinstitutional and universal in the two relevant senses.

Beitz' critique on the justificatory level follows directly from his critique on the conceptual level: Understanding human rights^{P} on a natural rights model neglects or contradicts some of their essential features. So the proposed concept does not fit the phenomenon thereby conceptualized. Therefore, it is not possible to reasonably criticize this phenomenon on the basis of that concept. So if, for instance, human rights^{M} are essentially "pre-institutional", whereas human rights^{P} are essentially "institutional", then one cannot criticize some human right^{P} for not being pre-institutional (or for not *being* a human right because it *is not* preinstitutional) because that feature did not apply to it in the first place. The point here is of course that the concept of human rights^{M} is inherently normative. So to say that human rights^{P} are relevantly similar to human rights^{M} is at the same time to say that this is what they should be.

Let us get clear about the proper target of Beitz' critique. Nobody to my knowledge defends the devious view that "the human rights of international practice", however understood in detail, *are* natural rights. There is some conceptual confusion in certain human rights theories in this respect but that does not mean that their authors embrace this view substantially. Rather, to understand the human rights of international practice "on a model of natural rights" as Beitz puts it means to support some version of the following assumption: Any human right proclaimed as such in the context of the (international) human rights practice should only then really count as a human right if it can be shown that there is a *corresponding* moral or natural right. So its *content* must be morally justifiable *as if* it were a moral or

[188] Beitz 2009, 57-58.

natural right. As we have seen, with regard to the human rights listed in certain core documents of international law this is for instance Griffin's view.

This specification is crucial. It shows that Beitz' emphasis of the *conceptual* differences between human rights^{P} and human rights^{M} is either misleading or beside the point. He essentially presents a debunking argument[189] in which the contingent, conditional and particular *genesis* and *factuality* of human rights^{P} is invoked against their necessary, unconditional and universal *validity* in terms of human rights^{M}. Construed like this, the argument is doomed to fail: Beitz' declared aim is to set forth what human rights are *as (part of) a contingent modern practice*. It is clear that, considered as such, human rights^{P} are a societal phenomenon that depends on numerous contingent socio-historical presuppositions. However, it is unlikely that any Moral theorist would deny this. In contrast to this, Beitz has not shown that the *normativity* inherent in human rights^{P} is not adequately captured by a moral human rights idea. He rightly maintains that this assumption requires an argument. But he has not offered a valid argument against it.

What does Beitz propose instead? We do not need to go into the details of his alternative account but only indicate its broad lines. What regards the concept or nature of human rights Beitz explains: "The approach I shall explore tries to grasp the concept of a human right by *understanding the role this concept plays within the practice*."[190] He takes human rights to be "a category of normative idea"[191] found in "a public normative practice of global scope whose central concern is to protect individuals against the consequences of certain actions and omissions of their governments."[192] So

> [t]he central idea of international human rights is that states are responsible for satisfying certain conditions in their treatment of their own people and

[189] Cf. Beitz 2009, 50-51.
[190] Beitz 2009, 8-9, emphasis added.
[191] Beitz 2009, 47.
[192] Beitz 2009, 14.

> that failures or prospective failures to do so may justify some form of remedial or preventive action by the world community […].[193]

Just as Griffin, Beitz corroborates this interpretation by relating it to a certain historical narrative. However, in contrast to Griffin, Beitz emphasizes the *discontinuous* elements in the history of human rights. In his historical narrative, human rights in their modern manifestation as a global political practice appear as radically different from rather than on a continuum with human or natural rights in the history of natural rights thought.[194]

According to Beitz, "his" concept of (international) human rights results from considering them "sui generis"[195]. In contrast to this, conceptualizing them on a naturalistic model is to regard them "as instantiations of one or another received idea"[196] – an idea, we should add, that deviates from or is even at odds with the central idea of the human rights practice just indicated, a deviance that one might easily discern if one looked at the practice itself instead of projecting some ready-made schema onto it. The last remark aims at Beitz' conceptual-methodological approach that deserves to be considered more closely.

As mentioned above, Beitz holds that the core features of the concept of human rights as it emerges within the human rights practice should be determined by analyzing the role(s) that this concept plays within that practice:

> If the focus of critical interest is the idea of human rights as it arises in public reflection and argument about global political life, then it seems self-evident that we should take instruction from the public practice in conceptualizing its central terms.[197]

So "[a] practical approach does more than notice that a practice of human rights exists; it claims for the practice a certain authority in guiding our thinking about the

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[193] Beitz 2009, 13.
[194] See Beitz 2009, 14-27.
[195] Beitz 2009, 197.
[196] Beitz 2009, 197.
[197] Beitz 2009, 11.

nature of human rights."[198] This methodological requirement of practice-dependency on the concept-level is regularly mentioned as one of *the* defining features of a "practical" approach to human rights. Against this, we should take Beitz' remark seriously: The requirement is "self-evident". It is self-evident because it is tautological – bluntly: If we want to understand what human rights are taken to be in the practice then we need to analyze what human rights are taken to be in the practice. So *in itself* this methodological point is hardly a point at all. There are two ways how to make sense of it. As a *first* option, one might argue that Beitz' Moral opponents are so fundamentally misguided that they miss or explicitly reject even this self-evident methodological demand. This seems unlikely. If we stick with Griffin and Gewirth as examples, we see that Gewirth did not attempt to conceptualize international human rights in the first place whereas Griffin would fully agree with Beitz' *methodological* demand, albeit not with his *substantive* results. In other words, he would reject the assumption that conceptualizing human rights in terms of natural rights means to merely impose a certain idea onto them but argue that this very idea *is* central to the (legal) human rights practice (it is part of what (legal) human rights *are*). Accordingly, he, too, would hold that he does give the practice "a certain authority in guiding […] [his] thinking about the nature of human rights", in line with his bottom-up approach. This suggests a *second* option, which is that conceptual practice-dependency is after all not a distinguishing feature of practical approaches. The relevant difference lies primarily in the substantive interpretation of the human rights practice and its inherent normativity (its "central idea") rather than in the methodological approach.[199]

This leads us back to the difference between "practical" and "political" that I emphasized in Section 2. The main difference between Griffin and Beitz (to stick with their examples) on the conceptual level is that they reconstruct the central normative idea of the human rights practice in moral and political terms respectively – roughly: natural rights versus legitimate limitation of sovereignty for

[198] Beitz 2009, 10.
[199] In a similar direction Gilabert 2011, 448.

the sake of individuals. There is no necessary contrast between both interpretations, neither substantively nor what regards their moral or political character. However, it is striking that in developing his own proposal, and especially in a chapter entitled "Normativity", Beitz does not only refuse to grant the idea of natural rights *any* role for understanding the human rights of international practice but also largely avoids the term 'moral'. Beitz does not make the point explicity. Yet this strongly suggests that one chief reason why he rejects the Naturalistic approach so vehemently is not that its adherents reconstruct the moral dimensions of the practice *in the wrong way* but that they focus on these (allegedly) *moral* dimensions in the first place. In other words, Beitz seems to hold that the inherent normativity of the human rights practice should be understood in political *instead of* moral terms, which does put his conception in opposition to moral conceptions from the start. Importantly, this means that if one wants to follow Beitz in regarding his theory as an *alternative* to moral approaches one also needs to endorse a specific view about the independency of "political" from "moral normativity" and "political" from "moral justification". I reject it for the reasons I explained in the last chapter.

Let me add a couple of remarks about Beitz' justificatory approach. Beitz advocates one variant of the justificatory bottom-up requirement: The "practical principles"[200] that should guide the normative assessment of the human rights practice are "principles *constructed for this arena*, taking account of an unsystematic array of ethical and practical considerations"[201]. These principles ought to be responsive to the "distinctive identity" of human rights "as normative standards"[202], an identity that lies in their function as specified above. In view of this function, arguments for the normative justifiability of some human right^{P} need to establish three claims: (1) "[t]hat the *interest* that would be protected by the right is sufficiently important" so that "it would be reasonable to consider its protection to be a *political priority*"; (2) "[t]hat it would be advantageous to protect the underlying interest by means of *legal*

[200] Beitz 2009, 7.
[201] Beitz 2009, 7, emphasis added.
[202] Beitz 2009, 128.

or policy instruments available to the state"; and (3) that a state's failure to protect this interest "would be a suitable object of *international concern*."[203] Whereas manifold normative, empirical and historical considerations might figure in the establishment of such an argument, a reference to moral (human) rights is not among them, according to Beitz.

I want to close with two remarks. *Firstly*, in parallel to Beitz' conceptual approach, note that advocating a practice-dependent approach to the justification of human rights^{P} does *in itself* not prevent one from regarding a principle of human rights^{M} as one of these justificatory standards. To be sure, Beitz firmly rejects this standard. But this, as we have seen, results from a certain interpretation of the practice, not from his methodology. However, imagine that someone who defends a moral human rights idea would agree that conceptualizing human rights^{P} does not require any reference to this idea. (In the next chapter I will argue that this is plainly wrong.) She might of course advocate some form of justificatory practice-*in*dependency and argue that the practice morally ought to conform to a principle of human rights^{M} nonetheless. This *secondly* raises the question if justificatory practice-dependency is a distinctive feature of Practical approaches. The trouble with this question is that it is merely hypothetical, for any of the Moral proponents mentioned above would claim that a moral human rights idea *is* an essential part of the practice. So the question does not arise in the first place.[204]

3.4 Raz

Raz' prominence within the Moral-Political Debate essentially traces back to two papers in which he develops his Political critique.[205] In what follows I will focus on his paper "Human Rights Without Foundations" only,[206] and I will focus on those

[203] Beitz 2009, 137, emphases added.
[204] They might come to different conclusions in what ways precisely moral human rights should function as a justificatory standard but that is a different matter.
[205] Raz 2010 and Raz 2010a.
[206] Raz 2010. The paper is not an easy read. It confronts the reader with a number of interpretative puzzles and I readily admit that I have not been able to solve all of them. Needless to say, as is

elements of his account that complement the picture of the debate as it emerged from the previous discussion of Beitz. As we shall see, Beitz' and Raz' accounts differ in several important respects, a fact that is oddly underrepresented in the literature.[207]

Raz understands a "political" conception of human rights (like his) in the following way:

> The task of a theory of human rights is (a) to establish the essential features which contemporary human rights practice attributes to the rights it acknowledges to be human rights; and (b) to identify the moral standards which qualify anything to be so acknowledged. I will say that accounts which understand their task in that way manifest a political conception of human rights.[208]

According to this definition, what primarily distinguishes Political from Moral accounts ("traditional" accounts, on Raz' terminology) is a specific understanding of the *task(s)* of a theory of human rights. If I rightly argued that any contribution to the Moral-Political Debate needs to meet the two minimal criteria suggested above then we might have some doubts about this definition from the start.

What is Raz' underlying understanding of a human right? He addresses human rights specifically as *rights*. Apart from that, there are three different concepts of human rights at work in his paper, which he does not distinguish explicitly (and to which he equally refers as "human rights", without qualification): a concept of

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common practice I reconstruct Raz' arguments as charitably as possible but in my view there remain rather large argumentative gaps and conceptual unclarities nonetheless. I should emphasize that – once again – part of this unclarity might have easily been avoided by explicitly distinguishing between the three (!) human rights concepts that Raz implicitly employs. I elaborate on this below.

[207] It is frequently pointed out that both Raz and Beitz regard the human rights practice as essentially international and political (although Raz clearly has a legal focus as well), that they attribute particular importance to the functions of (the idea of) human rights within that practice, and that they assume that their main function is (roughly) to limit the sovereignty of states for the sake of individuals or to give reasons for legitimate intervention. What regards the differences between their theories, it is typically pointed out that e.g. their views of what precisely constitutes "legitimate intervention" differ. Nothing of this is irrelevant or wrong and yet it leaves many deeper differences between their approaches untouched, differences that are crucial for understanding what is going on in the Moral-Political Debate.

[208] Raz 2010, 327.

moral, a concept of legal and a concept of morally justified legal human rights.[209] For instance, he states that human rights are "moral rights held by individuals"[210] and that "the political conception […] regards human rights as rights which are to be given institutional recognition"[211]. Human rights would then not be legal rights but a certain subset of moral rights. Allen Buchanan has suggested a plausible way how to make sense of this ambiguity in Raz' paper by attributing to him, too, the Mirroring View: "His [Raz', M.G.] view […] apparently is that being the legal embodiment of a moral human right […] is a necessary condition for being a justified international legal human right."[212] This strikes me as a perfectly convincing interpretation that is also in line with the further considerations in this section. The most important observation at this point is that other than Beitz (and much closer to Griffin) Raz endorses a concept of human rights as (a specific kind of) moral rights, and that he assumes some close relationship between a concept of moral human rights and the human rights of international practice (on his understanding), i.e. the human rights legally recognized as such in international law. Let us now return to Raz' characterization of the two tasks of a Political conception of human rights. The *first* task is interpretative or descriptive: A concept of human rights ought to be developed by analyzing how the term 'human right' is typically used by participants in the practice (level of conceptualization). The *second* task is ethical, namely "to identify the moral standards which qualify anything to be so acknowledged"[213] (level of justification). If Buchanan is right that Raz implicitly holds the Mirroring View, then these "standards" will mostly, if not only, be constituted by moral human rights. The *second* task of a political conception is then essentially this: It should justify and conceptualize moral human rights in such a way that they can serve as a moral standard for the international legal-political

[209] I should also note that throughout his paper Raz never uses the terms 'legal right(s)' or 'legal human right(s)'.
[210] Raz 2010, 335.
[211] Raz 2010, 335.
[212] Buchanan 2013, 15.
[213] Raz 2010, 327.

practice of human rights. This is a basic requirement for *their* conceptualization and justification.

As Raz develops his account explicitly as an alternative to "traditional" approaches, we now need to consider more closely against what his conception is directed. He attributes the Traditional conception in particular to Gewirth and Griffin. Raz raises three kinds of objections. The *first* objection is "internal" in that traditional conceptions are claimed to fail on their own account, i.e. provided their aim of justifying the nature and grounds *of universal moral rights* ('human rights', on these accounts). The *second*, equally internal point of critique is that traditional conceptions "overreach"[214]. They overreach in that they attempt to justify *one common ground* for universal moral rights and international human rights, yet in vain (they should have confined themselves to the former). For instance, Raz argues that international human rights aim to protect much more than mere personhood so that it cannot be maintained that personhood is *their* ground. So here as well traditional accounts are claimed to miss their own goal, namely to justify the nature and grounds *of international human rights.*

Raz' third objection is summarized in the following, frequently quoted passage:

> Theories like those of Gewirth and Griffin derive their human rights from concerns which do not relate to the practice of human rights, and they provide no argument to establish why human rights practice should be governed by them. There is nothing wrong in singling out the capacity for agency, or more broadly the capacities which constitute personhood, as of special moral significance. They are of special significance, and arguably they provide the foundation of some universal rights. […] The problem is the absence of a convincing argument as to why human rights practice should conform to their theories. There is no point in criticizing current human rights practice on the ground that it does not fit the traditional human rights ethical doctrine. Why should it?[215]

[214] Raz 2010, 323-324.

[215] Raz 2010, 327-328. This passage is referred to on a regular basis within the Moral-Political Debate but I have not come across a single attempt to interpret its meaning in any depth in the context of Raz' paper.

Raz' point seems to be this: Traditional accounts are originally concerned with the question what the nature and grounds of universal moral rights are. However, there is no obvious connection between this question and the different question what the nature and grounds of international human rights are. To hold that universal moral rights (moral human rights) and international (legal) human rights share the same ground means to mix up both questions, or to reduce the latter question to the former for no reason except a terminological contiguity. The structure of Raz' argument resembles Beitz' critique here. However, recall that Raz other than Beitz conceives of human rights as a subset of universal moral rights, namely those that ought to be given legal or other institutional recognition (as legal human rights); and that legal human rights should "mirror" them in order to be morally justified. Also note that Griffin and Gewirth doubtlessly agree that not all universal moral rights ("human rights" on their terminology) ought to be given legal recognition, let alone as legal human rights. Therefore, terminology and substantive subtleties aside, Raz basically agrees with Traditional approaches what regards the justificatory function of some universal moral rights with regard to legal human rights. So where exactly does the disagreement lie? In the above passage Raz concedes that agency or personhood "arguably […] provide[s] the *foundation of some universal rights*" (emphasis added). Yet those are precisely the moral rights that should *not* be given legal recognition as legal human rights – they are not human rights, on Raz' terminology.[216] Raz' moral human rights, in other words,

[216] The need for definitional clarity what regards the use of the term 'human right' is reflected in a recent paper by Etinson and Liao. They comment on Raz' position as follows: "[I]t is important to note that not all adherents of the Political Conception seem to agree that ordinary moral reasoning ought to be avoided when developing an account of human rights. For instance, […] Raz […] says that 'I do not deny that there may be universal human rights which people have in virtue of their humanity alone.' (Raz 2010, 334) Nor does Raz commit himself to the strictures of public reason in discussing the grounds of human rights. This suggests that Raz is not averse to using ordinary moral reasoning when developing an account of human rights even though he is an adherent of the Political Conception." (Etinson / Liao 2012, 334) I am not sure how to interpret their second point but the first clearly does not support their conclusion. For in the passage they are quoting Raz is referring to "universal human rights" on the Traditional conception (i.e. universal moral rights, without qualification), which, however, are precisely not "human rights" on his conception.

have *different foundations* than Griffin's and Gewirth's universal moral rights.[217] This seems like an odd assumption: Why should one class of moral rights be grounded in fundamentally different kinds of moral considerations than another class? There is a rather straightforward answer to this but this requires to look at Raz' allegedly alternative proposal first.

Following Rawls, Raz takes up the first of the abovementioned tasks by proposing the following concept of a human right: "[…] I will take human rights to be *rights which set limits to the sovereignty of states,* in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena"[218]. So one essential feature of human rights is that they perform a sovereignty-limiting function in that they serve as a "defeasible" reason or a "defeasibly sufficient ground"[219] for intervention – "defeasible" in moral, not in legal terms. Human rights violations are therefore rights violations which, morally speaking, give a sufficient reason for limiting sovereignty. By implication, this means that unless a right fulfills this function it is not properly called a 'human right'.

From his proposed execution of the first task Raz moves directly to his completion of the second task:

> [O]bservation of human rights practice shows that they [i.e. morally justified legal human rights, M.G.] are taken to be rights which, whatever else they are, set limits to the sovereignty of states, *and therefore* arguments which determine what they are, are ones which, among other things, establish such limits.[220]

He goes on to explain that "*[t]his being so,* we have the core answer to the second question as well: *human rights are those regarding which sovereignty-limiting*

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[217] Judged from the title of Raz' paper – "Human Rights Without Foundations" – they have no foundation at all. (Raz does not explain the title at any point in his paper.) However, his concept of a foundation clearly differs from the concept of a (normative or justificatory) foundation or ground as I introduced it. I take it that he rejects the idea of one single and "ultimate" ground but not the existence of a ground in the sense of pluralist normative considerations.

[218] Raz 2010, 328, emphasis added.

[219] Raz 2010, 328.

[220] Raz 2010, 332, emphasis added.

measures are morally justified."[221] So Raz takes the sovereignty-limiting function of human rights as a given (this is part of what human rights *are*) while treating the question under which conditions they perform this function in a morally justified way as an open one. This ought to be determined by moral theory.

What conditions have to be fulfilled in order for human rights to perform a sovereignty-limiting function in a morally justified way? In other words, what are the grounds of moral human rights and, correlatively, of morally justified legal human rights? Raz holds that human rights "derive from three layers of argument"[222]. They constitute the three "existence conditions" whose joint fulfillment is both necessary and sufficient for a right to count as a human right (this is what human rights *fully are*).[223] The *first* layer involves the establishment of an "individual moral right"[224], for instance a moral right to education. Then "the *second* layer shows that under some conditions states are to be held duty bound to respect or promote the […] rights [.] of individuals identified in the first part of the argument."[225] For instance, under some conditions a state might be under the moral duty to provide adequate means for education to the individuals under its jurisdiction. So on this second layer a political or juridical duty-bearer is identified, which is a necessary condition for the relevant moral right to be a right "which should be given legal or other institutional recognition"[226]. Finally, the *third* layer "shows that they [i.e. the states, M.G.] do not enjoy immunity from interference regarding these matters."[227] This layer thus essentially involves a refinement of what the moral duty identified on the second layer implies, namely that its violation both allows and calls for intervention by others. The decisive difference between "mere" moral rights and moral "human" rights lies between the first layer on the one hand and the second and third layer on the other hand: Even when it has been

[221] Raz 2010, 329, emphasis added.
[222] Raz 2010, 336.
[223] Cf. Raz 2010, 336: "If all parts of the argument succeed then we have established that a human right exists."
[224] Raz 2010, 336.
[225] Raz 2010, 336, emphasis added.
[226] Raz 2010, 335.
[227] Raz 2010, 336.

shown that, for instance, there is an individual moral right to education, this right will qualify as a human right only if the additional conditions are met that "the social and political organization of a country makes it appropriate to hold the state to have a duty to provide education"[228] and that states do not "enjoy immunity from external interference regarding their success or failure to respect the right to education of people within their territory"[229].

We can now specify: According to Raz, a legal right is a legal human right if it is legally recognized as such in international law (morally neutral definition of a legal human right). As such it performs a sovereignty-limiting function. A legal human right is morally justified if and only if (1) there is a corresponding moral right, which (2) correlates with a moral duty of a state to protect it, and (3) this moral duty overrides the possibly conflicting moral duty to respect the sovereignty of the state. If one of these conditions is not met, a legal human right is not morally justified. In turn, a moral right is a moral human right if and only if conditions (2) and (3) are met, in which case it will ground a legal human right. In other words, morally justified legal human rights are grounded in moral human rights, and those are by definition all and only those moral rights that ground legal human rights. The crucial point here is that moral and morally justified legal human rights are defined *reciprocally*: Raz does not only understand legal human rights on the basis of the *function* that they fulfill in international practice but he also understands moral human rights on the basis of their *grounding function* with regard to legal human rights. This specific version of practice-dependency lies at the core of Raz' political approach. What distinguishes it on the conceptual level is that the *contingent empirical features* of the field of application of a particular class of moral rights (the human rights practice) are *built into the concept* of that class of moral rights itself ('human rights'). What distinguishes it on the justificatory level is that the *contingent empirical considerations* that are required for moral human rights to be

[228] Raz 2010, 335.
[229] Raz 2010, 336.

applied to a practice (again the human rights practice) are *built into the concept* of the foundations of those rights.[230]

Is Raz' Political conception an alternative to Moral conceptions? Put differently, does this version of practice-dependency represent anything but a terminological matter, i.e. another attempt to fix *the* meaning of the term 'human rights'? Let us assume for a moment that Raz were right in claiming that universal moral rights need to be justified differently than Griffin and Gewirth suggest, for whatever reason. This would be a substantive claim about the best justification of moral rights, which is clearly disputed among defenders of the Moral approach as well. So it cannot be a distinguishing feature of Political conceptions. What regards Raz' substantive interpretation of the practice (legal human rights essentially perform a sovereignty-limiting function), a proponent of the Moral approach could in principle agree with it as well. So this claim cannot be what distinguishes Moral and Political accounts either. Let us now further assume that Griffin and Gewirth would agree to adapt their terminology: Substantively they already agree that only a subset of universal moral rights should receive legal recognition as legal human rights. Now they would further agree that only the rights included in this subset should be called 'human rights'. Moreover, they would agree that the concept of a ground or foundation insofar as it relates to legal human rights should not only include moral principles of justification but also empirical considerations of application. Because these points are terminological only, there is no reason why a proponent of the Moral approach should not in principle use the terms 'human rights' and 'ground' or 'foundation' in this way (and why a defender of the Political approach should not use different terminology). In other words, these terminological questions cannot be a distinguishing feature of Moral and Political accounts either. We have now set apart all elements from Raz' argument that concern substantive disagreement that might as well arise within the Moral or Political camp each, and mere

[230] This also explains why Raz rejects the universality of human rights: Raz affirms that there are universal moral rights and that they constitute *part* of the grounds or "existence conditions" of human rights. Yet human rights are *also* grounded in *contingent empirical facts* and therefore not universal. For a different interpretation see Schaber 2011, 62 and 65-66.

terminological matters. What would be left? I find it difficult to see that this is much more than a terminological critique.

4. A Second Look at the Debate: Reconsidering Its Central Questions

Recall that the leading question of this chapter is in what sense the Moral and the Political or Practical approach might constitute alternative approaches to human rights. With a view to this question, let me summarize the most important commonalities and differences as they emerge from the preceding reconstruction. For the reasons indicated above, I will focus on Griffin’s, Beitz’ and Raz’ accounts only.

All three accounts aim at illuminating the inherent normative dimensions of some aspect of the human rights practice. So they are “*practical*” with regard to their *object* and they are equally concerned with the “*normative aspect*” of that object. Furthermore, they share the aim of normatively justifying or criticizing the practice (as opposed to mere description). So in all three cases we encounter some kind of *normative theory*. Clearly, the accounts differ with regard to the question what elements of the practice should be regarded as open to normative critique or as fixed. However, this is a question that any political and moral theory is confronted with when it comes to the normative justification of an existing practice so there is no difference in principle here. What regards the theories being normative, we have seen that Beitz seemingly endorses the view that political justification is in some sense *fundamentally* different from or an *alternative* to moral justification. (The same arguably holds for the relationship between moral and political theory more generally.) So his theory is “*political*” (in his terms) with regard to his *justificatory approach*. Raz and Griffin by contrast declaredly engage in *moral theorizing and justification*.

All three accounts are based on a considerably broad (and arguably also vague) understanding of the human rights practice as encompassing a variety of political

and legal practic*es*. They further agree in regarding it as global or international. Only Beitz describes the *practice* as *essentially political* (rather than legal) but we should not give too much weight to this for he clearly recognizes that legal and moral aspects matter to it as well. Within that practice Beitz focuses on human rights as *political claims* whereas both Raz and Griffin focus on *legal human rights* or on human rights as part of human rights law. To this extent the objects of their theories differ. Furthermore, both Griffin and Raz assume that the inherent normativity of legal human rights is inseparably bound to an idea of moral human rights. So their focus lies at the same time on *moral human rights* (as part of the practice).

What regards "the" *concept* of human rights the three accounts share a commitment to *conceptual practice-dependency*: Whatever a human right is taken to be, this understanding should be consistent with or derived from the way human rights are commonly understood in the human rights practice. (Just as a side-note, none of them provides a methodologically sound way of reconstructing this alleged understanding.) Moreover, this commonly shared concept is supposed to capture "the" central normative idea (again singular) of the human rights practice. Raz and Beitz adopt a functional approach in reconstructing this idea: Human rights play a particular role in international politics and law. So the relevant function is the *political and legal function* that they perform *in the context of international politics and law* (i.e. limiting sovereignty for the sake of individuals). As different from this, Griffin takes what we might call an interpretative approach in reconstructing the human rights idea: The history and current constitutive documents of international human rights law show that it crucially relies on an idea of *moral human rights* (i.e. the idea that all human beings have certain moral rights in virtue of being human). Note that we might just as well say that Griffin draws on the *moral (grounding) function* that an idea of moral human rights performs *in the context of human rights law*.[231] Moreover, we have seen that Beitz and Raz emphasize the specificity of the human rights phenomenon in its modern

[231] This is an important point about which I will say more in the next chapter.

manifestation (particularly in the realm of politics and law) and the discontinuous elements of its history. Against this, Griffin assumes a large historical continuity, especially with regard to the history of natural rights thought. With strong reservations, we might frame these different perspectives on the *conceptual history* of human rights in terms of "*politico-legal practice*" versus "*moral thought*".[232]

On the *level of justification* we find again a shared commitment to *practice-dependency*, albeit to a variable degree: The practice should, at least to some extent, be judged by its own standards.[233] This is why the disparity in the substantive interpretations of the practice and its central normative idea in part explains the disparity in the proposed principles of justification. In this respect Beitz' proposal might be interpreted as turning two major premises of Griffin's account upside down: Moral human rights do not only play *no major role* in the practice but *no role at all*; consequently, they should not only not constitute the *sole moral standard* for its justification but they should *not* constitute such a standard *at all*. As different from this, both Griffin and Raz assume that legal human rights should be justifiable by reference to moral human rights and they equally embrace the Mirroring View. However, both Raz and Beitz assume that human rights can and should be justified by reference to a variety of normative or moral considerations rather than by reference to a single ground. In that sense they reject the idea of *a foundation*.

John Tasioulas has pointed out that what is commonly referred to as *the* "moral" and "political" or "practical" view resembles a family of arguments and viewpoints rather than two coherent positions.[234] This is certainly right, and it implies that the positions and arguments that were addressed in the last section cannot be regarded

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[232] This is true as a matter of focus but it is misleading if one regards the history of human rights as being characterized by elements of continuity as well as discontinuity (as I do). It is also misleading in light of the fact that human rights thought and human rights as a political and legal practice depend on one another in numerous ways, both historically and today.

[233] Note, however, that someone who claims that there are moral human rights would argue that the human rights practice also needs to conform to a moral human rights standard if that standard were not internal to the practice (to put the point broadly). In that sense strict justificatory practice-dependency is incompatible with a theory of moral human rights.

[234] See Tasioulas 2009, 938.

as fully representative of the debate as a whole. Still, all four accounts occupy a prominent place in it (deliberately or not), so they should at least give us some clear indication where the line between both views might be drawn. To cut a long story short, I have troubles with detecting that line. There are numerous differences between all four accounts, but not a single one of these differences is properly expressed in terms of "practical", "political" or "moral", let alone as an opposition between these categories.

The cogency of this result depends rather heavily on the following assumption that has guided my interpretation and reconstruction: It is pointless and unconstructive to frame questions about the nature and grounds of human rights in terms of "essence" and "either-or" as much as their moral, political and legal as well as their theoretical, practical and historical aspects are concerned.[235] For instance, one might claim (as several scholars in recent years have done) that more attention should be payed to the fact that the human rights practice is *also* a legal practice. But this is not to maintain that it is *essentially* legal (or moral or political). The same holds for arguing about *the* concept of human rights, *the* central idea of the practice, *the* moral idea that grounds it. I simply fail to see the point of such arguments and they seem patently misguided in light of the enormously complex and multifacetted history and presence of human rights. I have interpreted the above accounts charitably but presumably not faithfully in the light of this assumption. That is, I have to some extent abstracted from their "holistic" and "essentialist" aspirations by connecting particular claims to particular aspects of particular human rights phenomena. To my mind this is precisely what is required in order to clear the space for meaningful controversy and to move beyond the false dichotomy between both views.

Think of Griffin, for instance. It is one thing to say that, according to Griffin, human rights are natural rights, which is why any right that is claimed to be a human right must be conceivable and justifiable on a natural rights-model. This is how we would have to summarize Griffin's position in line with his own

[235] For one of numerous examples for framing the debate in these terms see Mayr 2011, 73.

deliberations and with Beitz’ perception of his view. It is another thing to say that Griffin focuses on a concept of human rights as moral rights and claims that as such they are natural rights; that he focuses on one aspect of the human rights practice, namely international human rights law; that he picks one aspect and one way to approach international human rights law, namely to study the text of certain treaties and declarations; that on this basis he maintains that international human rights law is committed to an idea of moral human rights; that certain elements of this modern idea are reflected in the continuous moments of the history of political and moral thought; and that therefore legal human rights need to mirror moral human rights in order to be morally legitimate. Griffin’s Political opponents should have attacked some version of *this* view.

I assume that this way of putting Griffin’s project into perspective is more modest and nuanced than Griffin himself would have it. Importantly, a parallel point could be made with regard to Beitz’ and Raz’ accounts. The main flaw of their critique and their allegedly alternative proposals is that they replace one essentialist narrative by another yet without arriving at a more nuanced view. For example, they do not pose a single one of the following critical questions that arise from the second but not from the first way of putting Griffin’s position (I would answer all of them affirmatively): Isn’t a sole focus on moral human rights all too narrow as a proper reconstruction of the moral ideas that figure centrally in the human rights practice? Do political and legal dimensions not matter all too little in Griffin’s historical and contemporary narrative, especially in the light of his bottom-up requirement? Related to this, isn’t the history of (the concept of) human rights a history of continuity as well as discontinuity? Moreover, doesn’t Griffin eventually take human rights law “out of practice” by focusing solely on certain texts, and by interpreting these texts in isolation instead of contextualizing them? Finally, what – if anything – might justify the “Mirroring View”?

This set of questions points at different ways in which Griffin’s theory might be complemented and refined in light of additional facets of the human rights practice and additional theoretical possibilities that he underestimates or patently ignores.

Yet instead of revising his theory in this sense Beitz and Raz advocate "[a] fresh start"[236]. This is why scholars have rightly pointed out that Moral and Political theorists make to some extent complementary mistakes.

Against this background, what are the constructive questions to which the debate gives rise? Generally speaking, it prompts us to think about the moral, legal and political as well as the theoretical and practical aspects of human rights much less in dichotomic terms than in their complex interplay. More specifically, from the perspective of moral theory it illustrates the need to consider more closely the dual role that the concept of a moral human right plays in relation to the human rights practice: as a moral claim or commitment that constitutes an integral part of it, and as a moral principle applied to it. A sufficiently nuanced understanding of the practice, or rather: the relevant aspect of the practice matters crucially with regard to this task. For instance, if we want to understand the relationship between a concept of moral human rights and human rights law, then we need some account of what constitutes the *practice* of human rights law, which is arguably more than a couple of declaratory texts taken out of context. Yet we equally need a clear account of what it might mean that human rights law is *committed* to an idea of moral human rights, and in what ways this commitment might affect its quality and shape (again, as a practice). Finally, in light of the interdependence between a moral theory of human rights and the human rights practice this presupposes a clear grasp both of the moral implications of human rights law, *considered from the perspective of human rights law*, and the legal implications of a moral human rights idea, *considered from the perspective of moral theory*.

This task is enormously complex and I am by no means attempting to carry it out in full here. What can be done, however, is to take some important steps in the direction of its completion. In the remainder of this study I will develop such a proposal that revolves around the function of human dignity.

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[236] This is the title of Chapter 5 of *The Idea of Human Rights*: Beitz 2009, 96.

4. A New Perspective: The Moral Self-Understanding of the Legal Human Rights Practice

1. Introduction

In my analysis of the "Moral-Political Debate" I have so far focused on two tasks: I have demonstrated how it is partly based on false or onesided presuppositions; and I have indicated briefly some important questions that arise from the debate as soon as we move beyond those. The next step is now to further specify the leading question of this study in the light of these insights. To this end we need to step back from the details of the debate and look at the broader picture instead. At the same time we need to shift the focus again: from the alleged contrast between the morality and practice of human rights to the question about the moral implications of legal human rights. The goal of this chapter is to provide the transition from the preceding critical reflections to the constructive argument to be developed in Chapters 5 to 7.

The Practical approach, at least in its Beitzian version, is based on the false contrast between a *moral idea* of human rights on the one hand and "the human rights *of international practice*"[237] on the other hand, broadly understood as (international) political and legal norms. What regards our understanding of these norms, it confronts us with an alleged alternative: Either we understand legal human rights "*on a natural rights-model*"[238], in which case they are mere "embodiments" of moral or natural rights (such as in Griffin); or in terms of their "*practical functions*", in which case their moral functions are replaced by their political functions and their moral dimension remains after all fully unclear. These oppositions are misguided. It is (or rather: should be) beyond doubt that a moral idea of human rights constitutes an integral part of the human rights practice.

[237] Beitz 2009, 45, emphasis added.
[238] Cf. Beitz 2009, 52.

Human rights fulfill a variety of functions, among them moral functions. In other words, this is one aspect of what "the human rights of international practice" *are*. The assumption that legal human rights have a moral ground does not necessarily commit one to some kind of Mirroring View. Nor does it imply that all legal human rights can or should be "deduced" or "derived" from that moral ground. It means first of all that we cannot properly understand what legal human rights are without a reference to an underlying moral dimension. Griffin's account represents only one way how to philosophically make sense of this claim, and certainly not the most plausible one.

The Practical claim that we can understand the nature of legal human rights norms independently of an underlying moral dimension is not only implausible from the perspective of philosophical theory. It is also deeply at odds with the legal human rights practice itself, i.e. with the self-understanding of this practice. In order to see this more clearly, it is important to take seriously a methodological requirement that Practical theorists emphasize: We need a clearer understanding what it means that the legal human rights practice is "committed" to a moral idea of human rights and human dignity, based on studying that practice. In other words, it is not enough to specify what this means from a philosophical perspective; to take the legal and practical character of human rights seriously also means to clarify what this means from the perspective of the legal human rights practice itself. An argument that shows that it is one of the functions of legal human rights to protect human dignity (and what this means) must therefore be developed, starting from an analysis of that practice.

In what follows I further explain this requirement and develop the necessary steps for undertaking this task. I first argue that Moral and Practical theorists eventually make a similar mistake: They do not investigate what it means, from the perspective of legal practice, that legal human rights have the function to protect human dignity. Even more fundamentally, it is unclear how it might be shown at all that the legal human rights practice is "committed" to a moral idea of human dignity in this sense *(2)*. In a second step, I reflect on the question how this might be done: To

reconstruct the meaning of this claim does not only require the study of texts of human rights declarations and conventions but it requires to engage hermeneutically with this practice itself and to become aware that law is an interpretative practice *(3)*. In Section 4 develop a preliminary understanding of what it means that law is an interpretative practice with the help of Dworkin's legal theory *(4)*.

2. From Legal Text to Legal Practice

The methodological requirement to study the functions that legal human rights fulfill in the human rights practice leads to the task to investigate what it means, from the perspective of legal practice, that one of these functions is to protect human dignity. I will explain this assumption in what follows.

Legal human rights are the constitutive norms of the legal practice or institution of human rights. By emphasizing the importance of the "functions" of legal human rights for a conception of these norms, Practical theorists first of all point out a basic implication of our general understanding of social practices or institutions: When we seek to understand the "nature" of an institution, we ask (among other things) what it is there for and (maybe) good for. So we do not only presuppose that every single legal human rights norm fulfills a certain function but also that the legal practice of human rights as a whole is supposed to provide an answer to some kind of structural or societal problem. In this fundamental sense, we understand what legal human rights "are" when we understand what functions they fulfill. Importantly, nothing of this suggests that they have only one (essential) function or that these functions can only be understood in political terms.

What regards its further systematic implications, it is important to see that this is a point about the *nature* of institutions, not about their *justification*: It is one question what the functions of legal human rights *are*; it is a different question what their function(s) *morally ought to be*. The question "What are the functions of (legal) human rights?" is ambiguous in this regard. It may *firstly* aim at a characterization

of these norms as they currently "exist": We seek an understanding of legal human rights, based on a reconstructive account of the functions that they actually fulfill. I use the term 'actual' here to underline the reconstructive character of this task. It is not meant to suggest that these functions are "given" in some empirical or metaphysical sense. This is not the case: What functions an institution fulfills is essentially a matter of interpretation, which raises the crucial question about the appropriate method of interpretation (see below). Here the more important point to be noted is that this interpretative task yet *presupposes* empirical analysis or (more broadly put) an *engagement with* the legal human rights practice: We can only understand what functions human rights (actually) fulfill when we study the practice of human rights and the way human rights are "at work" in practice.

The question "What are the functions of (legal) human rights?" may *secondly* aim at a specification of the functions that these norms morally ought to fulfill. The functions of legal human rights so understood are the moral implications of a moral idea of human rights with regard to the legal realm. Let me illustrate the difference to the former understanding of the question with an example. In his recent work Rainer Forst proposes a philosophical interpretation of the "normative substance"[239] as well as "legal function"[240] of human rights. He proceeds from the assumption that "[h]uman rights are a complex phenomenon, comprising an array of different aspects"[241]: They have a moral, a legal and a political "life"[242], a "historical existence"[243] as well as a "social aspect"[244]. This deserves emphasis because it shows that his reflections are certainly not meant to be "purely theoretical" or "practice-independent" in some sense: Roughly, his goal is to elucidate the meaning and normative consequences of human rights with the help of philosophical (Kantian constructivist) theory, starting from an analysis of the core message or

[239] Forst 2010, 718. See further on what follows Forst 2012.
[240] Forst 2010, 718.
[241] Forst 2010, 711.
[242] Forst 2010, 711.
[243] Forst 2010, 712.
[244] Forst 2010, 712, emphasis deleted.

"deeper normative grammar"[245] of human rights claims as they are raised in the context of social protests and struggles. Forst concludes that "human rights have a common ground in one basic *moral right*, the *right to justification*"[246] – this is, according to Forst, the core normative substance of human rights. Importantly, he now infers the "legal function" of human rights from these socio-historical and moral-philosophical reflections: "From this it follows that the *main function* of human rights is to guarantee, secure, and express each person's status as an equal given his or her right to justification."[247] So "the *legal and political function of human rights* is to make this right [to justification, M.G.] socially effective"[248].

Let me be clear about my point. Substantive differences aside, I do not mean to suggest that there is anything wrong with Forst's account as far as it goes: Clearly, it is an integral part of a moral theory of human rights to indicate its legal implications. However, there is something *missing* in Forst's account: He does not, at any point in his argument, engage with the actual legal practice of human rights, i.e. he does not make an attempt to understand this practice. He does not, in other words, take into account what the functions of legal human rights are, *from the perspective of that practice*. This means first of all that we lack any clear idea of what it might mean to make the moral right to justification "socially effective", or how this moral standard might be "translated" into law. More fundamentally, it remains unclear how the legal function of human rights that Forst formulates relates to the *self-understanding* of this practice. To be clear about this: Being a moral philosopher (rather than a legal scholar), of course we would not have expected Forst to carry out a detailed empirical analysis of the legal human rights practice or to specify how exactly this right might be legally implemented (that is quite simply not his job). However, provided that he formulates a moral standard of justifiability *for* this practice, one would have expected him to address the question how his philosophical argument relates to the self-understanding of this practice, i.e. to

[245] Forst 2010, 716.
[246] Forst 2010, 712, first emphasis added.
[247] Forst 2010, 719, emphasis added.
[248] Forst 2010, 712, emphasis added.

"connect" to this self-understanding in some sense. Here it is important to see that Forst's philosophical analysis arguably relies on a background assumption, namely that the actual legal practice of human rights is committed to a moral idea of human rights (and human dignity)[249] in some sense. Accordingly, by specifying what functions legal human rights morally ought to fulfill, he has provided a philosophical interpretation of this commitment. However, he has done so by analyzing the meaning of human rights in the context of social struggles. He has not, by contrast, made any attempt to clarify what this commitment means, from the perspective of legal practice.

This gap in Forst's account strikes me as typical of current moral theories of human rights more broadly. It appears that philosophical reflections about the "political and legal functions" of human rights almost always refer to their functions in the second sense just explained, i.e. as the functions that political and legal human rights norms morally ought to fulfill, from the perspective of philosophical theory. By contrast, the question what functions legal human rights norms actually fulfill is hardly ever explicitly and systematically addressed in philosophical theories. Rather, this seems to be largely presupposed: At least one of their main "actual" functions is to protect moral human rights and human dignity. Importantly, I am *not* claiming – contra Practical theorists – that this assumption is *wrong*. What is lacking is an attempt to understand what this commitment means and implies from the perspective of legal practice. This raises three problems in particular. *Firstly*, without any clearer idea how this commitment manifests itself in legal practice, this assumption remains considerably unspecific. *Secondly*, philosophical accounts should be sensitive to the self-understanding of this practice. Accordingly, it is one question what this commitment implies from a philosophical perspective; it is a different question how it is understood in legal context. *Finally*, as long as this is merely presupposed rather than based on an analysis of legal practice it invites

[249] According to Forst, the right to justification is also "the true ground for the claim of having one's dignity respected: [...] To possess human dignity means being an equal member in the realm of subjects and authorities of justification and to be respected as such." Forst 2011, 965. See further on this Chapter 7, Section 3.2.

precisely the kind of criticism that Practical proponents raise: that this is, after all, just an idea(l) that moral philosophers project onto the human rights practice.

What regards the plausibility of this critique raised by Practical theorists, it is important to keep two questions apart. A *first* question is whether philosophers, at least sometimes, mix up a philosophical interpretation of the concept of human dignity with a reconstruction of what human dignity means in legal context, i.e. how this concept is itself interpreted in legal practice – which is correct.[250] A *second* question is whether the assumption that legal human rights have the function of protecting moral human rights and human dignity is, in itself, just some philosophical projection – which it clearly is not. Rather, it seems that many moral human rights theories are characterized by a strong focus on the Universal Declaration of Human Rights (and maybe also its two partner covenants). Sometimes one even gets the impression that when philosophers refer to legal human rights norms or to the legal practice of human rights, what they actually mean is this document and the rights that it contains. Accordingly, an understanding of the nature and functions of legal human rights is derived, at least in large part, from the content of the Universal Declaration – in which case it is of course not far to seek that legal human rights have a moral ground (human dignity) and are there to protect moral human rights. So it is first of all important to see that this means to take seriously an assumption that we encounter in central documents of the legal practice of human rights itself.

And yet this excessive focus on the Universal Declaration is at the same time problematic. In particular, it seems that many moral philosophers consider the *text* of this document in isolation, i.e. by bracketing the fact that it is a political and legal document that is embedded in a practical context and practice. This leads to an unduly abridged view of what legal human rights are, namely the rights that are stated in the Universal Declaration. However, legal human rights are not fixed in legal text, let alone only in this text: They are *carried out* in legal practice. So, by

[250] This is what goes wrong, for instance, in Griffin's equation of the legal concept of human dignity with personhood. See Chapter 3, Section 3.1.

focusing on this document only, the actual legal practice of human rights hardly enters the picture – in other words, legal human rights are essentially taken "out of practice". By contrast, in order to gain an understanding of what this practice is about (and of legal human rights as practiced rights accordingly), one cannot just pick one document that occupies a prominent place in it. Instead one needs to develop a deeper and broader understanding of this practice. Finally, the moral commitments that the Universal Declaration contains are, taken in themselves, "just text". This leads to the problem already indicated above: Without considering how these commitments actually manifest themselves in legal practice, it remains not only unclear what they mean from the perspective of that practice but also whether they might just be mere rhetoric.

Ironically, proponents of the Practical approach – who declaredly take the *practice* of human rights seriously – make a similar mistake by taking the moral claims that the Universal Declaration contains in an opposite direction: While moral philosophers tend to take it as self-evident that legal human rights should protect human dignity without investigating further what this means for and within legal practice, it is a striking commonality of different Practical approaches that the assumption that human dignity is the ground of (legal) human rights is degraded to mere "justificatory rhetoric"[251] after all. It seems that this may be interesting from a philosophical perspective but is neglectable on a Practical account of (legal) human rights. This is only possible on one precondition: by neglecting the role that the concept of human dignity plays in judicial interpretations of human rights. Let me again illustrate the point with an example.

In a recent paper Beitz pursues the question whether human dignity in the theory of human rights might be anything more than merely "a phrase"[252] (thereby hinting at Macklin's famous critique).[253] He notes that, while "many friends of human rights

[251] Buchanan 2013, 98. Buchanan does not explicitly affirm this but it seems that he remains, as Beitz, hesitant what regards the significance of human dignity for understanding the (international) human rights practice. See Buchanan 2013, 98-106.
[252] Beitz 2013.
[253] See Macklin 2003.

believe that we cannot understand their special importance without a grasp of the value of human dignity"[254], it is at the same time "easy to be suspicious of the idea that human dignity can do useful work in our thinking about the nature and basis of human rights"[255], for instance because it might just be "too abstract"[256] or "only ornamental"[257]. However, because of the "inescapability"[258] of references to human dignity in the contemporary human rights discourse, "one might hope for an account that clarifies the role – if any – that an idea of human dignity plays in explaining the nature and significance of human rights"[259]: "If one accepts that human rights constitute a public, normative practice, then one might think a theory of the practice should take seriously an idea that occurs so often in its public discourse."[260]

Beitz' analysis leads him to the hesitant conclusion that his reflections "suggest" that there are "at least two constructive roles that an idea of human dignity *might* play in a theory aiming to offer […] a justification [of international human rights, M.G.]" [261] : *Firstly*, it might prove helpful in giving expression to the "empowerment" aspect of human rights;[262] and *secondly*, it might help to explain the special importance of human rights protections against particular "dignitarian harms".[263] Further details about his conclusion do not need to concern us here. It suffices to note that, according to Beitz' analysis, human dignity is peripheral for our understanding of the human rights practice and that there remains uncertainty about its relevance after all.

What *is* illuminative therefore is how he *arrives* at this conclusion. Beitz runs us through a range of options that apparently *might* reveal the "constructive roles" of human dignity. Essentially, his argument comes in two parts. He begins with a

[254] Beitz 2013, 259.
[255] Beitz 2013, 259.
[256] Beitz 2013, 260.
[257] Beitz 2013, 260.
[258] Beitz 2013, 260.
[259] Beitz 2013, 260.
[260] Beitz 2013, 260, reference deleted.
[261] Beitz 2013, 290, emphasis added.
[262] See Beitz 2013, 288-289.
[263] Beitz 2013, 289, using Rosen's phrase: see Rosen 2012.

historical survey of the "context from which the practice emerged"[264], i.e. "the framing of the international human rights regime"[265]. These historical reflections lead him to the conclusion "that [t]he effort to *give content* to the idea of human dignity *in the discourse of human rights* will have to look elsewhere for guidance"[266] – for two main reasons: *Firstly*, he notes that there is "little evidence" for "the importance of an idea of human dignity in the thinking of the framers"[267]. The *second* reason is

> that we are unlikely to discover a broader *consensus about the meaning of human dignity* either in their own thinking or in their main sources – almost certainly not one that could be formulated with sufficient precision to make it plausible *that the catalog of values presented in international human rights doctrine was or might be derived from it*.[268]

Having reached this negative result, Beitz next turns to "philosophical and legal usages"[269] of the concept. However – and this is crucial –, these "usages" are exclusively attempts to provide a coherent interpretation of human dignity in philosophical and legal theory. By contrast, there is one line of argument that Beitz does not pursue at all: He does not consider what functions human dignity fulfills *in current legal practice* and what human dignity *means*, i.e. how it is *interpreted*, in legal practice.

This is striking. On his own "practical" premises, we would have expected Beitz to give to the legal human rights practice "a certain authority in guiding our thinking"[270] about human dignity. That is to say, we would have expected him to begin with an analysis of the functions that human dignity fulfills in the legal human rights practice, in order to arrive at a clearer picture how this concept bears on our understanding of this practice. One can of course only speculate about the

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[264] Beitz 2013, 261.
[265] Beitz 2013, 261.
[266] Beitz 2013, 270, emphasis added.
[267] Beitz 2013, 269.
[268] Beitz 2013, 269, emphases added, reference deleted.
[269] Beitz 2013, 271.
[270] Beitz 2009, 10.

reasons why Beitz is not doing this. To begin with, it seems that he mixes up three questions: A *first* question is whether the concept of human dignity is important for the (legal) human rights practice in some sense; a *second* question is what human dignity means in legal context; and a *third* question is how one might coherently interpret its role from a philosophical perspective. With regard to none of these three questions it is evident why what the drafters thought about human dignity or whether or not they deemed human dignity to be important should be authoritative. Neither is it clear why a consensus about human dignity should be decisive, or why this would require that all human rights in the Universal Declaration would have to be derived from it. In other words, Beitz employs a variety of criteria the relevance of which for the question at hand is at least not obvious, while not doing what would be the obvious way to go, namely to study the role of human dignity in legal practice. Rather, this practice stays completely out of sight.

I suspect that there are at least three deeper reasons for this. A *first* reason is Beitz' assumption (shared by other Practical theorists as well) that the human rights practice is an essentially *international* practice, which implies the separateness of international "human" and domestic "constitutional" rights.[271] As McCrudden observes, this "results in the sidestepping of one of the main ways in which human rights is [sic] conceived in constitutional contexts, *as something courts interpret*."[272] Practical theorists thereby eventually commit the same mistake as Moral theorists: Legal human rights are reduced to something that is stated in international treaties and declarations, while the question how these rights are carried out in legal practice does not enter the picture. A *second* reason lies in the presupposed contrast between the (moral) *ground* of legal human rights on the one hand and their practical *functions* on the other hand – as Buchanan puts it: Human dignity "refers to the *grounding* of the system [of international human rights, M.G.] and not to what might be called its *functional features*."[273] This opposition misses the fact that,

[271] See further on this point Chapter 5, Section 2.
[272] McCrudden, *Humboldt-Paper*, 11, emphasis added.
[273] Buchanan 2013, 98, emphasis added.

in judicial interpretations of human rights norms, the assumption that human rights have a moral ground (human dignity) develops practical effects in the legal construction of the functions of these norms with the help of the legal principle of human dignity. I will take up these two points in the next chapter. *Thirdly* – and most importantly in the context of this chapter –, Beitz' argument reveals a deeper unclarity: Provided that one wanted to show, based on an analysis of legal human rights in practice, that the assumption that it is one of their central functions to protect human dignity is not just some philosophical construction but a moral commitment that "belongs" to that practice – *how would one go about*? What I am suggesting is that the minor role that the concept of human dignity plays in Practical accounts of legal human rights has something to do with the fact that Practical theorists reflect insufficiently on their own presuppositions. By contrast, as soon as we take up the question what it might mean that legal human rights fulfill a moral function in a systematic manner, it becomes evident that human dignity plays not only a peripheral but a fundamental role for our understanding of these norms. This requires first of all a clarification of the relevant concept of a function and its methodological implications.

3. What Are Functions and How Can They Be Determined?

Given the centrality of the concept of a 'function' for the Practical approach, it is striking that neither Beitz nor Raz nor anyone else who advocates this approach has to my knowledge explained in any depth what they understand by the "functions" of human rights and how they are to be determined.[274] Rather, references to the "functions" of human rights typically remain rather vague and it is difficult to track on what grounds some concrete claim about their (main or essential) function(s) has been established.[275] This would not necessarily be a problem if there existed a

[274] This also holds for all interpretations and discussions of this approach as far as I am aware of.
[275] For instance, some might find the assumption that human rights are essentially triggers for intervention entirely convincing whereas others might find it overstated, overly narrow or plainly

consensus about the functions of human rights. For instance, I assume that most people can intuitively agree that it is at least one important function of human rights to limit state sovereignty for the sake of individuals. However, many moral philosophers assume that it is one of their functions to protect human dignity. Because Practical theorists call this assumption fundamentally into doubt, the need arises to consider more closely some aspects of the concept of a 'function' in order to see what is methodologically implied in determining the functions of legal human rights.

Let us begin with a basic observation.[276] Whenever we are concerned with the functions of something, we are concerned with the *effects* that *one item* (A) has *on some other item* (B). (A) might for instance be the social institution of marriage and (B) the stability of modern societies, or the career prospects of men in the 21st century, or the social recognition of homosexual couples in Germany before and after the legalization of gay marriage. So the concept of a function is a *relational* concept and the relation is specified in terms of *effects*. Accordingly, when one asks "What are the functions of (legal) human rights?", the answer does not only depend on one's preconcept of 'human rights' but also on that *upon which* they are supposed to have an effect: For instance, one might be interested in their function(s) for world society, international relations between states, the role of the individual in modern society, the empowerment of workers in Latin America, the development of South African constitutionalism or the recognition of capitalist economy. This basic point needs to be emphasized for the following reason: The Practical claim that human rights essentially fulfill a sovereignty-limiting function in the modern states system relies on such presuppositions. That is to say, it does not only rely on a conception of human rights as (essentially) politico-legal and international norms but also on an understanding of the human rights practice as an (essentially) politico-legal, international, state-centered practice. By contrast, if one assumes (as

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mistaken, yet as long as it remains unclear how exactly Beitz, Raz and others arrived at this result the possibilities of arguing about it are limited.

[276] See on what follows Luhmann 1972 and Messelken 1989.

I will argue in the next chapter) that the legal human rights practice is international as well as domestic then a whole range of other functions of human rights enters the picture.[277] So, to begin with, there is a variety of functions that human rights may (and do) fulfill, depending on context and perspective.

Proceeding from here, when one asks "What are the functions of (legal) human rights?", one might *firstly* aim at the *objective effects* they have, or *secondly* at the effects that they are *supposed* to have, i.e. their *pursued or intended effects*. (Needless to say, one might also be interested in both.) In other words, one might employ a *non-purposive* or a *purposive* concept of a function. For instance, one might argue that human rights fulfill a "status-egalitarian function"[278], in the sense that this is what the legal practice of human rights "aims at". However, one might also argue (for instance) that their function is to contribute to a deeply unjust capitalist economic order and thus to precisely not support equality in status, in the sense that they have this objective effect, independently of whether they are supposed to function that way. In both cases, one derives an understanding of legal human rights from an understanding of their "functions". It is clear that these two ways to approach the "functions" of human rights are not completely unrelated to one another. However, it is important to see that they bear on the understanding and justification of these norms in different ways, and that – crucially – different *methods* are needed to determine their functions in a purposive and non-purposive sense respectively. If we analyze the functions of legal human rights in the sense of their objective effects, then we presuppose that these effects escape to some extent the intentions of those who engage in the practice. What regards their justification, we presuppose that a practice should not only be assessed by reference to what it is supposed to do but also what it actually does. The appropriate *method* for determining the functions of human rights in this sense is some kind of *empirical analysis*, as a tool for "measuring" these effects (as for instance in sociological

[277] For instance, the claim that human rights fulfill a "sovereignty-limiting function" is unlikely to explain their effects on the recognition of capitalist economy.
[278] See Buchanan 2013, 28-31.

theory). Moreover, we approach the practice from a third-person perspective and in a value-neutral, descriptive fashion. By contrast, if we seek an understanding of a practice on the basis of its intended or pursued effects, then we seek to reconstruct the self-understanding of the practice: We assume that it has some *purpose* that is "inscribed" in it or that it is "committed" to in some sense. So we approach the practice from a *normative* perspective. Accordingly, when one asks about the functions that human rights "are meant to play"[279] (Beitz), then one asks about the functions of human rights in the sense of their purposes. Human dignity would then be a moral purpose of legal human rights in this sense. How can we determine the purposes of legal human rights in this sense? What method does this require?

While there might certainly be other options, I will now briefly consider five possibilities: The purpose of legal human rights might be understood as (1) an *empirical feature* of the institution of human rights, or something that is directly derived from its empirical features; (2) some kind of *metaphysical entity*; (3) the subjective *intentions* of their founders; (4) a commitment in declarations or treaties, i.e. a commitment stated in legal *text*; (5) a *derivative of all subjectively assumed purposes*. I will then propose a sixth option (6): The purpose of legal human rights should be understood as a *practical construction,* i.e. as a hermeneutical concept. I shall stress in advance that the first-mentioned aspects clearly bear upon our understanding of human rights in different ways. In particular, I do not mean to suggest that an account of the functions of legal human rights does not presuppose empirical analysis. The question is how we may reconstruct the purpose(s) of these norms from a normative perspective, and I do not think that the first five options provide the answer to this question.

It is clear that (*firstly*) an analysis of the purposes of legal human rights is not equivalent to an empirical analysis of their "functional features". Nor can the

[279] Beitz 2009, 7-8: "These familiar conceptions are question-begging in presuming to understand and criticize an existing normative practice on the basis of one or another governing conception that does not, itself, take account of *the functions that the idea of a human right is meant to play, and actually does play,* in the practice." (emphasis added) Beitz speaks about "the" *idea* of human rights here but that does not affect the methodological point I wish to make.

former just be derived from the latter. Determining the purposes of human rights would then essentially be a matter of description rather than interpretation: Roughly, as soon as we have gathered sufficient empirical information about relevant actors, processes, institutional structures etc., we will also get a grasp of their purposes. This is clearly mistaken: The concept of a purpose is a normative concept. The purpose of a practice or institution can therefore not be specified by empirical means. Needless to say, it presupposes empirical knowledge about the institution. However, its purpose cannot be inductively gained from this empirical knowledge; determining it is a task of its own.[280] So a purpose is not an empirical feature, and the method in question is not empirical description.

One might *secondly* think of the purposes of the legal practice or institution of human rights as some kind of metaphysical property, i.e. as its "inherent *telos*". It is not evident to me how such a *telos* might be determined at all. Here it suffices to note that such a teleological or metaphysical concept of a purpose would be deeply at odds with the practical and contingent character of institutions (which implies among other things that they can be changed).

Thirdly, one might think of the purposes of legal human rights as that what they have been created for. Their purposes would then be traced back to the subjective intentions of their founders or creators, e.g. the intentions of the drafters of the Universal Declaration. The purposes of human rights so understood would be what they envisioned them to be there for. Methodologically, an analysis of the purposes of human rights in this sense would require some kind of historical reconstruction (e.g. of the drafting process of the Universal Declaration). While such a historical analysis may be instructive in many regards, the intentions of the founders are only of limited relevance for a *systematic* account of the nature of human rights (as distinguished from a historical reconstruction), for two main reasons. Firstly, what we are after in the present context are the purposes that the legal human rights

[280] Note also that in order to study the *constitutive* features of an institution we need to have an idea what the institution is (and hence of its purposes) to begin with. Among other things, this is evident from the fact that we might demand to change or abandon particular features of an institution in the light of its assumed purpose.

practice fulfills today, for instance because we are concerned with its justifiability and its potential improvement in the future. However, these purposes may be quite different ones than what the founders envisioned them to be. So they are irreducible to their subjective intentions. This directly relates to the second reason: When we ask about the purposes of legal human rights, we claim to say something about the institution of human rights itself rather than about the intentions of those who founded the institution. So we assume that these purposes must be "enshrined" or "inscribed" in the institution in a way that is irreducible to mere subjective intentions. We might also say that we are after the purposes of human rights in a more "objective" sense, where "objective" first of all just means: not merely subjective. We attempt to say something about the institution itself rather than about the intentions of those who created it.

The same problems apply *mutatis mutandis* to a *fourth* option that I already touched above: One might attempt to derive the purposes of legal human rights norms from what is stated in certain central legal human rights documents, e.g. from the text of the Universal Declaration. However, *firstly*, these documents have themselves arisen out of a specific political constellation and thus, taken in themselves, lead us back to the subjective intentions of their authors. *Secondly*, these purposes might after all be "just text": They might not play any significant role in the practice of human rights. So the purposes of legal human rights cannot simply be "read off" these texts.

As a *fifth* option, one might think of the purposes of the legal human rights practice as the quintessence of the subjective attitudes or beliefs of the participants in that practice. 'Objectivity' would then mean "inductive generality". Beitz e.g. suggests this when he keeps emphasizing the *discursive* character of the human rights practice and maintains that "a view of the discursive functions of human rights"[281] may be generated by considering what meaning "competent participants in the practice"[282] attach to human rights. Apart from the question who such a competent

[281] Beitz 2009, 102.
[282] Beitz 2009, 102.

participant would be, it is problematic (if not impossible) to base an understanding of human rights on their "discursive roles" only for the following reason: General references to "*the* human rights discourse" tend to blur the fact that this discourse is actually enormously broad and variegated. One might even maintain that there is no such thing as "the" human rights discourse but only a variety of local, regional, international, in short: *context-specific* discourse*s* that differ from context to context: The human rights discourse in Germany is different from that in South-Africa; the legal human rights discourse differs from the discourse in moral philosophy; the academic human rights discourse is different from that of the wider public; and so forth. Furthermore, this discursive plurality is not merely an accidental side-effect of the globality of human rights but an integral component of the institution of human rights itself: It is, at least to some extent, an *institutionalized discursive plurality* in the sense that international human rights norms do not only allow but indeed call for their context-specific (re)interpretation.[283] Accordingly, a genuine *discourse-analysis* of human rights would have to take a whole range of contextual commonalities and varieties into account; ultimately it would nearly entail a reconstruction of the most important legal and political discourses of our times. It is highly dubitable whether this would lead to one coherent understanding of what human rights are, contrary to what Beitz suggests. Therefore, proposals regarding *the* "discursive functions" of human rights either presuppose an elaborate analytical apparatus, or they remain considerably vague and intutitive, or they are implicitly based on a strongly abridged view of what constitutes the relevant discourse (which in the case of Beitz parallels his narrow understanding of the human rights practice).

So, to sum up, all five concepts and methods bear upon our understanding of (the purposes of) legal human rights in different ways but they do not provide the methodological key to the question at hand, i.e. how one might "detect" that the legal practice of human rights is committed to the moral purpose of protecting human dignity.

[283] See further on this point Chapter 5, Section 2.

I therefore want to suggest a *sixth* option, namely to approach the question about the purposes of legal human rights in a *hermeneutical* fashion. The main idea may be summarized as follows. To take the *legal* and *practical* character of legal human rights seriously means first of all to take into account that these norms, just as legal norms generally, are neither fixed in legal text nor do they "exist" in some factual or metaphysical sense. Rather, legal human rights *are* rights in (legal) practice, or *practiced* norms: They are *interpreted* norms. In other words, the legal human rights practice, just as legal practice generally, is an *interpretative* practice. The question what legal human rights *are* is therefore inseparable from the question what they *mean*, and their meaning is *constructed* in legal interpretation. As we shall see, legal interpretation aims essentially at the construction of the *purpose* of a legal text.[284] In this interpretative process, assumptions about the "objective purposes" of legal norms or the "intention of the legal system" as a whole play an important role, which again is interpreted (among other things) by reference to moral principles or "values" that underlie the legal system – like human dignity. In the present context it is first of all important to note that, from the perspective of legal practice, the meaning and purposes of legal human rights are themselves not something that is given or fixed – in history, text or subjective intentions – but constantly (re)interpreted and thus dynamic. For the question at hand this has the following crucial consequence: We need to arrive at a clearer idea how the assumption that human dignity is the ground of human rights manifests itself in the legal interpretation of these norms. It is out of this interpretative process that the moral purpose of protecting human dignity has to come to the fore. To this end we first of all need to develop an understanding what is involved in legal interpretation.

The approach is thus "hermeneutical" in a twofold sense: It takes into account that when we ask about the purposes of legal human rights, we interpret the purposes of what is itself an interpretative practice. To take seriously the fact that law is a hermeneutical context of its own thus indicates a way to move beyond the static alternative between reducing legal human rights to mere "images" of moral or

[284] See this Chapter, Section 4 and in more detail Chapter 5, Section 3.

natural rights or being completely independent from morality. The fundamental question is rather what role the moral idea of human dignity plays in legal reasoning about these norms and thus in the self-understanding of this practice.

Let me anticipate the next steps. In the following section I will develop a first, broad idea of what it means that law is an interpretative practice by drawing on Dworkin's thoughts about the matter. In Chapter 5 I will then more systematically take up the task to develop an understanding of human dignity as the moral purpose of legal human rights, from the perspective of the legal human rights practice.

4. Law as an Interpretative Practice: Dworkin

Dworkin's answer to the question "What is law?" is that law is interpretation: "I shall argue that legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally."[285] The details and deeper meaning of this claim can only be understood against the background of Dworkin's critique of the positivist legal tradition, especially H. L. A. Hart's theory of law, which would lead us too far astray here. In the present context, Dworkin's reflections are illuminative for the following reasons: They allow us to develop a general understanding of how subjective and "objective", reconstructive and evaluative elements interact in what Dworkin calls the "constructive interpretation" of social practices (like law). This yields at the same time a first idea what role substantive reflections about the underlying moral purposes of law play in legal interpretation, i.e. how moral ideas "enter" law. All of these elements will be explained in more detail with the help of Aharon Barak's legal theory in the next chapter.[286] I end with an important clarification what regards the relationship between Dworkin's "non-positivist" legal theory that I draw upon in this section

[285] Dworkin 1982, 179.
[286] See Chapter 5, Section 3.

and Raz' "positivist" concept of law that I used to introduce the preliminary concept of legal human rights in Chapter 2.[287]

Dworkin firmly rejects the view that law "exists" in the sense of a fixed collection of rules with a predetermined meaning[288] – that "when we speak of 'the law' we mean a set of timeless rules stocked in some conceptual warehouse awaiting discovery by judges"[289]. Law is not a fact: Legal norms do not have a (quasi-)factual existence of their own, independently of their legal interpretation. Rather, "determining what the law requires in a particular case necessarily involves a form of interpretative reasoning."[290] Jurisprudence is therefore not "mechanical"[291]. The judge does not *detect* the meaning of a legal norm – it cannot be *deduced* from the legal text in a mechanical fashion.[292] However, neither does he just invent it. Rather, the judge *gives* the norm a meaning by interpreting or constructing its *purpose*, i.e. by "*imposing* purpose"[293] upon the norm. Legal interpretation is therefore a "constructive" or "creative" activity, according to Dworkin. What does this mean?

Before I can address this question I need to send ahead a clarification. Dworkin explains his view of constructive interpretation by reference to social practices: When one seeks to understand the purpose of a social practice (like law) one engages in constructive interpretation, according to Dworkin. However, constructive interpretation is also what the judge engages in when he interprets a legal norm. How are these two claims connected to one another? The answer lies in Dworkin's fundamental assumption that one can only interpret the purpose of a social practice by adopting a standpoint that is *internal* to that practice, i.e. the perspective of a participant in that practice, which is here first of all the judge.[294]

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[287] See Chapter 2, Section 2.3.
[288] Bittner 1988, 18.
[289] Dworkin 2009, 15.
[290] Wacks 2014, 53.
[291] Dworkin 2009, 16.
[292] This is also evident from the *dynamic* character of law: Just as the rules of any social practice, the law changes and evolves over time through the (re)interpretation of the underlying purposes of norms. Dworkin 2009, 16.
[293] Dworkin 1986, 52, emphasis added.
[294] See Bittner 1988, 44-47. This does of course not mean that the interpreter has to accept or endorse the relevant rules or institution.

However, the judge interprets the meaning of a particular legal norm by reference to the very same question, namely what the purpose of the practice is that he is engaging in (law). This is why, according to Dworkin, there is no sharp division between the question "What is law?" (that aims at the meaning of the practice of law) and the question "What is the law?" (that aims at the meaning of a particular legal norm), for both questions eventually aim at the purpose of law. This is also the reason why, according to Dworkin, the boundaries between legal theory and legal practice are fluid – one might even speak of their "fusion"[295]: "The philosophy of law is […] itself the center of legal reasoning and part of the institution of law."[296] This may suffice to make clear that and how the following explanations about the constructive interpretation of social practices bear on the question of legal interpretation. Let us now consider more closely what characterizes "constructive" interpretation.

Dworkin distinguishes "constructive" or "creative" interpretation from "scientific" and "conversational" interpretation. "Scientific interpretation" is concerned with "events not created by people"[297]: The interpreter collects empirical data and interprets them in terms of causes and effects. According to Dworkin, this kind of interpretation is generally unsuitable for interpreting social practices: "For the interpretation of social practices […] is essentially concerned with *purposes* rather than mere causes"[298], or with assigning *meaning* to the institution (rather than merely giving some form of explanation). In "conversational interpretation", by contrast, we interpret "what people say"[299] and thus do give a kind of purposive explanation. Conversational interpretation "assigns meaning in the light of the motives and *purposes* […] *it supposes the speaker to have*, and it reports its conclusions as statements about his '*intention*' in saying what he did."[300] Conversational interpretation differs from constructive interpretation in two core

[295] Bittner 1988, 47, my translation.
[296] Bittner 1988, 47, my translation.
[297] Dworkin 1986, 50.
[298] Dworkin 1986, 51, emphasis added, original emphasis deleted.
[299] Dworkin 1986, 50.
[300] Dworkin 1986, emphases added.

respects: *Firstly*, the meaning of the statement is traced back to the intention of the speaker, i.e. the participant in the conversation and "author" of the statement. This is why, *secondly*, the main interpretative task is to reconstruct this intention as faithfully as possible. Put the other way around, the interpreter (i.e. the conversation partner or "listener" of the statement) tries to "read into" the statement his own views as little as possible. For these two reasons together, this kind of interpretation is not suitable for the interpretation of social practices either, according to Dworkin:

> [A] social practice creates and assumes a crucial distinction between interpreting the acts and thoughts of participants one by one […] and interpreting the practice itself, that is, interpreting what they do collectively. It assumes that distinction because the claims and arguments participants make, licensed and encouraged by the practice, are about what it means, not what they mean.[301]

Dworkin adds that this "distinction would be unimportant for practical purposes if the participants in a practice always agreed about the best interpretation of it"[302] – which, however, they typically do not, at least not when it comes to details. So this leads us back to the point already stressed in the last section: that the need to systematically interpret the purpose of a social practice or institution typically arises when there is disagreement about it, which makes it unlikely or even impossible that one may arrive at this purpose through some kind of enquiry among the participants in the practice.

This is why Dworkin proposes a different interpretative method: The interpretation of social practices is "not conversational but *constructive*"[303]. He also calls it "creative", which however does precisely not mean that it is simply free-floating (see below). Rather, according to Dworkin, there are significant parallels between the interpretation of social practices (and thus also legal interpretation) and the interpretation of works of art, especially literature. The comparison is useful. Because of its prominency in Dworkin's legal theory, let us take the example of a

[301] Dworkin 1986, 63.
[302] Dworkin 1986, 63.
[303] Dworkin 1986, 52.

novel. When one interprets a novel, one presupposes that its meaning or "message" is irreducible to what its author intended it to be. Rather, the novel or story is something "in its own right". However, neither does it simply *have* a particular meaning. Rather, by interpreting it, the interpreter *imposes* meaning upon the story.[304] This is why the interpretation necessarily entails a "subjective" or "creative" element, as is also visible from the fact that there is usually (or even always) more than one possible interpretation. At the same time the interpreter cannot give the story just any meaning. Rather, the interpretative possibilities are restricted by the constitutive features of the novel: the text, the characters, the plot, and so on. Finally, the interpreter will attempt to interpret the novel in the best possible way, i.e. to present it in its "best light". According to Dworkin, all of these elements that figure in the interpretation of a work of art characterize the constructive interpretation of social practices as well:

> Interpretation of works of art and social practices […] is […] essentially concerned with purpose […]. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. It does not follow […] that an interpreter can make of a practice or work of art anything he would have wanted it to be […]. For the history or shape of a practice or object constrains the available interpretations of it […]. Creative interpretation, on the constructive view, is a matter of *interaction between purpose and object.*[305]

Just as the interpretation of a work of art, the interpretation of a social practice therefore inevitably implies a combination of "subjective" and "objective", descriptive and evaluative elements, which implies that it is neither free-floating nor value-neutral. I will further explain this in what follows.

What does it involve more specifically to interpret a social practice in a "constructive" fashion? Famously, the answer that Dworkin gives to this question is

[304] As Barak puts it with regard to legal texts: "The author of the text formulated the text. The interpreter of the text formulates its purpose." Barak 2005, 89. See Chapter 5, Section 3.
[305] Dworkin 1986, 52, emphasis added, original emphasis deleted.

that this means first of all to adopt an "interpretive attitude"[306]. He explains it with the help of the imaginary example of the history of a community whose members begin to critically reflect upon their traditional practice of courtesy. The point of this example is to explain what is involved in legal interpretation by reference to a "much simpler institution"[307] – so, in short: the "practice of courtesy" stands for the legal practice; the "rules of courtesy" represent the laws or legal norms; and the community members stand for the judges.[308] I will now first stick with the example and then spell out what this means for legal practice more concretely.

The practice of courtesy of the imaginary community "[f]or a time […] has the character of taboo: the rules are just there and are neither questioned nor varied."[309] At some point in time the community members develop an "*interpretive attitude*" towards their traditional practice of courtesy. This is a "complex"[310] attitude "that has two components"[311]:

> The *first* [component of the interpretive attitude, M.G.] is the assumption that the practice of courtesy does not simply exist but has *value*, that it serves some *interest* or *purpose* or enforces some *principle* – in short, that it has some *point* – that can be stated independently of just describing the rules that make up the practice.[312]

By adopting this component the community members make sure that they have a joint understanding of their practice of courtesy: They agree that "the point of courtesy lies in the opportunity it provides *to show respect to social superiors*"[313] and that "'[c]ourtesy requires that peasants take off their hats to nobility[.]'"[314], for instance. This common concept of their practice serves as a "plateau" for its critical assessment:

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[306] See on what follows Dworkin 1986, 46-48.
[307] Dworkin 1986, 47.
[308] Cf. Guest 2012, 44-46.
[309] Dworkin 1986, 47.
[310] Dworkin 1986, 47.
[311] Dworkin 1986, 47.
[312] Dworkin 1986, 47, emphases added.
[313] Dworkin 1986, 48, emphasis added.
[314] Dworkin 1986, 47.

> The *second* [component of the interpretive attitude, M.G.] is the further assumption that the requirements of courtesy […] are not necessarily or exclusively what they have always been taken to be but are instead *sensitive to its point*, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point.[315]

When this second component is adopted, the interpretive attitude "acquires critical power"[316]. The community members agree that it is valuable to show respect through courtesy, so they do not want to abandon their practice altogether. However, they now critically reflect about what respect really is and requires – e.g. about "the proper grounds of respect", "[t]he main beneficiaries of respect" or "the nature or quality of respect".[317] By doing so, they attempt to come up with the *best justification* for their practice of courtesy, i.e. with *their own (re)interpretation* of what its purpose is and requires. "[F]or them interpretation decides not only why courtesy exists but also what, properly understood, it now requires. *Value and content have become entangled*."[318] Accordingly, Dworkin notes that

> [o]nce this interpretative attitude takes hold, the institution of courtesy *ceases to be mechanical* […]. People now try to impose *meaning* on the institution – *to see it in its best light* – and then to *restructure* it in the light of that meaning.[319]

The rules of courtesy are now adapted in the light of their reinterpreted fundamental purpose. The interpretive attitude is therefore an eminently *practical* attitude in which interpretation, evaluation and critique are inseparably intertwined:

> *Interpretation folds back into the practice*, altering its shape, and the new shape encourages further reinterpretation, so the practice changes dramatically, though each step in the progress is interpretive of what the last achieved.[320]

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[315] Dworkin 1986, 47, emphases added.
[316] Dworkin 1986, 48.
[317] Dworkin 1986, 48.
[318] Dworkin 1986, 48, emphasis added.
[319] Dworkin 1986, 47, last emphasis in the original, other emphases added.
[320] Dworkin 1986, 48, emphasis added.

The interpretative process just described involves three "stages" of interpretation that Dworkin distinguishes: a "preinterpretive" stage at which the purpose of a practice is identified; an "interpretive" stage that implies the critical reinterpretation of this purpose; and a "postinterpretive" stage at which the rules of the practice are adapted in the light of its reinterpreted purpose.[321] A core distinguishing criterion of these stages is that they involve different degrees of consensus: The concept of the practice that is identified on the preinterpretive stage must be more or less consensual, for the participants need to have some joint understanding of the practice that they are engaging in. By contrast, there will be less consensus about the "best interpretation" of the practice on the "interpretative" stage, so the partipicants will inevitably develop their own substantive views about the best conception of the practice.

According to Dworkin, when judges interpret legal norms they do essentially what the community members do: They presuppose that the practice they engage in (law) serves some purpose (preinterpretive stage); they come up with their own interpretion of what it means to show this purpose "in its best light" (interpretive stage); and they interpret legal rules (i.e. they decide what the law is or requires in a particular case) in the light of this assumption (postinterpretive stage). Let us finally see what this means for legal interpretation more concretely by returning to the example of the novel.

Dworkin argues that the role of the judge can be compared to the role of an author who participates in writing a "chain novel":

> In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be […]. […] [T]he novelists […] aim jointly to create, so far as they can, *a single unified novel that is the best it can be*.[322]

[321] See on these three stages of interpretation Dworkin 1986, 65-68.

[322] Dworkin 1986, 229, emphasis added, reference deleted. Part of the point of this comparison is also that, as in law, there is not a *single* author whose intentions could be decisive. See Dworkin 1982, 193.

The judge ought to contribute to the "chain of law"[323] in a comparable sense: He ought to continue the "story of law" that others have told before him – rather than to invent a new one[324] – and at the same time contribute to it in such a way so as to make it "the best it can be". Dworkin calls these two requirements the dimension of "fit" (or form) and the dimension of "value" (or substance).[325] They constitute the two inseparable aspects of what it means to regard law as a single unified whole or as "integrity". What does this mean more specifically?

As with any social practice, there must be some common idea of what law is (there for), i.e. a widely consensual *concept* of the purpose of legal practice that underlies all judicial activity. According to Dworkin, the fundamental purpose of law is to provide the moral justification for state coercion:

> Our discussions about law by and large assume, I suggest, that *the most abstract and fundamental point of legal practice is to guide and constrain the power of government* in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is *justified*.[326]

In other words, the concept of law, according to Dworkin, is itself not morally neutral: Understanding the nature of law is inseparably connected to the question what law should be or what makes it morally justified. He assumes that it is an integral part of the self-understanding of law that it is based on an idea of "political morality"[327] or that its purpose is to help build a morally good society. This assumption lies at the heart of his view of "law as integrity":

> [L]aw as integrity […] supposes that law's constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way, but by securing a kind of *equality* among citizens that

[323] Dworkin 1986, 228-238.
[324] Cf. Dworkin 1982, 194-195: "A judge's duty is to interpret the legal history he finds, not to invent a better history."
[325] See Dworkin 1986, 230-232. See also Bittner 1988, 37-40 and Guest 2012, 52-61.
[326] Dworkin 1986, 93, emphases added.
[327] See Dworkin 1982.

> makes their community more genuine and improves its *moral justification for exercising the political power it does*.[328]

Against this background, let us now return to the two abovementioned dimensions of legal interpretation.

Like the co-author of a chain novel, the judge ought to conceive of the law of his country as a "single unified" whole. His interpretation of a legal norm must therefore (*firstly*) "fit" the law of his country: It ought not only be consistent with the legal text but also with the settled law in his country, with its institutional and constitutional history, with the public opinion as expressed in legislative statements, and so on.[329] And yet, when reconstructing this legal history, the judge will already have to make up his own mind about the interpretation of that history: "He or she must read through what other judges in the past have written not simply to discover what these judges have *said*, or their *state of mind* when they said it, but to reach an *opinion* about what these judges have collectively *done*."[330] This coherency-requirement imposes an important constraint what regards the scope of possible judicial interpretations of a norm.

Secondly, he must develop his own substantive view about the best interpretation of that law. He ought to make the best moral sense of law. This is why legal interpretation necessarily involves a dimension of value or evaluation: His view of what the law is (in a particular case) is inseparable from the view what the law should be, which implies that the judge will bring his own substantive interpretation of the underlying moral purpose of law into the picture. He brings in his own vision of what (the) law should be.[331]

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[328] Dworkin 1998, 95-96, emphases added.
[329] See Guest 2012, 338.
[330] Dworkin 1982, 193, last emphasis in the original, other emphases added.
[331] Cf. Dworkin 1982, 196: "Judges develop a particular approach to legal interpretation by forming and refining a political theory sensitive to those issues on which interpretation in particular cases will depend; and they call this their legal philosophy. It will include both structural features, elaborating the general requirement that an interpretation must fit, doctrinal history, and substantive claims about social goals and principles of justice. Any judge's opinion about the best interpretation will therefore be the consequence of beliefs other judges need not share."

The aspired coherency of legal interpretation is therefore not "bare logical consistency"[332]. It is consistency "in principle", i.e. legal interpretation ought to "express a single and comprehensive vision of justice."[333] It is evaluative coherence. Judges "should attempt to integrate their decisions and arguments within the body of existing law but do this in the best moral way."[334] This deeper meaning is also captured in the ambiguity of Dworkin's idea of "law as integrity". It means not only that law is a unified whole but also that it is a morally qualified whole, as when we speak of the integrity of a person.[335] Briefly, judges who accept the paradigm of law as integrity make their decisions based on the assumption that they must be justifiable from a moral point of view, or that law is itself a tool for building a moral society.

The discussion of Dworkin yields the following main points. Law is neither a fact nor a collection of static rules but a dynamic process. Legal interpretation is essentially concerned with coherency and integrity, and in a twofold sense: The legal history of a country constitutes a constraint on possible interpretations; at the same legal interpretation inevitably involves an element of evaluation or "political morality". Let me close with an important clarification that will at the same time provide the transition to the considerations about human dignity in the next chapter.

In Chapter 2 I have explained my basic understanding of the difference between law and non-law with the help of Raz' "positivist" concept of law: A norm is a legal norm if it has been generated by a valid legal procedure, which is any procedure defined as such within a given legal system.[336] Accordingly, immoral law is nonetheless (valid) law if it fulfills this condition. Dworkin's theory of law, by contrast, is commonly characterized as non-positivist or anti-positivist: In brief, he is known for defending a firm place of morality in our understanding of law, and of

[332] Dworkin 1986, 185. See on what follows also Guest 2012, 50-61.
[333] Dworkin 1986, 134.
[334] Guest 2012, 52.
[335] Cf. Guest 2012, 62: "The community is to be regarded as having a personality that is subject to the same sort of moral criticism that we make of a person who has not acted with integrity."
[336] See Chapter 2, Section 2.3.

moral reasoning within legal reasoning. How does this fit together? In other words, do I not contradict myself by drawing on Raz and Dworkin at the same time?

To begin with, it is clear that I draw on both Raz and Dworkin for systematic reasons: In the context of this study I am not interested in their theories as such but only insofar as they help us to address its leading question. Any farther-reaching exegetical questions about whether and (if so) how their views might be reconcilable do therefore not need to concern us here. However, for present purposes it is important to note that there is (at least) one situation in which they *are* reconcilable, namely when a moral principle is *incorporated* into law. So a non-legal principle or norm, i.e. a principle that is external to law, is legally transformed into an *internal* principle of law, i.e. into a (moral-)*legal* principle. Whereas on Raz' view it is not *conceptually necessary* for law in order to be law that it conforms to certain moral standards, this is of course *conceptually possible*: If the legal validity of legal norms is legally bound to their conformity with certain moral principles within a given legal system, then these moral principles *have become* legal principles and (partly) define what counts as valid law in this very system. So, by elevating certain moral principles (e.g. a principle of human dignity) to *constitutional status* the legislator binds (valid) legal decision-making to these principles. As a result, *law becomes morally qualified law* in the context of the relevant legal system. The legal principle of human dignity is such a principle: It is a moral principle that has been incorporated into a variety of jurisdictions after 1945, and thus constitutes an internal principle within these legal systems.[337] We might also say that it is part of the self-understanding of these systems that they serve the moral purpose of protecting human dignity.[338] Let us now consider this claim in more detail.

[337] See Chapter 5, Section 4.

[338] The idea of human dignity plays a central role in Dworkin's later work *Justice for Hedgehogs* that I have left out of consideration here: See Dworkin 2011.

5. Human Dignity as the Moral Purpose of Legal Human Rights

1. Introduction

The assumption that legal human rights have a moral ground – human dignity – is not just a philosophical idea that moral philosophers read into the legal human rights practice. It is part of the self-understanding of this practice and has practical effects in judicial interpretations of legal human rights with the help of the legal concept of human dignity. In other words, from the perspective of legal practice, it is one of the fundamental[339] moral purposes of legal human rights to protect human dignity. Accordingly, one cannot understand what legal human rights *are* in (legal) practice without a reference to this moral idea. The main argumentative goal of this chapter is to explain these related claims, and hence to specify the "place" of a moral commitment to human dignity in the self-understanding of the legal human rights practice in a way that is sensitive to the peculiar dynamic of this practice.

The following considerations belong to a three-step argument that will be developed in this chapter and the subsequent Chapters 6 and 7. In order to clarify the scope of the considerations in this chapter, I need to briefly anticipate the line of argumentation. I proceed from the fundamental premise that moral philosophy and legal practice constitute two hermeneutical contexts of human dignity: They are not independent of one another yet neither reducible to one another. The legal concept of human dignity is a moral principle, standard or "value" that has been incorporated into law. So the legal concept of human dignity is *also* a moral concept. However, this does not mean that the legal concept of human dignity is merely an "image" of a moral concept of human dignity (just as legal human rights are not "images" of moral human rights). Put differently, it does not mean that the

[339] See Sections 3 and 4.2.

legal interpretation of the meaning of human dignity is reducible to or substitutable by a moral-philosophical interpretation of human dignity. Rather – this will be one of the main results of this chapter –, an integral part of the dynamic of the legal human rights practice is a tension between a commitment to universal principles on the hand and their context-specific (re)interpretation in the light of the particular self-understanding of legal communities on the other hand. At the same time the moral claim inscribed in the legal concept of human dignity constitutes an important link to a moral-philosophical reflection on human dignity. Accordingly, in Chapter 6 I will propose a certain moral-philsophical interpretation of the moral concept of human dignity. Against this background, in Chapter 7 I will take up the question what human dignity *means* in legal practice, i.e. how human dignity is itself interpreted. Against this background I will address the question whether and how the moral conception proposed in Chapter 6 may contribute to bringing more coherence to legal interpretations of human dignity (and human rights).

The argument in this chapter comes in three main steps. The *first* step is to develop a more articulate concept of legal human rights: We need a clearer idea what we are referring to when we speak about 'legal human rights' *(2)*. Because legal human rights are rights in legal practice, this is inseparable from the question what constitutes and characterizes the legal human rights practice, which itself depends on conceptual and systematic-normative reflections.[340] The result of these reflections will be that legal human rights comprise international 'human' rights as well as domestic 'constitutional' rights, and that both kinds of legal human rights norms are embedded in a transnational legal-practical context that is characterized by various forms of interaction between the domestic and international level. As a consequence, the question about the domestic contextualization and judicial (re)interpretation of human rights comes into focus. "Zooming in", as it were, in a *second* step I consider more closely what a judge does when he or she constructs the purpose of a legal text, and of a constitutional right (i.e. domestic legal human right) more specifically *(3)*. So in this section I continue and deepen the considerations

[340] See Chapter 2, Section 3.

about law as an interpretative practice from the preceding chapter. The goal is to develop a more thorough understanding how constitutional "values" (like human dignity) bear upon the legal construction of the "objective purpose" of a legal text. I shall stress in advance that I will further discuss the idea of human dignity as a value in the next chapter.[341] One of the main results will be that these "values" are themselves interpreted by reference to the particular self-understanding of the relevant legal community. In a *third* and final step, I consider more concretely the role of human dignity in judicial interpretations of human rights *(4)*. The result will be that the common legal recognition of human dignity as the ground of human rights manifests itself in legal practice by serving as an important interpretative guideline with regard to the content and scope of legal human rights and the creation of new rights.

The following considerations touch upon a variety of issues and debates that I will not be able to do justice here. The role of this chapter is to "locate" a moral commitment to human dignity in the self-understanding of the legal human rights practice, which allows us to leave further questions aside.

2. 'Legal Human Rights': A Further Substantiation of the Concept

In Chapter 2 I have introduced the concept of legal human rights in a preliminary fashion. For a start, legal human rights are simply human rights in a legal sense or in other words a specific kind of legal rights: They are all human rights that are recognized in law and international treaties.[342] This first conceptual approximation merely served to make clear that they are irreducible to (a concept of) moral human rights and that, as I use the term, *actual* legal recognition is a defining feature of legal human rights: They are not human rights that morally ought to be recognized by law but human rights that have a legal status. We now need to develop a more profound understanding of what legal human rights are. It is clear that this task

[341] See Chapter 6, Section 2. On the concept of a constitutional value see this chapter, Section 3.2.
[342] See Chapter 2, Section 2.4.

requires not only attention to appearances of the *term* 'human right(s)' in law. Rather, any attempt to further substantiate the concept inevitably takes the form of moving back and forth between conceptual and normative-systematic reflections on the one hand and empirical observations of legal practice on the other hand.[343] I shall stress that in what follows I do by no means aim at a comprehensive conception of these norms. The goal is to substantiate the concept so far as is needed with regard to the leading question of this chapter.

2.1 Legal Human Rights as Legally Instantiated Human Rights

Let me begin by proposing a refined definition: *Legal human rights are all human rights that are instantiated in domestic or international positive law.* I elaborate on the domestic and international character of legal human rights in the next section so here I merely want to add a clarifying note about the concept of instantiation. By substituting the term '(legal) recognition' with '(legal) instantiation' the refined definition captures rights that are explicitly recognized as human rights within some legal code as well as rights that are not recognized in this way yet otherwise delivered through legal means by governments or institutions. For instance, the International Covenant on Economic, Social and Cultural Rights acknowledges "the right of everyone to […] adequate food". So this would be one example of a legal human right. Many national constitutions also instantiate or deliver that right. However, they do not necessarily instantiate it in human rights-terms or even in rights-terms at all: It might not be listed in the constitutional text or it might not be listed there as a human right, or there might not be a written constitution in the first place. Nevertheless a specific legal order might have an institutional framework through which adequate food is provided (e.g. via social security or health services) and that makes it possible to effectively complain against shortcomings in this regard. The institutional setting of a society then reflects the normative conviction that all members of this society are entitled to access to adequate food. In such

[343] See Chapter 2, Section 3.

cases we would as well say that there is a legal human right to "adequate food" even if it is not expressly recognized.[344]

To understand legal human rights as being instantiated in law thus means to significantly broaden the scope of the definition. This has two core merits. *Firstly*, it disentangles the *concept* of legal human rights from appearances of the *term* 'human rights' in law (i.e. in legal texts). So it takes account of the asymmetric relationship between concepts and terms as explained in Chapter 2.[345] *Secondly* and relatedly, it does justice to the fact that juridification can and does take many and very different forms. Therefore, to "locate" a legal human right – i.e. to answer the question whether there is this or that legal human right in some legal system – is a complex task that requires to not only study legal texts but also how legal norms are executed in practice. So the proposed definition takes the *practical* character of legal (human) rights into account.

2.2 Legal Human Rights as International and Domestic Legal Norms

Let me next turn to the second feature of the proposed definition that requires further explaining. This is the assumption that legal human rights may be instantiated in international or domestic law. It implies that legal human rights are not confined to the realm of international (human rights) law but equally belong to the realm of domestic (constitutional) law. Importantly, this entails more than that legal human rights, understood as a specific kind of *international* legal norms, *influence* or *depend upon* domestic law in certain ways, for instance what regards their enforcement. This is undisputed. I rather claim that the legal human rights practice comprises domestic and international law, or that domestic constitutional

[344] It is common practice to point to such implicit commitments when e.g. some domestic law-maker or government has to show that its laws are in line with higher-level laws, e.g. with the European Convention on Human Rights. It is then sufficient that the government shows that it delivers the right; it must not be named or listed as such. As already indicated, this is especially apparent in cases where countries lack written constitutions.

[345] See Chapter 2, Section 3.

rights *also are* human rights.[346] So this is a substantive claim about the "nature" of legal human rights that implies that it is a mistake to regard them as "essentially international". It is at odds with an influential – maybe even the dominant – strand in the current philosophy of human rights, so it requires a justification. I will now first briefly point out what I regard as the main problems with the alternative view and then present more specific reasons for my own view.

Most philosophical publications of the last years focus on the international dimension of human rights, which frequently goes along with the assumption that they are (essentially) international. This holds for instance for the Practical conceptions addressed in Chapter 3. The view is also embraced with regard to legal human rights more specifically. Allen Buchanan, who explicitly distinguishes between a concept of moral and of legal human rights, contrasts "moral human rights" with "*international legal* human rights".[347] Why would one think that legal human rights are essentially international legal norms and that the legal human rights practice is an essentially international practice? I suppose that this assumption is grounded in some version of the following view. It is a distinctive feature of human rights in their modern manifestation (i.e. roughly from 1948 onwards) that they (are meant to) "transcend" the nation state. This regards first of all the modern *idea* of human rights, as compared to the historically earlier idea of civil rights. On the one hand, states or national governments remain the main addressees of the demand to respect or protect human rights (e.g. via domestic legislation and law enforcement). On the other hand, the notion of "human" – as distinguished from "civil" or "citizen" – implies that protecting human rights is not merely a national but rather a "common concern"[348], and that all national legal systems should respect the human rights provisions. It involves an international dimension in the sense that, ideally, the international or "global community" watches over the conformity of domestic governance with human rights standards and takes appropriate measures

[346] It is a different question whether international human rights should be regarded as international *constitutional* rights. See on this question Gardbaum 2008.
[347] Buchanan 2013.
[348] Beitz 2001.

in the case of (severe) non-conformity, i.e. human rights violations. Therefore, rather than "ending at the borders of the nation state" as it is often put, the *normative claim* inscribed in the concept of a *human* right precisely aims at transcending these borders. In brief, human rights are normatively prior to (external) state sovereignty and at the same time normative standards for legitimate (internal) state sovereignty.

So one reason why human rights are regarded as essentially international are the international implications of the modern human rights idea, where "international" means "global" or "cosmopolitan". This idea – so this line of thought continues – also lies at the heart of the *international* legal human rights system as it was gradually established from 1948 onwards, and of *international* human rights law. From these (correct) assumptions about the cosmopolitan character of the modern idea of human rights and its entanglement with the establishment of an international legal system of human rights it is only a small step to the (false) conclusion that legal human rights are essentially or only *international* legal norms that affect, but do not comprise, domestic legal norms. To study legal human rights in practice or context then means to study them in *international* practice or context. The Practical claim that human rights essentially fulfill a "sovereignty-limiting function" in the modern states system relies on this understanding: They are international political and legal norms that *restrict* and compensate the deficiencies of domestic governance and jurisdiction (vertically or "top-down", and one-way). "International" then signifies a certain *sphere* of politics and law, i.e. the sphere of international politics and law, as distinguished from politics and law on the regional, domestic or local level.

Let me briefly indicate what goes wrong in inferences to the international character of legal human rights of this (or a similar) kind. It is clear that the establishment of an international system of human rights law was a major legal innovation after (roughly) 1948 and that the legal human rights practice has an important international dimension. However, this does not mean that one can gain an accurate understanding of the nature of legal human rights by focusing on this dimension

only, or by reducing them to this dimension. This is so for two reasons: *Firstly*, it presupposes a *substantive* distinction between (domestic) constitutional and (international) human rights that cannot be maintained. *Secondly* and relatedly, it falls short of the way international legal human rights are "at work" in practice, namely *in conjunction with* domestic law. In other words, it means not only to dismiss one dimension of the human rights practice (the domestic dimension) but also misunderstands the specific dynamic of this practice, which is more adequately characterized as transnational. I will explain these assumptions in what follows.

Let us begin with Gerald L. Neuman's observation that

> [t]wo leading systems exist today for protecting the fundamental rights of individuals: constitutional law and human rights law. Both systems assert an ultimate authority to evaluate whether governmental practices comply with fundamental rights, and each system sits potentially in judgment over the other.[349]

As Neuman understands it, the term 'fundamental rights' is "an umbrella term including both the constitutional rights and human rights."[350] So 'fundamental rights' are legal rights, on his understanding:[351] They are the entirety of "suprapositive"[352] individual rights that are positivized in constitutional and human rights law. Accordingly, 'constitutional rights' are those fundamental rights that are positivized in domestic constitutional law, while 'human rights' are those fundamental rights that are positivized in international human rights law.[353] This has two important implications. *Firstly*, the distinction between constitutional and human rights is first of all a *systemic* one: It is based on the distinction between two kinds of legal systems or contexts of positivization of one and the same set of "suprapositive" norms. Famously, Neuman has therefore coined the phrase of the

[349] Neuman 2003, 1863.
[350] Neuman 2003, 1865.
[351] I emphasize this only because the term may also be understood in a non-positive sense.
[352] A "suprapositive" right is a "right, abstractly conceived", according to Neuman, rather than the non-positivized foundation of law. On an understanding of the concept in the latter sense see for instance Böckenförde 2003.
[353] Cf. Neuman 2003, 1865.

"dual positivization"[354] of (suprapositive) individual rights in our legal world as it is currently structured. *Secondly* (and by implication), constitutional and (international) human rights are *indistinguishable contentwise*. Instead "[t]he same right, abstractly conceived, e.g., freedom of expression, may be both a human right and a constitutional right"[355]. Needless to say, this does not mean that every single international human right is also a constitutional (basic) right and vice versa (not to mention the differences between constitutions).[356] The point is rather that one cannot infer from the content of a right whether it is an (international) "human" or a (domestic) "constitutional" right. What regards the *concepts* of these rights, it is therefore equally plausible to refer to them as two "types of legal *human rights* norms"[357], and to constitutional and (international) human rights law as a "dual *human rights* regime"[358]. In other words, legal human rights *are* international as well as domestic.

In line with this, there is in fact a large substantial conformity between the rights contained in both systems. As Stephen Gardbaum notes:

> Taken as a whole, […] the rights contained in the three general international human rights instruments [i.e. the UDHR, ICCPR and ICESCR, M.G.] are broadly similar in substance to the rights contained in most modern constitutions. Both typically include such civil and political rights as the right to the liberty and security of the person; rights against torture, cruel and inhumane punishment, and slavery; the right to vote; rights to freedom of expression and religious practice; and rights to be free from state discrimination on the basis of race, ethnicity, national origin, and gender.[359]

[354] Neuman 2003, 1864.
[355] Neuman 2003, 1865.
[356] Nor does it mean, of course, that these rights may not be interpreted differently in different legal contexts – see below.
[357] Besson 2015, 279, emphasis added. The same point is emphasized by Gardbaum in Gardbaum 2008, 750.
[358] Besson 2015, 279, emphasis added.
[359] Gardbaum 2008, 750-751. According to Gardbaum, the most notable exception to this are certain parts of the ICESCR (Gardbaum 2008, 750), while at the same time "[m]any domestic bills of rights also include some or most of the core social and economic rights contained in the ICESCR, such as the rights to education, healthcare, choice of work, and basic standard of living." Gardbaum 2008, 751.

In addition to this, there are significant parallels between constitutional and (international) human rights with regard to their *history* or *genealogy*, their *structure* as well as their *functions*. Regarding their history Samantha Besson notes:

> [B]oth types of legal human rights norms [i.e. constitutional rights and human rights in Neuman's terminology, M.G.] as we know them today date back roughly to the same post-1945 era, a time at which or after which the international bill of rights was drafted on the basis of existing domestic bills of rights and at the time at which or after which most existing domestic constitutions were either completely revised or drafted anew on the basis of the international bill of rights.[360]

In a similar vein Stephen Gardbaum states that

> both [systems, M.G.] were essentially created after 1945 as responses to the massive violations of fundamental rights immediately before and during World War II. This filled what were major gaps in the coverage of *both* domestic and international law.[361]

This is of course not to say that there were no bills of rights long before this or that the idea of civil rights is not much older than this; nor is it to disregard the fact that there are modern constitutions that have a much longer history (the Dutch constitution, for instance). However, it is important to see that most jurisdictions did enact their constitutional bills of rights after 1945 – which is reflected, among other things, in the fact that the concept of human dignity was not only incorporated in international human rights documents but likewise in many national constitutions after 1945.[362] It is therefore mistaken to think of international human rights law as a new kind of legal system that was mainly *added* to domestic constitutional law after 1945 – as if the innovation would have been essentially one-way and independent of profound changes within domestic legal orders themselves. Rather, what we find when looking at legal history is that the emergence, development, formulation and revision of domestic bills of rights and international human rights treaties after 1945

[360] Besson 2015, 279.
[361] Gardbaum 2008, 750.
[362] See McCrudden 2008, 673 and Barak 2015, 34-36. I come back to this point in Section 4.2 below.

are intimately intertwined in that they continually influenced one another. Accordingly, at least after 1945 "[t]he distinction between constitutional and human rights has become increasingly fuzzy and indistinct"[363]. From a genealogical perspective their relationship is therefore more accurately described as one of interpenetration and mutual influence rather than of separateness and unilateral impact.

Importantly, once we turn away from history towards the presence of legal practice we find that the same holds for the relationship between both systems today:

> Nowadays […] constitutional rights either pre-exist the adoption of international human rights law or ought to be adopted on the ground of the latter – either in preparation for ratification or as a normative consequence thereof –, thus confirming the synchronic nature of their functions and their co-existence requirement.[364]

That the two systems "co-exist" does therefore precisely not mean that they stand side by side in an unrelated fashion – I return to this important point below.

Moreover, the two systems resemble one another what regards their *structure* of rights:

> [A] few rights in each system are treated as categorical or peremptory norms, permitting no limitations or derogations. Apart from these, the primary conception of rights is as presumptive shields rather than absolute trumps, permitting them in principle to be justifiably limited or overridden […]. […] Most of the rights in each system apply directly only against governments and not private actors, although in various ways […] many of the rights indirectly regulate private relations.[365]

Finally, as already indicated above, there is at least one crucial functional commonality between constitutional and (international) human rights: "[D]omestic bills of rights and international human rights law perform the same basic function of

[363] McCrudden, *Humboldt-Paper*, 12.
[364] Besson 2015, 279. The same point is emphasized by Gardbaum in Gardbaum 2008, 750.
[365] Gardbaum 2008, 751, emphasis deleted.

stating limits on what governments may do to people within their jurisdictions."[366] One could also say that they limit governmental power or sovereignty in two complementary ways, namely by imposing (state-)external and (state-)internal limits upon sovereignty. This "make[s] it possible to talk about domestic bills of rights and international human rights law as two systems for protecting the same thing: 'the fundamental rights of individuals'."[367]

The considerations so far illustrate two points. *Firstly*, the concepts of (domestic) constitutional and (international) human rights overlap in important ways, most notably what regards the content of these rights and at least one of their basic functions (protecting fundamental rights). The main reason why we distinguish them are their different contexts of positivization. However, *secondly*, a brief look at legal practice in the past and present shows that these contexts – domestic constitutional law on the one hand, international human rights law on the other hand – are themselves deeply entangled with one another. In a final step, we need to consider the *relationship* between international and domestic human rights guarantees more closely.

Needless to say, the two legal systems also differ in various ways, most notably what regards their respective enforcement mechanisms. Whereas at the domestic level "constitutional and other courts exercis[e] various powers of judicial review and compulsory jurisdiction over their governments […] international human rights courts with similar powers remain the exception rather than the rule, especially at the global level."[368] However, this just reaffirms that the two systems fulfill "distinct albeit *complementary* functions"[369], as Besson points out:

> [H]uman rights guarantees in international law are usually *minimal*. They *rely on national guarantees* […] to formulate a minimal threshold that they reflect and entrench internationally […]. More importantly, they are usually *abstract* and *meant to be fleshed out* at domestic level, not only in terms of

[366] Gardbaum 2008, 750. I should stress with Gardbaum that he does not claim that this is their only or only basic function. See Gardbaum 2008, 750, footnote 2.
[367] Gardbaum 2008, 751.
[368] Gardbaum 2008, 751.
[369] Besson 2015, 280, emphasis added, original emphasis deleted.

> the specific duties attached to a given right but *also in terms of the right itself*. […] [B]oth levels of protection are usually regarded as complementary and as serving different functions, therefore, rather than as providing competing guarantees.[370]

International human rights guarantees are formulated *with an eye to* their domestic implementation. As Besson makes clear, this has two important implications. *Firstly*, international human rights imply the duty to be implemented at the domestic level. So "respect for *both* human rights regimes are owed by domestic institutions, implemented by domestic institutions and monitored in roughly the same way."[371] Accordingly, to assume that international human rights are mainly there to correct the deficiencies of domestic legal orders is shortsighted. Instead the two systems work together to protect the fundamental rights of individuals. *Secondly*, we must not think of this process of implementation as a mere transferral of one and the same legal norm from one legal system to another, or as its "duplication". Rather, "[d]omestic human rights law does more than merely *implement* international human rights […]: *it contextualises and specifies them*."[372] We might also say that this is what "implementation" means in this case. Crucially, the implementation of international human rights guarantees in domestic law does therefore not only allow but *call for* their context-specific (re)interpretation: Their substantive meaning and concrete normative consequences are specified under local conditions, so that they comply with national democratic decisionmaking. So considered, to formulate international human rights guarantees in rather minimal and "abstract", i.e. *interpretatively open* terms is not necessarily a deficiency. It is first of all a way of bringing universal normative standards and the need for democratic self-determination of particular legal communities together.[373] It is important to keep this in mind also when it comes to the much-criticized "vagueness" of human dignity – I will say more about this below.

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[370] Besson 2013, 54, emphases added, reference deleted.
[371] Besson 2015, 280, emphasis added, reference deleted.
[372] Besson 2011, 28, emphases added.
[373] Cf. Benhabib's concept of "democratic iterations": Benhabib 2006 and 2008.

International and domestic human rights law do therefore not merely "co-exist". Their relationship is more accurately described as a "process of *dynamic and 'mutual'* – as opposed to merely 'dual' – positivization and legitimation"[374]. So, while the legal human rights practice *comprises* international and domestic law, the specific *dynamic* of this practice is better captured by the term '*transnational*', which stresses the *interconnections* between these fields.[375] More specifically, it is

> a dynamic in which the idealism of *universal principles* both *limits the range of local variation* and is simultaneously enhanced by incorporating the specific attributes that emerge from *viewing the universal through the prism of local conditions*.[376]

Let me sum up: The dominant focus on the international dimension of legal human rights, whether it is grounded in a substantive view about their nature or not, means to bracket an entire legal-practical context of these norms which is domestic constitutional law. Moreover, one misses a central features of legal human rights that can only be understood out of the relationship between both spheres: the tension between the universality of human rights and their particular, context-specific interpretation; relatedly, the "vagueness" of these norms as they are stated in international documents and treaties, and their substantive concretization and interpretation in concrete legal context. As I will further explain below, the same points hold *mutatis mutandis* for the legal concept of human dignity. I will say more about their implications for the question at hand in the next section.

2.3 Legal Human Rights in Practice: Plural Contexts, Dynamic Meaning

The goal of this chapter, to repeat, is to develop a clearer understanding of what it means, from the perspective of legal practice, that human dignity is the ground of

[374] Besson 2015, 280, emphasis added.
[375] See Klug 2005, 86-87.
[376] Klug 2005, 96, emphases added.

human rights, and how this assumption manifests itself in the legal human rights practice. In what follows I will briefly summarize the most important implications of the reflections in the preceding section with regard to the further pursuance of this goal.

In his critique of "practical" or "political" human rights conceptions Christopher McCrudden observes:

> [...] Rawls' distinction between 'constitutional' rights and 'human' rights is no longer sustainable, if it ever was. The fact that constitutional rights and human rights are not separate, contributes to two problems. The *first* is that *it is wrong to view the function of human rights primarily as a tool for limiting state power operating at the international level.* The *second* problem that arises is that it results in the sidestepping of *one of the main ways in which human rights is [sic] conceived in constitutional contexts, as something courts interpret.*[377]

I will take my cue from these critical remarks.

A first and rather obvious consequence of the preceding reflections is that it seems devious from the outset to restrict an account of the (main) function(s) of legal human rights to the "international arena"[378], and even more specifically to their role(s) with regard to the international relations between states.[379] For as already pointed out it ignores not only the other levels of the human rights practice (domestic, regional etc.) but also the interdependency between these levels, and it conceptualizes the function(s) of human rights exclusively on a top-down model. The resulting view is that (international) human rights are mainly there to correct the deficiencies of domestic legal orders (one-way) whereas on a broader picture it is clear that these functions are much more manifold. In other words, it "underestimates the variety of different roles that human rights play, internationally, transnationally, and domestically."[380]

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[377] McCrudden, *Humboldt-Paper*, emphases added.
[378] Raz 2010, 328.
[379] Cf. Nickel 2006.
[380] McCrudden, *Humboldt-Paper*, 11.

So we should first of all note that legal human rights fulfill a variety of functions, and that these functions can only be properly understood by taking their different contexts and specific dynamic into account. Even though I am here concerned with the function of human dignity more specifically, I will presuppose this in what follows.

The second point that McCrudden stresses bears more directly on the present task. The international, domestic and transnational character of legal human rights has the important consequence that the question how these norms are carried out in legal practice comes into focus. In other words, it shifts the focus from a static understanding of legal human rights as norms that are mainly stated in the text of international treaties and declarations to the question how these norms are concretized and (re)interpreted within particular jurisdictions and what regards the relationship between these jurisdictions. Starting from here, three implications are particularly important.

To study legal human rights in legal practice means to study them in legal context. A *first* immediate consequence of the preceding considerations is that these contexts are *plural*: Legal human rights are not only instantiated in international law but likewise in domestic constitutional law, and that means: a large plurality of legal systems. As a consequence, the question whether it is a purpose of legal human rights to protect human dignity – and what this means – is replaced by the different question whether this is a purpose of legal human rights in legal context A, B or C (for instance in the constitutional context of Spain, France or Germany). In other words, the purposes of legal human rights are *context-bound*: Human rights are, at least potentially, interpreted in diverging ways in different legal contexts. This requires two qualifications. *Firstly*, this does not yet tell us anything about the degree of divergence. For instance, one might find that human dignity serves as an interpretative guideline for the purposes of legal human rights in a variety of legal systems, and that human dignity is interpreted in relevantly similar ways (and

human rights accordingly).[381] However, one must first of all be aware that it is likely that there is divergence, because context-specific (re)interpretation is part of the very "logic" of transnational human rights. In any event, this would nonetheless presuppose to carry out a contextual analysis and it would lead to the result of a context-transcending function, not of a context-independent function. *Secondly*, although these contexts are plural, they are not independent from one another – as is evident, for instance, from the transnational legal dialogue about human dignity.[382]

Secondly, the meaning of legal human rights is not fixed but essentially dynamic. Note that one of the points that I stressed above, namely that international human and domestic constitutional rights are indistinguishable what regards their content, does not speak against this assumption. What we are concerned with now is the question how this *content* is *interpreted*, or what legal human rights *mean*, and this interpretation and meaning differs potentially from legal context to legal context. To give just one well-known example: In the German jurisdiction the right to freedom of expression does not include the right to exhibit Nazi-symbols or to deny the Holocaust whereas in the U.S.-American jurisdiction it does. Whether the deeper reasons for this lie in diverging views about the concrete implications and effects of these rights or, more fundamentally, about its core meaning is of course a question of its own. The point here is simply that apart from apparently similar *wordings* of the norm its more determinate *meaning* depends on how it is *interpreted locally*, and that this interpretation determines its *practical impact* (e.g. who will be punished for what actions).

Finally, human rights guarantees are not only reinterpreted according to local conditions when they are implemented into domestic law. They are also *constantly interpreted and reinterpreted* once they have become constitutional guarantees. This is in large part what the legal human rights *practice* on the domestic level consists of: legal interpretation. Among other things, this is evident from the plain

[381] Only the first is the case. See this chapter, Section 4 and Chapter 7, Section 2.
[382] See below, Section 4.

fact that the abstract formulation of human rights guarantees in international law is mirrored in the usual (and intended) interpretative openness of constitutional norms. Let us next consider more closely how the purposes of domestic legal human rights are interpreted in legal practice.

3. Legal Interpretation as Purposive Interpretation: Barak's Account

Drawing on Dworkin's legal theory, in the last chapter I have developed a first, broad idea how presumptions about the underlying moral purpose of law as well as its substantive interpretation by judges figure in the legal construction of the purpose of a legal norm.[383] I have restricted the relevance of Dworkin's reflections in the present context to the case that a moral principle is incorporated into law, in which case judicial decisionmaking is bound to that principle. Let us next consider more closely what this means for domestic legal human rights with the help of Barak's theory of legal interpretation.

In his book *Purposive Interpretation in Law*[384] Aharon Barak, former President of the Supreme Court of Israel, develops a theory of legal interpretation that he elsewhere also uses to analyze the roles of human dignity in different constitutional contexts.[385] Barak shares with Dworkin the fundamental assumption that morality and the integrity of the constitution ought to play a central role in judicial reasoning.[386] The role of the judge, according to Barak, is "to help bridge the gap between law and society's changing needs"[387] by safeguarding constitutional values and interpreting them in the light of the goals and values of society at the time of interpretation.

[383] See Chapter 4, Section 4.
[384] Barak 2005.
[385] See Barak 2015. I draw on this analysis in Section 4.2 below.
[386] Cf. Balmer 2006, 145.
[387] Barak 2005, 236.

Barak has "fervent admirers as well as harsh critics"[388]. Among other things, he has been criticized extensively for "politicizing" courts and for construing judicial discretion in a way that gives judges the power to act more like legislators than interpreters of legal texts.[389] This critique also relates to Barak's understanding of the "objective purpose" of a legal text, which is in the focus of this section (and which, so a common critique, is strongly subjective rather than objective after all). Against this background I shall send ahead a clarification. The primary reason why I draw on Barak's theory in the context of this chapter is systematical: Not least due to his detailed explanations, it gives us a clear idea how the purposes of legal texts are constructed in legal interpretation and (more specifically) what role constitutional principles or "values" (like human dignity) play in the interpretation of the purposes of a constitutional text, and thus also domestic legal human rights. At the same time it is striking where Barak's explanations get considerably less specific: namely when it comes to the question how the judge ought to exercise his or her judicial discretion when interpreting the meaning of constitutional values or principles themselves. At the very least, the tendency in Barak's theory to confer to judges an almost legislative power is normatively problematic, and I should stress that I certainly do not share his position on these matters. I will briefly comment on this problem in the end of Section 3.2.

3.1 Constructing the Purpose of a Legal Text

Like Dworkin, Barak proceeds from the fundamental premise that "every legal text requires interpretation"[390]. This is why his methodological reflections bear on the legal interpretation of any legal text, though as we shall see there are also important

[388] Bendor / Segal 2013, 465.
[389] Balmer 2006, 150, echoing Richard Posner. For an overview of common criticisms of Barak's theory of purposive interpretation see Balmer 2006, 149-153.
[390] Barak 2005, 4. He makes it clear that "[t]he plainness of a text does not obviate the need for interpretation, because such plainness is itself a result of interpretation." Barak 2005, 4.

differences what regards the interpretation of different types of legal texts. The question that underlies the interpretative activity is "what meaning to attach to the text"[391], and the interpreter generates the answer by "determining the normative message that arises from the text"[392]. So legal interpretation is "a rational activity that *gives meaning* to a legal text"[393], which implies that the text does not *have* meaning *independently* of its interpretation. The difference between "legal meaning" and "semantic meaning" is crucial here:

> Interpretation in law […] is a process that 'extracts' the legal meaning of the text from its semantic meaning. Interpreters translate the 'human' language into 'legal' language. They turn 'static law' into 'dynamic law.' They carry out the legal norm in practice. Legal interpretation turns a semantic 'text' into a legal norm – hence the distinction between the semantic meaning of a text and its legal (or normative) meaning.[394]

So the legal meaning of a legal text is equivalent to its normative meaning or "message", which relies upon yet exceeds its semantic meaning. Let us now look at the task of interpretation more closely.

Barak advocates a particular interpretative technique that he calls "*purposive interpretation*". It is based on the fundamental assumption that "[i]n the field of law […] the goal of interpretation is to realize the goal that the legal text is designed to realize."[395] So "[t]he interpretation is purposive because its goal is to achieve the purpose that the legal text is designed to achieve."[396] The aim of legal interpretation, in other words, is to "turn" the legal text into a legal norm by *constructing the purpose* of the text.

Barak argues that "[p]urposive interpretation is based on three components: *language, purpose, and discretion*"[397]. The *first*, semantic component "*sets the limits of interpretation* by restricting the interpreter to a legal meaning that the text

[391] Barak 2005, 3.
[392] Barak 2005, 3.
[393] Barak 2005, 3, emphasis added.
[394] Barak 2005, 6-7, all references deleted.
[395] Barak 2005, 88.
[396] Barak 2005, 88.
[397] Barak 2005, 89, emphasis added.

can bear in its […] language"[398]. So the interpreter must not lend a meaning to a text that is not "permitted" by its language. The *third*, discretionary component "is the choice that purposive interpretation gives the judge from among a few interpretive possibilities"[399]. I will say more about this component below. The *second*, purposive and core component consists of "the values, goals, interests, policies, and aims that the text is designed to actualize. It is the function that the text is designed to fulfill."[400] What is the nature of this purpose, and how should the interpreter proceed in constructing it?

According to Barak, the legal concept of a purpose is a "legal construction, like concepts of ownership, right, and duty"[401]: "It is not a psychological or metaphysical concept, and it is not a fact."[402] So the purpose of a legal text is neither given in the sense of some mind-independent fact or metaphysical property nor is it a mental state. Rather, according to Barak, "[i]t combines subjective elements […] with objective elements […] so that they work simultaneously."[403] I will explain this in what follows.

Barak distinguishes three kinds of purposes of a legal text: its "*subjective purpose*", its "*objective purpose*" and its "*ultimate purpose*" or simply "purpose". The final goal of the interpretative process is to formulate the "ultimate purpose" of the text, which comprises its "subjective" and "objective" purpose – they constitute the "two foundations"[404] of its "ultimate" purpose. Before explaining this in more detail I shall add a clarificatory remark. The concept of an "ultimate" purpose might be misunderstood so as to have strong metaphysical implications – which, as we have just seen, is something that Barak explicitly rejects. The "ultimate" purpose of a legal text is precisely not the purpose that a legal norm has once and for all. Rather, it is "ultimate" in the sense that it constitutes the final step in the interpretative

[398] Barak 2005, 89, emphasis added.
[399] Barak 2005, 91.
[400] Barak 2005, 89.
[401] Barak 2005, 88.
[402] Barak 2005, 89.
[403] Barak 2005, 88.
[404] Barak 2005, 89.

process. The ultimate purpose of a legal text may thus always be reinterpreted in the future (under the relevant coherency constraints). What *is* problematic, by contrast, is Barak's idea of the "objectivity" of purpose, on which I shall comment below. Let us now first consider the concepts of a subjective and objective purpose of a legal norm as Barak conceives of them. What are they and how ought the interpreter go about in formulating them?

The "*subjective purpose*" of a legal text is the *subjective intention of its author*, as (re)constructed by the interpreter: "The subjective purpose constitutes the values, goals, interests, policies, aims, and function *that the text's author sought to actualize*."[405] This author might for instance be the founders (in the case of constitutional interpretation) or a testator (in the case of the interpretation of a will).[406] The authorial intent is the author's *actual* intent (Barak also calls it "psycho-biological intent"[407]) rather than the intent of a reasonable or ideal author. So the interpreter ought to (re)construct the subjective purpose of the legal text as realistically as possible rather than as reasonably as possible. She seeks this purpose by consulting two main sources: "the language of the text as a whole and the circumstances external to it, like the history of its creation"[408] – in brief, text and historical context.

By contrast, the "*objective purpose*" of a legal text is "*the intent of the reasonable author*"[409], i.e. a "'hypothetical' intent"[410]. Barak also calls it "*the 'intention' or will of the system*"[411], as it manifests itself in "the fundamental values of the system"[412]. What does this mean? To begin with, the notion of "objectivity" implies that the objective purpose of a legal text is neither equivalent to the subjective intent of its

[405] Barak 2005, 89, emphasis added.
[406] Barak 2005, 89.
[407] Barak 2005, 89.
[408] Barak 2005, 89.
[409] Barak 2005, 148, emphasis added.
[410] Barak 2005, 148. The following remarks are mainly based on Chapter 7 of Barak's book: Barak 2005, 148-181.
[411] Barak 2005, 90, emphasis added.
[412] Barak 2005, 154.

author *nor of its interpreter*. Instead it is "a social-objective intention"[413]: It "reflects, at various levels of abstraction, the purpose that the norm is supposed to achieve *within the bounds of a given democracy, at a given time*."[414] It is constituted by "the values, objectives, interests, policy, and function that the text is designed to actualize in a democracy"[415]. Leaving further details (as well as critical questions) aside for the moment, the central idea is that the objective purpose of a legal text is constituted by the *fundamental and commonly shared* societal values, objectives etc. *at the time of interpretation* rather than the subjective values, objectives etc. of the particular author at a moment in the past. The interpreter ought to act as a kind of medium between law and society in this regard: The objective purpose of the legal text that she formulates should not reflect her personal or subjective intention but "the values common to members of society, distinct from the judge's [i.e. the interpreter's, M.G.] personal values."[416] She ought to construct the objective purpose of the text based on her (re)construction of these "social-objective" values. Let us next consider in more detail how the objective purpose of a legal text ought to be determined.

When he interprets the objective purpose of the legal text, the interpreter distinguishes between its "*individual objective purpose*" and its "*general objective purpose*".[417] The *individual objective purpose* of a legal text is the purpose that is unique to it as *this specific* text or type of text. For instance, "[e]ach contract has its own individual purpose, depending on the parties to it and its type"[418]. Also, more generally, the individual purposes of contracts differ from those of wills and of statutory or constitutional norms.[419] So "[e]very legal text has *its own* [individual objective, M.G.] purpose"[420] that reflects its specificity.

At the same time – and crucially – "every legal text contains *general objective*

[413] Barak 2005, 90.
[414] Barak 2005, 148, emphasis added.
[415] Barak 2005, 148.
[416] Barak 2005, 148.
[417] See on this Barak 2005, 149-153.
[418] Barak 2005, 149.
[419] On the interpretation of different kinds of legal norms see more specifically Barak 2005, 305-393.
[420] Barak 2005, 149, emphasis added.

purposes"[421] (note the plural) that reflect *the intention of the legal system as a whole*. The central assumption is that the fundamental "values" that underlie a legal system also manifest themselves in the purpose of every particular legal norm. Barak gives the example of the normative principles of "equality, fairness and just results", which do not only reflect the general intention of a legal system but also constitute the general objective purposes of any legal norm contained in that system.[422] Consequently, *all* legal texts have *the same* general objective purposes: "These are the purposes that every legal text in the system must achieve, the fundamental values – or the proper balance between them when they clash – that every text must express."[423] They constitute "a kind of 'normative umbrella' spread over every legal text in the legal system"[424], the shared "environment"[425] of all legal norms within a given legal system.

How should the interpreter proceed when he determines the objective (individual and general) purpose of a legal norm? The details of this complex procedure do not need to concern us here, all that is important in the present context is the basic idea. The objective purpose of the legal text is constructed on four levels of abstraction. On the *first* and lowest level, the interpreter tries to imagine how the real author would have interpreted the purpose of the text at the time of its creation. On the *second*, intermediate level of abstraction the interpreter asks how the author of the text would have interpreted its purpose had he or she been a (maximally) reasonable person.[426] On the *third* and yet higher level of abstraction the interpreter considers "the type and nature of the text", asking what purpose typically characterizes this kind of text (e.g. a sales contract or a statute concerned with land taxation).[427] Finally, on the *fourth* and supreme level of abstraction "a judge asks *what purpose derives from the fundamental values of the system*. The judge consults the legal

[421] Barak 2005, 149, emphasis added.
[422] See Barak 2005, 149.
[423] Barak 2005, 149.
[424] Barak 2005, 149.
[425] Barak 2005, 149.
[426] Barak 2005, 151.
[427] Barak 2005, 152.

system's general values, from which he or she tries to derive the legal text's objective purpose"[428]. These values and principles are, for instance, "society's basic positions about human rights, separation of powers, and democracy."[429]

When the interpreter has formulated the subjective and objective purpose of the legal text, she reaches the final stage of the interpretative process, which is to determine its "ultimate" purpose:

> What is this purpose? What kind of relationship do we create between the intention of the text's author and the "intention" of the legal system? *The answer lies in constitutional principles.* Constitutional considerations of the autonomy of the private will and its relationship to the social fabric are the primary determinants of the purpose of a private legal text. Constitutional considerations of democracy, separation of powers, rule of law, and the role of a judge in a democracy are the primary determinants of the purpose of a public legal text. Purposive interpretation uses this set of considerations – which shapes a legal text's purpose – to solve the fundamental problems of legal interpretation.[430]

The interpreter constructs the (ultimate) purpose of the text by "synthesizing" and "integrating" its subjective and objective purpose:[431] She takes both of them into account and "assign[s] each a status according to its significance or weight."[432] What weight it has depends on the concrete text at hand (i.e. the text of this specific legal norm) and on the *type* of text that it is (a will, a contract, a constitution etc.). For instance, Barak notes that "in a will, subjective intent is weighted so heavily as to be the determining factor, *whereas in a constitution, the intent of the legal system*

[428] Barak 2005, 152, emphasis added.
[429] Barak 2005, 153.
[430] Barak 2005, 88, emphasis added.
[431] See Barak 2005, 183. As Barak notes, "[t]his stage is unique to purposive interpretation." (Barak 2005, 182) It rests on the assumption that legal interpretation is complex rather than one-dimensional in that both the intent of the author (subjective purpose) and the intent of the system (objective purpose) need to be taken into account when constructing the (ultimate) purpose of a legal norm. According to Barak, this task is usually simple for typically the subjective and objective purposes of a norm point into the same direction. The task gets more difficult when conflicts arise, either between subjective and objective purpose or between different objective purposes. In this case the conflicting purposes need to be weighed. The general criterion for weighing is what type of legal text the interpreter is dealing with, which is determined with the help of a whole range of sub-criteria, e.g. the age of the text and the content and scope of the issues it regulates. Barak elobarates on the matter of weighing in much detail. See Barak 2005, 183-206.
[432] Barak 2005, 91.

carries the day"[433] (see below). So, not only are the objective purposes of legal texts constructed by reference to constitutional principles; constitutional principles also determine how the objective and subjective purpose of the text ought to be weighed. For instance, if the subjective purpose is primary (like in a will), then this primacy relies itself on constitutional principles.

The central aspects that emerged in this section so far are summarized in the following passage:

> The [ultimate, M.G.] purpose of a norm is an abstract concept, composed of both its subjective and objective purpose. The first reflects the intention of the text's author; the second, *the intention of a reasonable author and the fundamental values of the legal system*. The first reflects, at varying levels of abstraction, an actual intention; the second reflects, at varying levels of abstraction, a *hypothetical intention*. The first reflects a historical-subjective intention; the second reflects a *social-objective intention*. The first is a fact established in the past; the second constitutes a legal norm that *reflects the present*.[434]

Let us next consider more closely how the purpose of a constitutional text is itself constructed and what role constitutional principles or "values" play in this task.

3.2 Purposive Constitutional Interpretation

According to Barak, "the ultimate purpose of the constitution is its objective purpose."[435] He justifies this assumption with the peculiar function and character of constitutional provisions:

> A constitution is at the top of a normative pyramid. It is designed to guide human behavior for a long period of time. It is not easily amendable. It uses many open-ended expressions. It is designed to shape the character of the

[433] Barak 2005, 91, emphasis added.
[434] Barak 2005, 90.
[435] Barak 2005, 190.

> state for the long term. It lays the foundation for the state's social values and aspirations.[436]

Let us consider the single aspects in some more detail. A constitution sits at the top of the "normative pyramid" made up of all legal norms within a legal system. Constitutional norms are normatively prior to all other legal norms: The latter (legally) ought not conflict with a constitutional norm and they (legally) ought to be interpreted "in the spirit" of the constitution. In this sense a constitution contains the normative guidelines (substantive and procedural) for all legislation and judicature within a given legal context.[437]

An important feature of constitutions is their *future-oriented* character: "A constitution […] is drafted with an eye to the future. Its function is to provide a *continuing framework* for the legitimate exercise of governmental power"[438]. On the one hand, a constitution "seeks to establish the nation's fundamental values, covenants, and social viewpoints"[439]. Its function is to express certain "deep" societal values and principles (as distinguished from mere "trends") and to commit law, politics and society to them over a long period of time (e.g. the principles of democracy or human dignity). This is why constitutions typically entail "*value-laden*" *language*. The intended continuity of constitutional provisions is also reflected in their high legal protection: They can usually only be changed, amended or abandoned through special procedures, usually by a qualified majority. On the other hand, a constitutional text needs to be formulated in a way so as not to "freeze"[440] the particular value commitments of its drafters and tie future generations to them. Rather, it ought to allow for different interpretations over time. This is why it is a common linguistic feature of constitutions that they contain "'majestic generalizations'", that they are "'open-textured'" and "contain more

[436] Barak 2005, 190, references deleted.
[437] Cf. Frankenberg 2008, 1411-1415.
[438] Barak 2005, 370, emphasis added.
[439] Barak 2005, 372.
[440] Barak 2005, 191.

'opaque' expressions than other legal texts"[441] (think again of 'human dignity').[442] They express a commitment to certain principles and values while expressing that commitment in *interpretatively open* terms:

> The language of a constitutional text must be both rigid and flexible. "Air valves" or open-ended terms that can be interpreted in a number of ways serve this purpose. *Constitutions define human rights in open-textured terms* […].[443]

In this sense a constitution "reflects the events of the past, lays a foundation for the present, and shapes the future. *It is at once philosophy, politics, society, and law.*"[444] According to Barak, "[t]he unique characteristics of a constitution warrant a special interpretive approach to its interpretation"[445], i.e. *purposive constitutional interpretation*.[446]

Barak argues that "[i]n giving expression to this constitutional uniqueness, a judge interpreting a constitution must accord significant weight to its objective purpose"[447]. Just as any legal text, the constitutional text has a subjective and an objective purpose. "The subjective purpose of a constitution is the goals, interests, values, aims, policies, and function that the founders of the constitution sought to actualize."[448] However, according to Barak, the intentions of the founders are only of very limited relevance for interpreting the (ultimate) purpose of the constitutional text. Other than for instance in the case of a will, the leading interpretative question is not what the author of the text took its purpose to be but how one should interpret this purpose in light of our *current* normative commitments: "*Constitutional*

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[441] Barak 2005, 372.
[442] There are two further reasons (see Barak 2005, 372-373): *Firstly*, a constitution is supposed to express national consensus. The open or opaque language of the constitution mirrors the fact that such a consensus only exists at a high level of abstraction. A *second* reason lies in the aforementioned value-laden language of constitutions, which tends to be "rarely clear or unequivocal" (Barak 2005, 373).
[443] Barak 2005, 373, emphasis added.
[444] Barak 2005, 370, emphasis added, references deleted.
[445] Barak 2005, 370, references deleted.
[446] This approach is to be distinguished from intentionalism and originalism: See Barak 2015, 69-70.
[447] Barak 2005, 374.
[448] Barak 2005, 375.

provisions should be interpreted according to society's basic normative positions at the time of interpretation"[449], i.e. by reference to commonly shared fundamental principles and values at the time of interpretation. Importantly, this holds for those values that are *expressly* mentioned in the constitution as well as for those values that *guide* its interpretation:

> [W]hether or not they receive explicit mention in the constitution, fundamental values should be interpreted according to their meaning at the time of interpretation. They reflect contemporary needs. The question is not how the founders of the constitution understood liberty, but rather what it means in our modern understanding.[450]

The objective purpose of a constitution is constituted by "the interests, goals, values, aims, policies, and function that the constitutional text is designed to actualize in a democracy. A democratic legal system's values and principles shape the objective purpose of its constitution."[451] As with any other legal text, the objective purpose of a constitution is interpreted on different levels of abstraction.[452] At the highest level, the objective purpose of the constitution are "the fundamental values of the system that form the normative umbrella spread over all legal texts in the system, including the constitutional text"[453]:

> A constitution draws life from fundamental values that in turn are an important tool for determining its objective purpose. *Fundamental values reflect a society's deeply held viewpoints.* They express a society's national ethos, its cultural legacy, its social tradition, and the entirety of its historical experience. Fundamental values like freedom, human dignity, privacy, and equality saturate constitutional texts. *These fundamental values are embodied in the words of the constitution that require interpretation as well as the objective purpose guiding the interpretation.*[454]

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[449] Barak 2005, 190, emphasis added, references deleted.
[450] Barak 2005, 381, reference deleted.
[451] Barak 2005, 377.
[452] Sources that the interpreter ought to take into account are the structure of the constitution and the relationship between its different parts ("internal sources"), which he ought to interpret as consistently as possible. Beyond this, he ought to include "external sources" like the "post-enactment history".
[453] Barak 2005, 377.
[454] Barak 2005, 381, emphases added, references deleted.

Let me briefly summarize the most important aspects that have emerged up to here. Every legal text has a subjective and an objective purpose. All legal texts have the same general objective purposes: Every legal norm within a given legal system ought to reflect the "fundamental values" or "intention" of the legal system, like liberty, human rights or human dignity. So constitutional principles or values constitute the major guideline for constructing the general objective purposes of all legal norms. These principles or values can either be "embodied in the *words* of the constitution that require interpretation" or they can be "embodied in […] the *objective purpose* guiding the interpretation."[455] (Needless to say, they can also be embodied in both.) At the same time – and crucially –, these principles or values are themselves in need of interpretation: The judge needs to decide, *firstly*, what these values *are* to begin with; and *secondly*, what they *mean and imply*. What regards this task, we have seen that according to Barak the judge ought to interpret constitutional principles according to their meaning at the time of interpretation, i.e. in the light of "current normative commitments" and "contemporary needs". We might also say that she ought to interpret them in the light of the concrete self-understanding of society at a concrete point in time.

This finally raises the question: How ought the judge go about in interpreting these values themselves? Before considering Barak's view about this, I first need to address a question that I have bracketed up to here, namely: What does Barak understand by a (constitutional) "value"? As he explicitly notes, he does not distinguish between 'values' and 'principles'.[456] So he uses the term '(basic) values' interchangeably with '(general) principles', and he speaks of both as "standards" and "objectives". He elucidates his understanding of the concept of a constitutional value (principle) in the following way: While any list of general principles (basic values) "varies […] from legal system to legal system and from era to era"[457],

[455] Barak 2005, 381, emphases added, references deleted.
[456] See Barak 2005, 164, footnote 56.
[457] Barak 2005, 165.

> [a]t its core are *three kinds of basic principles: ethical principles* (like justice, morality, fairness, good faith, human rights); *societal objectives* (like the preservation of the state and its democratic character, public peace and security, separation of powers, rule of law, judicial independence, consistency and harmony in law, certainty and security in interpersonal arrangements, realization of reasonable expectations, human rights); and *patterns of behavior* (like reasonableness, fairness, good faith).[458]

As the examples show, Barak conceives of these categories as "fluid"[459]: "[H]uman rights, for example, can be seen as both an ethical value and a societal goal."[460] So, to cut the matter short, Barak's value-concept seems to be a generic one: In the context of his legal theory, the term 'value' serves as an umbrella term for various standards that cannot be expressed in purely juridical terms but constitute standards *for* law. A 'constitutional value' (this is what I understand Barak to be saying) is then basically any standard that a legal system ought to be accountable to in some sense, a standard that, from the perspective of law, is fundamental for its justifiability or legitimacy. Two implications of this understanding deserve emphasis: *Firstly*, a constitutional "value" is not necessarily a moral standard – however, this is this secondary in the present context because the legal concept of human dignity is clearly at least also an "ethical principle". *Secondly*, while in moral philosophy it is of course common to distinguish between values and principles, Barak does not do this. Accordingly, I shall stress that in what follows when I stick with the value-terminology in the context of a discussion of Barak I presuppose these clarifications. I will discuss the idea of human dignity as a value in the next chapter.

How are the underlying "values" of a legal system to be determined?[461] Barak does not address this question in a very systematic or detailed fashion, but to begin with his remarks yield a number of (considerably broad) criteria: He notes that "[j]udges may certainly not impose on society *their own subjective perspectives* about the

[458] Barak 2005, 165, emphases added.
[459] Barak 2005, 165.
[460] Barak 2005, 165.
[461] See on this question Barak 2005, 165-168.

basic values"[462]. Rather,

> [j]udges should recognize values that society views as basic. *Social consensus* around fundamental and basic viewpoints should guide judges in their judicial work, both in infusing new basic values into the system, and in removing basic values that have become obsolete.[463]

So, "[i]n declaring a given basic value, judges express the *social consensus* that has *crystallized* in their systems."[464] However, Barak further notes that judges "need not give expression to the *passing trends* of a society that is *not being true to itself*."[465] Rather, they "should [...] give expression to the social consensus that reflects the *basic principles, 'deep' values, and national credo* of their society"[466], and to "the basic principles of a *mature democratic society*."[467] In particular, this means that "[t]he fact that the modern majority *thinks* that a certain kind of behavior is not worthy of protection does not affect the *basic perspective* of that same modern society on the behavior in question."[468] So "the basic values of the present are not necessarily the values that today's majority accepts"[469]. Neither are they "just the results of public opinion surveys"[470]. Rather, "[t]hey are the deep values of society as it moves through history".[471] Finally, Barak notes that "[i]t is the judge […] who is capable of expressing society's basic values."[472]

How ought the judge do this? What kind of method should he or she employ when determining the "deep values" of society? It is striking (and has been pointed out extensively by his critics[473]) that about this Barak remains considerably vague – as Thomas A. Balmer notes:

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[462] Barak 2005, 167, emphasis added.
[463] Barak 2005, 167, emphasis added.
[464] Barak 2005, 166, emphasis added.
[465] Barak 2005, 167, emphasis added.
[466] Barak 2005, 167, emphasis added.
[467] Barak 2005, 167, emphasis added.
[468] Barak 2005, 168, emphasis added.
[469] Barak 2005, 168.
[470] Barak 2005, 168.
[471] Barak 2005, 168.
[472] Barak 2005, 168.
[473] Cf. Balmer 2006, 149-153.

> [O]ne is left with the question of how judges are to perform that task. Presumably, they are not to rely upon public opinion polls, which generally measure the "passing trends" that Barak wants to avoid. Similarly, legislation cannot be the source of these fundamental values, since much of Barak's purpose is to explain when judges are permitted to reject statutes in favor of inconsistent, but more fundamental constitutional values. Barak writes that judges are to "derive" the legal system's fundamental values from "the core documents of the legal system, the democratic nature of the regime, the status of the individual as a free person, the social consensus, and the case law of the courts." […] But exactly (or even generally) how that "derivation" should take place is mysterious.[474]

Accordingly, Balmer calls Barak's view on judicial discretion "breathtaking"[475].

I cannot do justice here to this aspect of Barak's theory nor to its critique(s), which would require among other things to consider more closely Barak's view about judicial discretion as well as alternatives to his account. Whether judges are in the position to determine the "deep values" of society in the way Barak suggests is at least dubitable, but I will not consider this question further here for it is not immediately relevant for present purposes. I merely want to stress the following point: The reference to "values" and a criterion of reasonableness that figures in their determination necessarily implies to transcend the level of a mere reconstruction of the values that the society-members happen to embrace (as Barak clearly notes himself). So a "deep value" is neither reducible to what people (contingently) think nor to an (alleged) consensus nor to a majority opinion. Rather, the (re)construction of these values presupposes moral reasoning: They are, at least also, the values that the community members morally ought to embrace, on a "reasonable interpretation" of the self-understanding of this community. I will return to this point in Chapter 7.[476]

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[474] Balmer 2006, 151. The quote refers to Barak 2005, 356. Balmer further notes that "Barak's theory also falters because it assumes that there is social consensus on certain fundamental values, including democracy and human rights. Yet, once one moves beyond the most abstract level – a level rarely useful to a judge deciding a particular case – it seems that the social consensus he wants judges to rely upon often is absent." Balmer 2006, 150-151.

[475] Balmer 2006, 148.

[476] See Chapter 7, Section 3.2.

4. A Ground "At Work": Human Dignity in Legal Interpretations of Human Rights

In Section 2 I have argued that domestic and international human rights guarantees are embedded in a transnational legal context that is characterized by various forms of dynamic interaction both between domestic and international law and between different domestic jurisdictions. Focusing on the domestic level, in Section 3 I have explained how constitutional principles figure in the legal interpretation of the purposes of legal texts, and how the purposes of constitutional principles are themselves interpreted by reference to "values", whether explicitly mentioned in the constitution or not. It is clear that these considerations may yet be refined in numerous ways but they suffice to put us in a position to address the central question of this chapter, i.e. how the idea that human dignity is the ground of human rights manifests itself in legal practice: It is not just stated in legal text(s) but plays a central role in legal interpretations of human rights, i.e. in the concrete substantive specification of the meaning, purposes and normative consequences of human rights guarantees. I will now first add several important clarifications about the status of the following considerations.

To begin with, there is a "transnational consensus on the importance of dignity"[477] in the legal human rights practice, as Henk Botha notes – a consensus that apparently exists *within* legal practice yet is overlooked in prominent philosophical accounts *of* this practice. However, he also observes that "sometimes" this consensus just "appears to be a function of the high level of generality at which it is formulated."[478] In order to arrive at a more nuanced view of what makes (or might make) human dignity "important", it is crucial to keep several questions apart in the present context.

A *first* question is whether the concept of human dignity is important in the sense that it is *widely and extensively used* in judicial interpretations of human rights. The question is situated on the descriptive level and the answer is clearly "yes". Any

[477] Botha 2009, 171.
[478] Botha 2009, 171.

normative account of the *utility* of the concept of human dignity for legal practice and the *justifiability* of its legal usage(s) first of all needs to take this basic fact into account. Accordingly, any claim that it is *mere* rhetoric disregards the fact that "dignity arguments" have normative significance when it comes to specifying the content and scope of legal human rights guarantees. In the remainder of this chapter I will mainly explain this descriptive claim.

A *second* question is what human dignity *means* in legal practice. Here we must distinguish between a *concept* of human dignity – to which I turn in Section 4.1 – and the question how this concept is interpreted in legal context, or more accurately in different legal contexts: Is human dignity a value, a principle or a right, is it absolute or relative, what is its scope, what normative consequences are drawn from it, and so on. These questions are not only disputed among philosophers; they are also answered in (strongly) diverging ways in legal contexts. I will turn to this aspect in Chapter 7.

Finally, as already indicated above, a *third, normative* question is how one should assess the uses and interpretations of human dignity in legal context, for instance what regards "its capacity to guide the interpretation of human rights and to constrain judicial decision-making"[479] or what regards the moral implications of this concept. This question also will be addressed in Chapter 7.

Let me send ahead another clarification. As should be clear by now, there is only one way to gain an understanding of the meaning(s) and role(s) of human dignity in legal practice: One needs to study legal practice, which implies the analysis of legal arguments and cases, both within particular jurisdictions and from a comparative perspective. This is why in this section I will rely heavily on considerations by legal scholars who have the expertise to carry out such analyses.[480] Moreover, there is an enormous body of specialized literature that bears on these topics. In what follows I will mainly draw on analyses by Christopher McCrudden and Aharon Barak. They are pertinent in the field but they are, of course, not the only ones. Finally, the most

[479] Botha 2009, 171.
[480] The same holds for the reconstructive part of Chapter 7: See Chapter 7, Section 2.

direct way to illustrate how human dignity is used and understood in legal argument(s) is to draw the attention to such arguments ("The court argued that…"). However, it is also clear that, for a picture to emerge, one cannot only look at this or that argument but must take a large variety of arguments into account. The analyses just mentioned rely on such evidence (among other things) but it simply would not make sense to repeat this evidence here. I will therefore mainly refer to their results and give examples to illustrate their meaning.

4.1 A Modern, Normative, Rights-Related Concept of Human Dignity

The concept of human dignity has a long and multifacetted history that is reflected in the variety of its current uses and philosophical and legal interpretations.[481] As noted earlier, in this study I am concerned with human dignity only insofar as it stands in some justificatory or explicatory relationship to human rights, i.e. as their ground or normative core.[482] So the assumption that human beings "have" human dignity (in a sense to be specified) implies that they also "have" human rights (again, in a sense to be specified). So the question that I am concerned with is not how the different concepts of (human) dignity relate to one another (which is a question of its own) but how human dignity would need to be interpreted, provided that it is supposed to be the ground of human rights. What could be a plausible candidate for such an understanding of human dignity?[483] For instance, in the tradition of Cicero, human dignity would be a concept of "universal nobility"[484] that is embedded in a perfectionist, virtue-ethical framework: Human dignity grounds a duty towards oneself to behave in accordance with one's status as a rational being. This is a universal concept of human dignity, but it grounds duties towards oneself rather than a duty to respect the dignity of others. Moreover, in this Ciceronian tradition human dignity is something that comes in grades and can be lost. So it is

[481] See Düwell 2014 and McCrudden 2013a.
[482] See Chapter 1, Section 6.
[483] See on what follows Düwell 2014, 25-27.
[484] Cf. Neuhäuser / Stoecker 2014.

clear that human dignity so understood cannot be the ground of human rights. Another way to understand human dignity would be in a "cosmological" sense as in Pico della Mirandola: Here human dignity first of all signifies a certain place of human beings in the cosmological order (as distinguished from the place of animals, angels, and God). This concept is universal as well but it does not have direct moral and political implications, nor does it ground rights. What regards its present uses, it is important to distinguish between a *descriptive* and a *normative* concept of human dignity. By a *descriptive* dignity concept I mean an understanding of dignity as a certain kind of attitude or form of conduct, for instance when we say that somebody behaves in an "undignified manner" (lying drunk in the roadside ditch) or that somebody, despite being subjected to living conditions "unworthy of her dignity" (living on a dumping ground), still "keeps her dignity", e.g. in the sense of a proud attitude or inner self-esteem.[485] It is clear that this dignity concept cannot be a ground of human rights either.[486]

From this distinguished is an understanding of human dignity as a certain kind of moral property, value, status or principle (depending on the relevant theory) that grounds (at least also) duties towards others and is supposed to guide or underlie public, legally regulated action. Human dignity is something that every single human being has and cannot lose, and that other human beings and institutions ought to respect. It is this concept of human dignity that may provide a ground for human rights, i.e. a *modern, normative, rights-related* understanding of human dignity. The term 'normative' encompasses a legal and a moral concept of human dignity here. Apart from its interconnection with human rights, this concept has a number of further features that I will presuppose in what follows:[487]

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[485] For a philosophical exploration of such a descriptive concept of human dignity see Weber-Guskar 2016.

[486] Needless to say, there are interconnections between these concepts. For instance, when one attempts to specify what social conditions are incompatible with human dignity in a normative sense then one will often refer to paradigm cases that human beings experienced as leading to a loss of their dignity in a descriptive sense. So a descriptive concept of human dignity has itself normative implications and bears on a normative theory of human dignity in many ways.

[487] See Düwell 2014, 27-28.

(1) Human dignity is *universal in scope*: All human beings have human dignity, rather than for instance only human beings with a high social status, special character traits or a particular way of living. So the ascription of human dignity does not depend on any contingent differences between human beings; all human beings have it "simply in virtue of being human".

(2) Human dignity belongs to human beings *equally*: It is not the case that human beings have more or less dignity, depending for instance on the criteria just mentioned. So human dignity does not come in grades; neither can it be lost.

(3) The possession of human dignity justifies *duties towards others* rather than (merely) duties towards oneself. (It is debatable whether human dignity also justifies duties towards oneself. I leave this question unconsidered in what follows.) Furthermore, these duties correlate with (claim-)*rights*.

(4) These duties have the form of *categorical* obligations, i.e. they are "duties that are overriding with regard to other action-guiding considerations"[488]. This does not mean that these obligations cannot be weighed. It means that obligations that follow from (having) human dignity can only be weighed against other obligations that follow from (having) human dignity.

So this is the conceptual core of human dignity that characterizes its various (philosophical, legal…) uses in the human rights context. It is clear that, apart from this concept, there is large disagreement about how these features of human dignity ought to be interpreted, i.e. about the most plausible human dignity conception, and that further questions about these features arise in specific contexts of application. I will turn to some of these questions later on. Let us now first consider what role this concept of human dignity plays in the legal human rights practice.

[488] Düwell 2014, 27.

4.2 The Importance of Human Dignity for Legal Interpretations of Human Rights

I noted above that, from a historical perspective, the drafting process and further development of the international bill of rights and domestic bills of rights after 1945 continuously influenced one another.[489] This process is paralleled in the incorporation of human dignity into legal texts:

> The incorporation of dignity into the Charter and the Universal Declaration […] took place at the same time as human dignity was being incorporated into other regional human rights instruments and national constitutions. There appears to have been an injection of the concept of dignity throughout the world at that time. Identifying which particular document influenced which other document is thus a somewhat pointless enterprise as the concept was so much in the political ether, as it were, that it tended to crop up all over the place.[490]

Let me therefore begin with a broad – and inevitably selective – overview of occurrences of human dignity in human rights texts that gives us a first indication of its widespread appearance and significance for legal practice.[491] I will first focus on express recognition. Human dignity is expressly recognized in the Charter of the United Nations and the Universal Declaration of Human Rights, in international humanitarian law texts, in international human rights texts, in regional texts as well as in domestic constitutional texts. I will give examples in that order.

The Charter of the United Nations (1945) declares in its preamble that "[w]e the peoples of the United Nations [are] determined […] to reaffirm faith in fundamental human rights, *in the dignity and worth of the human person* [and] in the equal rights of men and women" (emphasis added). The preamble of the Universal Declaration of Human Rights (1948) states that "recognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (emphasis added). Article 1 underlines that

[489] See above, Section 2.2.
[490] McCrudden 2008, 673.
[491] The following overview is based on McCrudden 2008, 664-675, Botha 2009 and Brownsword 2014.

"[a]ll human beings are born free and equal in dignity and rights." Articles 22 and 23(3) contain more specific references to dignity in the context of the right to social security and the right to work.

In the field of international humanitarian law, human dignity is expressly recognized in the Geneva Conventions. Common Article 3 prohibits "*outrages upon personal dignity*, in particular humiliating and degrading treatment" (emphasis added). Beside further references to human dignity, the Additional Protocols I and II to the Conventions equally prohibit "outrages upon human dignity". Moreover, "[s]ince then, the statutes of *ad hoc* international criminal tribunals and the Rome Statute establishing the International Criminal Court have incorporated similar references to 'outrages upon personal dignity'."[492]

As McCrudden notes, "[s]ince the relatively dramatic increase in the use of dignity in the international human rights law context during the 1940s, dignity has become commonplace in new international human rights and humanitarian law instruments."[493] The International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights (both 1966) state that human rights "*derive from the inherent dignity of the human person*" (emphasis added). Several articles of the covenants also include references to human dignity. The same holds for another important human rights covenant, the International Covenant on the Elimination of Racial Discrimination. In addition to this, "[a]t the international level, dignity is now routinely incorporated in human rights charters, both general and specific."[494] Examples are the Slavery Convention (1956) and the major conventions on the Rights of Children (1989) and the Rights of Migrant Workers (1990), on the Protection against Forced Disappearance (2006) and the Rights of Disabled Persons (2007).[495] Moreover, as again McCrudden notes,

> [b]y 1986, dignity had become so central to United Nations' conceptions of human rights that the UN General Assembly provided, in its guideline for

[492] See McCrudden 2008, 667-668, here 668, reference deleted.
[493] McCrudden 2008, 668.
[494] McCrudden 2008, 668. See on what follows McCrudden 2008, 668-669.
[495] See McCrudden 2008, 669.

> new human rights instruments, that such instruments should be 'of fundamental character and *derive from the inherent dignity and worth of the human person*'.[496]

Finally, it deserves emphasis that "[i]ncreasingly, the role of dignity has expanded beyond the preambles to international human rights documents and into the texts of their substantive articles."[497] Human dignity is thus linked to specific substantive topics, for instance bioethics.[498]

Turning to the regional level, we see that dignity also appears in the texts of regional human rights instruments. The preambles to the principal Inter-American, Arab, African and some European human rights instruments include references to human dignity. As is well-known, it is not included in the text of the European Convention on Human Rights. However, it is mentioned in several later Council of Europe conventions, for instance in the Convention on Human Rights and Biomedicine. It is also recognized in the Charter of Fundamental Rights of the European Union (2000) that declares in its preamble that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity". Here, too, references to human dignity also occur in the context of specific provisions.

Finally, human dignity is central to a great number of national constitutions that have been adopted after the Second World War. As Henk Botha notes, "[t]his is particularly the case in countries emerging from authoritarian, oppressive, colonial and/or racist pasts."[499] Examples for this are the German Basic Law (1949) as well as the Constitutions of Greece (1975), Portugal (1976), Spain (1978), Namibia (1990), the Russian Federation (1993), South Africa (1993 and 1996) and Poland (1997).[500] All of them "invoke the fundamental dignity of the human person in signaling a break with the past and in seeking to prevent a reoccurrence of past

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[496] McCrudden 2008, 669, emphasis added.
[497] McCrudden 2008, 670.
[498] See also Beyleveld / Brownsword 2001.
[499] Botha 2009, 175.
[500] See Botha 2009, 175.

horrors."[501]

So far I have focused on express recognition of human dignity in human rights instruments. However, as again Botha notes, "it would be a mistake to restrict the significance of the ideal of human dignity to those constitutional provisions which expressly refer to it."[502] Rather, "[t]he idea of the inherent worth and dignity of the person […] is so basic to current understandings of human rights, that it is almost inevitable that they [sic] will inform rights discourse"[503]. In particular, "'human dignity' has become an integral part of the vocabulary of comparative constitutionalism"[504]. Accordingly, the domestic, regional and international legal discourses about human dignity are situated "within the broader context of a transnational constitutional discourse on human dignity."[505]

The preceding overview serves to illustrate two points. *Firstly*, a commitment to the "inherent dignity" of human beings is not only expressed in this or that legal text. It is "all over the place"[506], to repeat McCrudden's phrase. *Secondly*, apart from express commitment, human dignity also plays an important role in the legal discourse about human rights broadly understood, i.e. in legal reasoning about human rights. This discourse is on the one hand context-specific but at the same time transnational in the sense that legal systems borrow from one another.

Going one step further, it is crucial to see that it is not a "mere" discourse, i.e. some kind of abstract theoretical reflection among legal scholars about the ground of human rights that is somehow removed from legal practice. Rather, as soon as we move from legal text to legal practice, it becomes obvious that human dignity is truly "at work" in human rights adjudication: What legal human rights guarantees

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[501] Botha 2009, 175.
[502] Botha 2009, 176.
[503] Botha 2009, 176. He gives the example of the United States Supreme Court which "[e]ven in the absence of any reference in the Constitution to human dignity […] has, on occasion, invoked the language of dignity". Botha 2009, 176. For instance, it was argued "that the death penalty constituted a brutal assault on the dignity of the individual". Botha 2009, 176.
[504] Botha 2009, 171. See also Mahlmann 2012. In short, judges include foreign sources in their own decisionmaking, which among other things has the effect that dignity language becomes part of legal discourse also in countries where dignity is not expressly recognized in the constitution.
[505] Botha 2009, 172.
[506] McCrudden 2008, 673.

mean and require in concrete cases is frequently interpreted by reference to human dignity. In other words, the idea that human dignity is the *ground* of human rights in some sense means, from a legal-practical perspective, that it is the *purpose* of these norms to protect human dignity, an assumption that is not merely abstract but concretized in legal practice. Before explaining this in more detail, let me add a clarificatory remark.

Apart from its widespread appearance, there are "significant differences in the ways in which human dignity has been incorporated into positive law"[507]. Leaving further details aside, in the present context the most important difference of this kind is that between human dignity as a right and as the ground of human rights. For instance, Article 5 of the African Charter on Human and Peoples' Rights (1981) provides that "[e]very individual shall have *the right to the respect of the dignity* inherent in a human being" (emphasis added).[508] Here (human) dignity is itself considered to be "a right or obligation with specific content"[509], *alongside the other* human or constitutional rights. Human dignity is also recognized as a right in many national constitutions as well as in international human rights instruments.[510] Although it is important to keep this role of human dignity in mind, I will disregard human dignity as a right in what follows, for two reasons: *Firstly*, here I am concerned with human dignity as the ground that underlies the human rights and it is clear that, as a subjective right, human dignity does not constitute such a ground. This does not mean that it does not play a role in the interpretation of these norms but it would unnecessarily complicate things here. Moreover, *secondly*, from the perspective of purposive interpretation, "the purpose of the right to human dignity is to protect the value of human dignity."[511] The question about the ground and (correlatively) purpose of the right to human dignity thus leads us back to the "value" of human dignity, which is why in the present context we may focus on this "value" directly.

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[507] McCrudden 2008, 675.
[508] I pick up the example from Botha 2009, 174.
[509] McCrudden 2008, 681.
[510] See further on this Botha 2009, 175 as well as Barak 2013, 366-367.
[511] Barak 2015, 111.

At the same time "it is asserted with increasing frequency that dignity is the *basis* of all human rights and should be used as a *guide to their interpretation*. Dignity is invoked as a *supreme value*, an *interpretive Leitmotiv*"[512]. On the international level, the paramount example for this is the view expressed in the ICCPR and ICESCR that human rights "*derive* from the inherent dignity of the human person" (emphasis added). On the domestic constitutional level, a particularly prominent example is Article 1 of the German Basic Law that states:

> (1) Human dignity is intouchable [*ist unantastbar*]. To respect and protect it shall be the duty of all state authority.
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
> (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.[513]

Here human dignity is regarded as a legal principle or value that guides the interpretation of human rights. We can see this more clearly by turning to Barak's considerations about the "constitutional value" of human dignity, while recognizing that this role of human dignity is not confined to the constitutional level.

From a standpoint of purposive interpretation, human dignity is the (or one of the) objective purpose(s) of domestic legal human rights if it is (what Barak calls) a *constitutional value*. Human dignity *is* a constitutional value within a given legal system "if that is what is indicated after assessing the role, the function and the purpose that the constitution fills at the time of interpretation."[514] As explained above, this means that human dignity "is a value or a principle that is recognized *expressly* or *impliedly* by a constitution."[515] Human dignity is *expressly* recognized as a constitutional value "if there is a specific provision in the constitution regarding

[512] Botha 2009, 171, emphases added, reference deleted.
[513] The translation is adopted from Barak 2015, 225. The standard translation for "unantastbar" is "inviolable" (rather than "untouchable") but I agree with Barak that this translation is inaccurate for it already presupposes a particular interpretation of the phrase. Cf. Barak 2015, 227. See also Chapter 6, Section 5.
[514] Barak 2015, 70.
[515] Barak 2013, 361, emphases added.

that value."[516] Examples for this are the Constitution of Spain, the Constitution of the Republic of South Africa and the Basic Law of Germany. Human dignity is *implicitly* recognized as a constitutional value "when express recognition is absent, yet consideration of the constitutional text in its entirety leads to the conclusion that the value is included within the constitution."[517] Examples for this are the American Bill of Rights and the Canadian Charter of Human Rights.[518] As Barak notes, "[h]uman dignity as a constitutional value has several functions in the field of human rights"[519]:

> It provides the theoretical foundation for human rights; it assists in the interpretation of human rights at the sub-constitutional level; it is one of the values that every constitutional right is intended to realize; it plays a role in the limitations to constitutional rights and in determining the limits to such limitations; it plays a primary interpretative role in those cases where the constitution does recognize a constitutional right to human dignity.[520]

For instance, the German Basic Law, Israel's Basic Law and the constitutions of Portugal, Spain, Namibia, Colombia, Poland and South Africa all invoke human dignity as a founding value, as the basis of human rights and/or as a guide to their interpretation.[521] Let us now look at the roles of human dignity as a constitutional value more closely.[522]

According to Barak,

> [t]he constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in three ways: *first*, the value of human dignity serves as a *normative basis* for constitutional rights set out in the constitution; *second*, it serves as an *interpretative principle for determining the scope of constitutional rights* […]; *third*, the value of human dignity has

[516] Barak 2013, 361-362, reference deleted.
[517] Barak 2013, 362.
[518] See Barak 2013, 362.
[519] Barak 2013, 362, reference deleted.
[520] Barak 2013, 362-363, references deleted.
[521] Botha 2009, 176.
[522] See on what follows Barak 2015, 103-113.

> an important role in determining the *proportionality* of a statute limiting a constitutional right.[523]

So human dignity first of all "*comprises the foundation* for all of the constitutional rights"[524]. Human rights are not rights that stand next to one another in an unrelated fashion. Rather, as we have seen, they express the "intention of the legal system", which, to the extent that human dignity is a constitutional value, is to protect human dignity (though this does not necessarily mean that human dignity is the only "value" of this kind or even the most important one).

This is why the *second*, interpretational role of the constitutional value of human dignity is

> to *provide meaning* to the norms of the legal system. According to purposive interpretation, all of the provisions of the constitution, and particularly all of the rights in the constitutional bill of rights, are interpreted in light of human dignity.[525]

Barak gives the example of the constitution of South Africa that states that the Court, when it interprets the Bill of Rights, "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".

Moreover, human dignity as a constitutional value plays an important role with regard to interpreting the *scope* of rights. For instance, Article 9 of the Constitution of South Africa states that "[e]veryone is equal before the law […]" and that "[t]he state may not *unfairly discriminate* directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief,

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[523] Barak 2015, 103-104, emphases added, reference deleted.

[524] Barak 2015, 104, emphasis added, reference deleted.

[525] Barak 2015, 105-106, emphasis added, reference deleted. See also Barak 2015, 106: "Human dignity as a constitutional value does not only influence the purposive interpretation of the constitution. It also influences the interpretation of every sub-constitutional norm in the legal system. Indeed, the constitutional value of human dignity radiates upon the entire sub-constitutional law. Thus, it influences the interpretation of statutes and sub-statutory legislation. They are interpreted according to their purpose, which, through their objective purpose, includes the value of human dignity." (references deleted)

culture, language and birth [...]" (emphasis added). As Barak notes, for judges this raises two interpretational problems, among others:

> The first question is: what is the standard by which it should be determined when differentiation between people becomes discrimination? The second question is: what is the standard by which additional grounds for discrimination, beyond those expressly determined in the constitution, should be recognized? *The Supreme Court of South Africa held that this standard is human dignity*.[526]

So human dignity serves as the standard for determining when the right is violated to begin with (differentiation is discrimination if it violates human dignity) and for applying the right to types of differentiation that are not explicitly mentioned in the provision (they, too, are discriminatory when they violate human dignity).[527]

Let me give a second example. Many constitutions contain a provision that prohibits "cruel, inhuman or degrading punishment".[528] Barak gives the following example of the interpretation of this provision:

> The Supreme Court of the United States examined the question of whether or not the constitutional value of human dignity leads to the interpretational conclusion that the death penalty is a cruel and unusual punishment. Justice Brennan answered that it does. His was a dissenting opinion. The majority was of the opinion that the death penalty, in and of itself, is not a cruel and inhuman punishment. However, it must be ensured that the methods of inflicting that punishment are humane.[529]

In short, what is happening here is this: The normative consequences of a specific provision – the prohibition of cruel and unusual punishment – are examined by interpreting it in light of human dignity. In other words, human dignity is invoked

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[526] Barak 2015, 109, emphasis added, reference deleted.

[527] Another important function of the constitutional value of human dignity in this context is that "it influences the development of the common law." (Barak 2015, 106) Human dignity does therefore not only play a role in the interpretation of existing legal texts but also in the creation of new laws. Barak gives the example of the South African Constitution, which contains a provision "that states that, in developing the common law, the court 'must promote the spirit, purport and objects of the Bill of Rights'", which expressly include "democratic values of human dignity, equality and freedom" (Barak 2015, 107).

[528] Cf. Barak 2015, 109.

[529] Barak 2015, 110, references deleted.

in order to determine whether or not the death penalty constitutes a violation of this provision.

Finally, a *third* important role of the constitutional value of human dignity lies "in the limitation of constitutional rights, and in determining the limits of such limitations."[530] So, in short, judges frequently draw on human dignity when the question is whether a constitutional right may be justifiedly restricted by reference to public interest or by protecting some other constitutional right.

McCrudden has shown that human dignity "is drawn on by judges in a wide range of different jurisdictions"[531]. These include not only a great number of domestic jurisdictions but also the International Court of Justice, the European Court of Human Rights and the European Court of Justice.[532] McCrudden shows this on the basis of a detailed analysis of various legal arguments and cases. Take the European Court of Human Rights as an example. As mentioned above, the European Convention of Human Rights does not recognize human dignity explicitly. And yet "interpretations of the European Commission and Court of Human Rights [...] have drawn extensively on the concept of human dignity as the basis for their decisions."[533] This regards in particular Article 3 of the Convention, the prohibition of torture and of inhuman or degrading treatment and punishment. For instance, "corporal punishment, administered as part of a judicial sentence, was held to be contrary to Article 3 on the ground that it was an assault *'on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity'*."[534] The Court has further referred to human dignity "in the context of the right to a fair hearing, the right not to be punished in the absence of a legal prohibition, the prohibition of torture, and the right to private life."[535] Finally,

[530] Barak 2015, 112, reference deleted.
[531] McCrudden 2008, 682.
[532] See McCrudden 2008, 682-685.
[533] McCrudden 2008, 683.
[534] McCrudden 2008, 683, emphasis added.
[535] McCrudden 2008, 683, references deleted.

"[t]he Court now regards human dignity as underpinning all of the rights protected by the Convention."[536]

Moreover, human dignity is used in a large variety of topics and cases, and it is "increasingly present in the interpretation of particular substantive areas."[537] In other words, dignity arguments are invoked with regard to concrete substantive human rights-related questions, such as weighing the right of the foetus against that of the mother, or euthanasia. McCrudden identifies four such areas in particular, which in legal practice are frequently associated with the scope of protection of human dignity:[538] The *first* category is the prohibition of inhuman treatment, humiliation or degradation, where human dignity has e.g. famously figured in decisions about the death penalty. For instance, human dignity was used to specify what constitutes "degrading" treatment under Article 3 of the European Convention of Human Rights, namely: "something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers […]."[539] In the *second* category fall questions about individual choice, autonomy and the conditions for self-fulfillment, where in particular "[d]ignity has been central to the approach which several jurisdictions take to the woman's interest in deciding whether to have an abortion"[540]. The *third* category concerns questions about group identity and culture, where "[t]he principle of human dignity is often drawn on as one of several values that anti-discrimination norms further."[541] So, as in the example given above, human dignity is invoked to settle what counts or does not count as "discrimination". *Finally*, judges have drawn on human dignity with regard to the creation of the necessary conditions for individuals to have essential needs satisfied, i.e. in the context of socio-economic rights.

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[536] McCrudden 2008, 683.
[537] McCrudden 2008, 685.
[538] See McCrudden 2008, 685-694.
[539] Judge Sir Gerald Fitzmaurice, quoted from McCrudden 2008, 686.
[540] McCrudden 2008, 688.
[541] McCrudden 2008, 689.

Once again, this overview might be amended in numerous ways but it suffices to make clear a fundamental point: In legal practice, "the idea of human dignity serves as the single most widely recognized and invoked basis for grounding the idea of human rights generally, and *simultaneously* as an exceptionally widespread tool in judicial discourse about the content and scope of specific rights."[542] In other words, the idea that human dignity is the ground of human rights acquires practical force in the assumption that it is the purpose of legal human rights to protect human dignity. As a result, what counts or does not count as a human rights violation is concretized by reference to human dignity, which of course implies: particular interpretations of human dignity and its legal implications.

Let me end with a final remark. The legal concept of human dignity has moral and universal implications, in the following basic sense: Human dignity is something that all human beings have (rather than, for instance, only the members of this or that legal community) and it involves a moral claim to be treated in a particular way. Accordingly, human beings do not have human dignity because this is recognized by law; its legal recognition is itself based on the assumption that law ought to respect human dignity. However, throughout this chapter I have also stressed the context-specifity of legal interpretation. I have not yet gone into the question what human dignity means in different legal contexts, but provided that legal interpretation is sensitive to the particular history and current self-understanding of legal communities, we may well expect that there will be divergence in its interpretation in different jurisdictions. What does this particularity of legal interpretation imply with regard to the universal moral claim that is part of the legal understanding of human dignity? According to Barak, human dignity means "humanity"[543]. And yet he notes that he does "not accept the opinion that human dignity is an *axiomatic, universal concept*"[544]: "In my opinion, human dignity is a *relative concept*, dependent upon historical, cultural, religious, social

[542] Paolo G. Carozza, echoing McCrudden in McCrudden 2008, in Carozza 2008, 932, emphasis added, reference deleted.
[543] Barak 2015, 124 ff.
[544] Barak 2015, 6, emphasis added, reference deleted.

and political contexts."[545] It is "a *contextually dependent value*. It is a changing value in a changing world."[546] We must be careful about what this means. What I understand Barak to be claiming is that whatever human dignity substantively means and requires should be completely left to particular legal discourses: "[E]ach legal system must ultimately define its own position on this constitutional value"[547]. In other words, although all human beings have human dignity, this may well mean something completely different in different legal contexts. I cannot prove this, but my suspicion is that this has to do something with Barak's understanding of human dignity as a value: In short, either the meaning of human dignity is radically context-specific; or law becomes some kind of realization-machine for whatever axiomatically follows from this value, independently of the contingent self-understanding of concrete legal communities. Both assumptions are wrong. In the next chapter I will make a proposal how to interpret human dignity in a way which, I think, can accommodate the tension between the necessary and universal as well as the particular and contingent dimensions of human dignity.

[545] Barak 2015, 6.
[546] Barak 2015, 6, emphasis added, reference deleted.
[547] Barak 2015, 105.

6. Human Dignity as a Universal Moral Status[548]

1. Introduction

In the last chapter I have argued that it is part of the self-understanding of the legal human rights practice that legal human rights are grounded in human dignity: From the perspective of legal practice, it is a fundamental moral purpose of these norms to protect human dignity. This first of all means that we cannot conceptualize legal human rights without a reference to an underlying moral dimension. It also means that there is an important link between a legal and a moral-philosophical understanding of human dignity and human rights. On the one hand, a philosophical explication of the meaning, ground(s) and normative implications of the moral idea of human dignity can contribute to its legal understanding. On the other hand, a moral-philosophical conception of the moral concept of human dignity and its legal implications cannot ignore how the legal concept of human dignity "works", in particular what regards its interpretative openness and thus the possibility of its context-specific (re)interpretation. So far I have focused on the perspective of legal practice: What are the moral implications of the legal concept of human dignity (and human rights)? In this chapter I will disregard the legal context of human dignity and propose a particular moral-philosophical interpretation of the moral concept of human dignity and its legal implications. Importantly, this does not yet imply any particular claim about whether or not this conception should be adopted in law. This presupposes to address a question that I have bracketed thus far, namely how human dignity is itself interpreted in legal practice, and to what extent the interpretative openness of human dignity fulfills itself an important function in law. I will systematically take up this question in the next chapter.

[548] Parts of this chapter have formerly been published in Düwell / Göbel 2017 and Göbel 2017.

The central thesis of this chapter is that human dignity should be interpreted as a universal moral status that is grounded in the necessary practical self-understanding of human agents. It is not a metaphysical value, and it is not best understood on a moral realist account. The question why we should assume that all human beings have human dignity and what this means more specifically is essentially *hermeneutical*: It does not call for a philosophical "proof" of the existence of some moral fact and a "deduction" of a time- and spaceless catalogue of rights. Rather, it requires an argument that shows that we cannot coherently understand ourselves as rational agents without attributing to one another the moral status of human dignity. Human dignity, so understood, is the core of a universal moral principle that expresses the fundamental[549] moral obligation to recognize one another as subjects of moral concern, which means: to respect one another as holders of (moral) human rights. This principle is not grounded in a value of human dignity but in a self-reflexive movement of thought that shows that no rational agent can consistently deny that this principle is valid for him or her. Finally, this moral principle is neither substantively empty nor does it prescribe what human rights there are once and for all. Rather, it implies a substantive criterion for specifying human rights in concrete social and historical contexts, and for putting these rights into a hierarchy.

We find the central reference points for the "hermeneutical" understanding of human dignity I just sketched in the Kantian tradition. In the history of philosophical thought, it is Kant's practical philosophy that stands for the centrality and systematic connection of the moral idea of *respect for persons* and a *self-reflexive* method of moral reasoning that grounds the validity of this idea in the necessary practical self-understanding of persons or rational agents. Alan Gewirth has shown how it is possible, by relying on a self-reflexive method, to justify a universal moral principle that (other than in Kant) is at the same time a principle of (moral) human rights. Both Kant's and Gewirth's practical thought are therefore highly systematically fruitful when it comes to developing a coherent philosophical interpretation of the modern, moral concept of human dignity. This is why I will

[549] I explain what I mean by this in Section 4.2.

base my argument in this chapter on their considerations. I shall stress, however, that I draw on their thought for systematic rather than exegetical reasons: The goal of this chapter is *not* to offer a detailed text-exegesis, comprehensive interpretation or critical discussion of their positions. Rather, I draw on Kant and Gewirth because and only to the extent that they are promising with regard to the *systematic* question how one may best interpret human dignity as a moral status that grounds human rights. The goal is to develop a systematic outline of how the idea of human dignity might be understood, following such a Kantian-Gewirthian line of thought.

The chapter is structured as follows. I begin by explaining how I conceive of the central differences between a status- and a value-concept of human dignity *(2)*. Then I consider more closely what it means to justify human dignity in a self-reflexive manner, and in particular what this implies with regard to the necessity and contingency of human dignity *(3)*. After that I turn to Kant *(4)*. I first clarify my basic position with regard to recent debates about whether Kant advocated a modern idea of human dignity *(4.1.1)* and human rights *(4.1.2)*. This will give my question a clearer shape what regards the disentanglement of exegetical and systematic as well as terminological and conceptual questions. I then argue that Kant's principle of respect for persons as expressed in the so-called "Humanity Formula" of the Categorical Imperative should be interpreted as a principle of human dignity. I first focus on the systematic place of this principle in Kant's ethics *(4.2.1)* and then on how Kant develops this principle with the help of a self-reflexive movement of thought *(4.2.2)*. Turning to Gewirth, I then explain how the principle of respect for persons, which in Kant is a duty-commanding principle, can be developed further to a principle of human rights, and what practical implications follow from this *(4.3)*. I end by indicating some central implications of this conception for the interpretation of the dignity provision in the German Basic Law *(5)*.

2. Human Dignity: Value or Status?

Recall that a modern, moral concept of human dignity is distinguished by the following features:[550] *Firstly*, human dignity is *universal* in that it is ascribed to all human beings. *Secondly*, it is ascribed to all human beings *equally*. *Thirdly*, the attribution of human dignity grounds or involves the *moral claim to respect* the holder of human dignity. *Fourthly*, this moral obligation is *categorical* or *overriding*: The moral duties that follow from having human dignity can only be weighed against one another. *Finally*, human dignity stands in some close justificatory or explicatory relationship to human rights (which are here first of all moral human rights). It is a basic desideratum for any moral theory of human dignity to offer a coherent interpretation of its nature, ground(s) and normative implications in the light of these constitutive features.

How one interprets these features and their relationship to one another depends crucially on how one conceives of the *ontological status* of human dignity, which again depends also on one's metaethical approach. In current debates it is commonly assumed that human dignity is either an *absolute value* or a *universal moral status*. The former view seems to represent the dominant way how the ontological status of human dignity is understood.[551] As already indicated, I share the latter view, which I regard as a genuine alternative to a value conception of human dignity. Let me therefore begin by clarifying how I conceive of these competing understandings.

Even though a value-concept and a status-concept of human dignity are frequently contrasted in current philosophical debates, it is not always clear where precisely the difference between them is supposed to lie. This is mainly because there are several possibilities how to interpret the concept of value and status respectively,

[550] See Chapter 5, Section 4.1.

[551] The assumption that human dignity is (or has to be) some kind of objective value has long dominated philosophical theory, being taken for granted rather than argued for explicitly. The alternative to consider human dignity as a status has become prominent in particular by Jeremy Waldron's account in Waldron 2009. See also Waldron 2013, 24-27. However, Waldron regards the relevant status first of all as a *legal* status. For an account of human dignity as a *moral* status see for instance Düwell / Göbel 2017 and Schaber 2017.

and because *both* concepts might figure in one and the same conception of human dignity (Mahlmann, for instance, speaks of a "value-status"[552] of human dignity). The goal at this point is not to give an overview of these different options nor to discuss them. Rather, I want to clarify how I will refer to human dignity as a value and a status in what follows, and what I take to be the main differences between the two understandings – being well aware that there are other interpretative possibilities. I interpret the difference between both understandings as a difference in the metaethical approach to human dignity. I will explain this in what follows.

I understand the difference between a value- and a status-concept of human dignity along the following lines. To conceive of human dignity as a value often (though not necessarily – see below) implies to conceive of it as a value *property*, i.e. some kind of objective, mind-independent feature that all human beings possess, as comparable to a natural property. The underlying idea is that human dignity is something that all human beings objectively and inalienably *have* – rather than earn, acquire, may lose or just contingently attribute to one another – so that it must be some inherent, "normatively laden" feature of their common human nature. This is why a value-concept of human dignity is often coupled with a metaethical approach of *value realism*: What makes the assumption that human beings have human dignity true is that there is a mind-independent fact that verifies it. In a second step, it is then typically argued that certain moral claims follow from having this (absolute) value (human dignity "grounds" these moral claims). We can broadly distinguish between two versions of this value realist understanding of human dignity. On a *metaphysical value realist* account, the value 'human dignity' would be a mind-independent object that exists "out there in the world" and is detected through some kind of moral intuition. On a *supervenience theory of values*, human dignity would not *be* such a mind-independent object but a property that supervenes upon the natural features of some real object – which would here typically be "human nature", or more specifically the "natural" human capacity to set ends, to reason, or the like. In the present context, the differences between these two

[552] Mahlmann 2013, 603.

approaches can be disregarded in favour of their essential commonalities: On both accounts, the value 'human dignity' either is or is grounded in some *objective, mind-independent fact* (of human nature), where the relevant notion of objectivity relates to the (mind-independent) *existence* of that fact. Accordingly, human nature – the "locus" of human dignity – is approached from a *third-person perspective*, i.e. in an external, descriptive fashion. Finally, the role of human reason in justifying human dignity is confined to *detecting* this value (which is given or exists independently of it) or even to *articulating* its moral implications for it is detected by moral intuition. Put the other way around, it is important to note what does not play a role in such a value realist account: The cogency and meaning of the assumption that human beings – we – have human dignity is not tied to the *practical self-understanding* or *self-interpretation* of those who are supposed to have this value.

Before turning to a status-concept of human dignity I should add a clarification. I assume that the value of human dignity is indeed predominantly understood in a value realist fashion. However, of course it is not *always* understood that way, nor does it *need* to be understood that way. For clearly the concept of a value does in itself not imply value realism. So considered, what is potentially misleading about the comparison between "value-" and "status-concepts" of human dignity is that there are value theories that do not conceptualize value in an objective realist fashion but in a more constructivist manner (to put it broadly). Roughly, objective value is then itself something that we construct and ascribe (based on reasons) rather than detect (based on intuition). An understanding of human dignity as a value in this sense might eventually be much closer to "status-" than to "value"-concepts of human dignity.[553] I should therefore be clear about that, in what

[553] In the context of his analysis of Kant's conception of human dignity, Christoph Horn helpfully distinguishes six conceptions of values:
"(1) Values are objects that exist 'outside in the world' (*strong* or *metaphysical value realism*) and that are perceivable through a genuine value-sensorium (*value intuitionism*).
(2) Values are supervenient properties that exist in relation to natural features of real objects or events in the world (*supervenience theory of values*).

follows, when I refer to human dignity as a value I always mean a value *realist* understanding. By contrast, it is quite likely that the understanding of human dignity as a status that I will propose is compatible with or overlaps with value-*constructivist* interpretations of human dignity. However, I will not pursue this question further here.

According to a *status-concept of human dignity*, as I understand it, to say that all human beings have human dignity is not to say that they possess a certain (value) property but that they have a certain moral status or standing: They are subjects of moral concern, in a fundamental sense. So, other than for instance Waldron, I refer to human dignity as a *moral* (rather than legal) status here, which implies that its possession does not depend on its institutional recognition.[554] To affirm that all human beings have this moral status means that every human being is morally entitled to be respected by every other human being; at the same time every human being is an addressee of the moral obligation to respect every other human being. Importantly, human dignity does not *ground* this moral entitlement and obligation. Rather, it expresses its *core*. The point might also be put like this: According to a value-concept of human dignity (in the sense just explained), human beings ought to be respected *because* they have (the value of) human dignity. The term "because" indicates a justificatory sequence here: The possession of the value of human dignity is prior to the moral demand for respect in the justificatory chain. By

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(3) Values can exist due to an objective relation of two entities in the world: that which is valuable and that for which it is valuable. Valuable in this sense is in particular everything that meets somebody's objective inclinations or needs (*inclination or need theory of values*).
(4) Values are derived from the practical self-relation [*Selbstverhältnis*] of the agent, namely on the basis of the inner value-perception of the agent with regard to the conditions of meaning [*Sinnbedingungen*] of rational agency (with a view to the stoic tradition I call this the *oikeiosis theory of values*).
(5) The existence of values traces back to subjective wishes. Something is valuable for me because I wish it (*wish theory of values*).
(6) Values exist because of an imperative act of positing [*imperativischen Setzungsaktes*] […] (*imperative theory of values*)." (Horn 2014, 101-102, my translation)
As Horn notes, the value-conceptions (1) to (3), which are objective and realist, are clearly at odds with Kant's view. The (Humean) conception (5) does not capture how Kant conceives of *moral* values. Options (4) and (6), by contrast, may well be defendable on Kantian premises. They are precisely those value conceptions that might be in conformity with my position. In my view, we may just as well call conception (4) "constructivist" or "hermeneutical".

[554] See Waldron 2009 and 2013.

contrast, if one understands human dignity as a moral status one would say: There is a fundamental moral obligation for every human being to respect every other human being *as* a being with human dignity, i.e. as a being with a certain moral status. All human beings then "have" this moral status in the sense that it is morally obligatory to attribute this status to them, i.e. to recognize them as beings with that status in one's actions. The relationship between the moral demand to be respected (as a being with human dignity) and having the status of human dignity is here not a justificatory sequence but a relationship of implication: The moral obligation that all human beings ought to respect one another *implies* that every human being has a certain moral status, for the actions of every human being morally ought to reflect that they have this moral status. There is no universal value prior to that ought or demand. So understood, human dignity is the core of the universal moral principle that every human being ought to respect every other human being, or that every human being ought to attribute a certain moral status to every other human being. In what follows, I will refer to this principle of universal respect – which, as I will argue below, is at the same time a principle of human rights – as the "*dignity principle*". Human dignity is then universal in that this moral claim and the correlative moral ought *apply universally* to all human beings, i.e. it is *universally valid*. Therefore, human dignity as a status and human dignity as a moral principle are just two sides of the same coin. In that sense the assumption that human beings "have" human dignity is itself not a descriptive but a moral or normative assumption: They have this moral status insofar as there is a universal, categorical, necessary and objective moral ought to treat every human being *as* a being with that status.[555] Importantly, this implies that the common expression that human beings "have" dignity or a certain value is eventually an imprecise or metaphorical way of putting things. (We say: "Human beings have dignity" and mean: "Human beings ought to be respected in a particular way" – not because they *have* human dignity but because this is morally obligatory.) With regard to the relevant justificatory task this means: It does not have to prove the existence of some subject-independent

[555] See also below, Sections 3 and 4.2.2.

value but the truth of a moral-practical principle. Put differently, the fundamental question why human beings deserve a certain kind of moral consideration requires an answer that shows why human beings *morally ought to attribute* this status to one another (instead of why they *have* it in the sense of a property).

At this point I should add a further clarification. The comparison between a "value-" and a "status"-concept of human dignity is potentially confusing in another regard: It leaves open whether the value or status of human dignity is itself thought to ground, or be grounded in, a certain value or status. For instance, one might hold that human dignity *is* a certain value property that *grounds* a certain moral status of all human beings; or one might maintain that human dignity *is* a moral status that is *grounded* in some value property; or one might hold that *because* human beings have the moral status of human dignity they also have a particular moral value; and so on. In other words, while the distinction indicates two competing ways how to conceive of the *ontological mode* of human dignity, it does not tell us anything about the relevant metaethical view, i.e. about the role that status- or value-related considerations play in the justification of the relevant moral duties, and about their *priority* within the justificatory chain. Accordingly, we need to distinguish the question what human dignity *is* from the further question how human dignity, as well as the dignity-related moral duties, are *justified*.

To be clear about this: When I propose to interpret human dignity as a moral status I do not only mean to rule out that it is a value but also that it is grounded in some value. Instead I proceed from the premise that it is more fruitful to not understand human dignity in value-terms at all, and especially not in value realist terms. Why do I assume this? As already noted in Chapter 1, an extensive discussion of value realism and other value theories is beyond the scope of this study. Therefore, in what follows I will merely briefly recall some common problems with this account and then present the alternative option directly.[556]

[556] For a defense of moral realism see e.g. Enoch 2011. Enoch assumes, however, that his moral realist approach is transcendentally justified. See also Brink 1989, Foot 2001, Halbig 2007, Scarano 2001 and Schaber 1997.

Firstly, it is unclear how the existence of any mind-independent moral fact or value property might be justified, and it is equally unclear how it might ground a moral claim. The alleged advantage of moral realism is that it provides a "robust" foundation for the universality of moral judgments, for it makes their objective truth (seemingly) completely independent from the standpoint of the judging subject (and dependent on subject-independent facts instead). However, the alleged subject-independency comes at a price: Moral realists face the question how these moral facts should be epistemically accessible to us. Consequently, moral realism is usually coupled with epistemic intuitionism. As is well-known, this again raises the question why moral intuitions should be a reliable basis for moral judgments, and how we should deal with the factual plurality of these intuitions.

Apart from this general point, epistemic intuitionism is (*secondly*) particularly unhelpful when it comes to understanding and justifying human dignity as well as its normative consequences. Plainly, intuitions tend to differ strongly when it comes to such consequences: Think, for instance, of paradigm cases like "peep shows", "dwarf tossing", "airplane shootdowns" or euthanasia, where not only diverging but indeed opposite conclusions have been and continue to be drawn from human dignity. In short, many people just do not have a clear intuition about these matters. Of course I am not claiming that any theory of human dignity can solve such matters once and for all. However, it should at least give us some clear guidance how to deal with them, and such a normative criterion can precisely not be found in our intuitions.

This leads to a *third* point: Provided that human dignity were a subject-independent value, it would neither be the only nor just any value. It would have to be a value "high" or "fundamental" enough to ground or involve *categorical* moral duties. In other words, the duties that follow from the value of human dignity would override the duties that follow from any other moral value. It is dubitable whether, on a moral realist account, this special place of human dignity in the entirety of moral values might be justified: How could one moral fact be morally superior to all other moral facts, or generate demands with a higher obligatory force?

Finally, I wish to add a *fourth* point that does not concern value realism specifically but the role of values in a moral theory of human dignity more generally. Briefly, we might wonder what would be lost in an account of human dignity that does not recur to values in some sense.[557] The basic idea is simply that the *point* of ascribing human dignity to human beings is to articulate the fundamental assumption that there is a certain moral standard of how human beings morally ought to treat one another, namely so as to respect each other's legitimate moral claims. So the central concepts in a theory of human dignity are the concepts of *moral duties* and (correlatively) of *moral rights* or entitlements, and it is at least not immediately obvious why one should have to recur to values in order to explicate and justify these rights and duties. I assume that the best way to prove this assumption right is to show how this is possible: The moral status of human dignity can and should be justified by a self-reflexive method of argumentation that grounds its universal validity in the necessary practical self-understanding of human agents. Let us next consider what such a justification involves more specifically.

3. The Universality and Necessity of Human Dignity on a Self-Reflexive Account

In current debates it is often maintained that human dignity is "absolute".[558] This claim may be understood in at least three ways.[559] It might mean, *firstly*, that the *validity* of the moral idea of human dignity is absolute in the sense that it does not depend on its actual recognition. So it is not grounded in (for instance) convention, positive law or some social contract. *Secondly*, the *criteria for the ascription* of human dignity may be considered as absolute in the sense that they belong to human beings as human beings (otherwise human dignity could not be universal).

[557] Addressing this question thoroughly would require an extensive discussion of the role of values in moral theory that would lead us too far astray here.
[558] This especially holds for debates in Germany, due to the special status of human dignity in the German Basic Law. See below, Section 5. For a recent discussion about the absoluteness or contingency of human dignity see Brandhorst / Weber-Guskar 2017.
[559] See on what follows Brandhorst / Weber-Guskar 2017a, 10-13.

So, whatever these criteria are, they cannot be relative to the particular properties of this or that human being. *Finally*, the *normative implications* of human dignity might be considered as absolute: Just as human dignity does not come in grades, so neither do the obligations that follow from it come in grades.

These are different claims and they must not be mixed up. Accordingly, in what follows I will not use the term "absolute(ness)" in order to avoid confusion. Instead I will refer to the *universality, necessity* and *overridingness* of the *ascription, validity* and *normative consequences* of human dignity. Let us now consider the relevant concepts of universality and necessity more closely.

The concepts of necessity and contingency can be understood differently in moral philosophy. One might for instance think of the necessity of the course of history, or of the metaphysical necessity of some moral fact. Here I understand them as *qualifications of claims to validity*, as expressed in (moral) propositions or judgments. A proposition or judgment is usually regarded as necessary if its negation implies a logical contradiction (in thought) so that it cannot be consistently upheld or meaningfully thought. So necessity is a particularly strong claim to validity: What is necessarily valid *cannot* be otherwise or wrong because it *cannot be thought* as being otherwise. In contrast to this, every judgment to which this criterion does not apply is contingently valid (which is the vast majority of judgments): Everything which is not necessary is contingent. Needless to say, "contingent" is not to be mixed up with "arbitrary". So there might be very good reasons for holding something to be right or true and yet not necessarily true. Having clarified this, let us now consider more closely how the universality and necessity of the dignity principle relate on a reflexive approach. Again a brief comparison with moral realism will prove helpful.

"All human beings have human dignity" is a moral judgment or principle. A fundamental difference between realist value conceptions and self-reflexive status conceptions of human dignity regards the understanding of the "truth-makers" of that principle. As explained above, when a moral realist states that human dignity is necessary and universal he or she first of all refers to the necessary and universal

possession of this value, which presupposes a metaphysical understanding of human nature. This *metaphysical* universality and necessity of human dignity grounds (or is supposed to ground) the universal and necessary *validity* of the respective judgment. The primary idea of universality and necessity is therefore a metaphysical one, of which the validity of the judgment is derivative.

On a self-reflexive account, by contrast, the universality and necessity of human dignity denote *nothing but* the universal and necessary validity of the judgment itself, for in a "self-reflexive universe" there are no moral facts "out there" that the judging person might draw upon. On such an account, the necessity of the dignity principle is *conceptually implied* in its universality: A practical principle is universally valid if it is true in the judgment of every human being. A justification of the universality of human dignity therefore has to show that the relevant principle cannot consistently be denied by anyone capable of practical judgment – in other words, that it is necessarily valid (in their judgment). Strictly speaking, the principle does then not apply to all human beings but to all human beings capable of practical judgment (because its applicability is its validity, and it is valid only in judgment): Only they can be the addressees of moral duties properly understood; at the same time, only they ought to be protected by the moral demand to respect human dignity. Hence they constitute the relevant scope of universality.[560]

Why should we think that human dignity is necessary? Continuing the preceding line of argument, this question points to the need to establish an "independent variable"[561] of the dignity principle: *By reference to what* can we establish the necessary validity of the assumption that human dignity ought to be attributed to every human being? Such a justification may only make recourse to features that the judging human beings share, regardless of any individual and contextual factors. At the same time those need to be features that these beings do not contingently but necessarily have, i.e. which are constitutive for them *as beings that make practical*

[560] In what follows I will not distinguish between human beings and persons (or agents), i.e. human beings that are capable to make practical judgments. It is clear that the moral status of human beings with none or restricted cognitive capacities is a topic of its own. See on this Düwell 2008, 100-115.
[561] See Gewirth 1978, 5.

judgments. Consequently, the argument needs to be self-reflexive: The justification needs to refer back to the necessary practical self-understanding of those *for whom* the relevant principle is supposed to be valid, i.e. who are supposed to recognize its truth. It has to be shown that our practical self-understanding necessarily implies the recognition of the dignity principle.

Philosophical justifications that involve the claim to have established the necessity of the justified assumption differ from justifications that involve a weaker claim to validity in the following way: They (declaredly) rest on incircumventable presuppositions, i.e. they rest only on (formal and substantive) premises that cannot consistently or meaningfully be rejected by anyone. However, at this point I need to add an important qualification: In theoretical philosophy, the criterion for determining whether some theoretical principle is necessary is whether it is true "in all possible worlds". By contrast, determining the necessity of a moral-practical principle by reference to this criterion would mean to miss the very point of moral questions from the start. For the fundamental question of morality is how *we*, i.e. beings with certain characteristics, capabilities etc. morally ought to act.[562] Counterfactual figures of thought in ethics – for instance Kant's "purely rational beings" – are meaningful only insofar as they help to clarify moral questions *for us*: The question is always why we, as finite, needy, vulnerable and socially situated agents, should consider ourselves to be morally obligated to act in certain ways. So considered, the point of reference of a necessary practical judgment are not abstract beings "in all possible worlds" but we, or every being that for contingent reasons is similar to us in practically relevant ways (which, of course, are in need of specification). The starting point of any justification of a claim to necessity is therefore always contingent, yet not in the sense of contingent validity. For this contingent starting point can itself not be justified but constitutes the very frame for thinking meaningfully about moral questions in the first place. Accordingly, this

[562] Of course these characteristics and, accordingly, the scope of this "we" can be determined in different ways. The point is that any such attempt will be built on what characterizes human beings (and maybe also certain animals) in *this* world, as we know and can recognize it.

does not mean that the conclusion of a moral justification is also always only contingently valid. Rather, such a justification rests on two assumptions: *Firstly*, we necessarily have to accept the validity of certain principles *within* that contingent yet inescapably given frame; and *secondly*, that the argument that is developed *on this basis* does not depend on any contingent premises.

It is tempting to draw the false conclusion from the abovementioned requirement that human dignity must not depend on contingent presuppositions *at all*. This is unconvincing: Even if one assumes (as I do) that the moral principle of human dignity has a "necessary core", its validity, content and normative consequences remain bound to numerous contingent factors, such as a certain constitution of human reason that is itself contingent and arguably also to certain socio-historical presuppositions. The task is to interpret the relationship between the contingent and necessary facets of the idea of human dignity in a sufficiently nuanced way, which is one of the core merits of a self-reflexive account of human dignity.[563] This should become clear in what follows.

4. A Self-Reflexive, Kantian Approach to Human Dignity

So far I have argued that human dignity should be interpreted as a status rather than as a value, that the affirmation of this status lies at the core of the moral principle to respect every human being in a certain way ("dignity principle"), and that the most promising strategy to justify the universal and necessary validity of this principle is a self-reflexive method of justification. In the history of philosophical thought, it is Kant's practical philosophy that stands for the centrality and systematic connection of the moral idea of *respect for persons* or "humanity" and a *self-reflexive* method of moral reasoning that grounds the validity of this idea in the practical self-understanding of rational agents. This is why it is fruitful to turn to Kant's philosophy when it comes to elucidating our modern, moral understanding of

[563] See further on this Düwell / Göbel 2017.

human dignity as well as its relationship to human rights. My claim is that a concept of human dignity as a moral status or principle in the sense advocated here lies at the heart of Kant's practical philosophy, although in order to show that it is a principle of human rights one necessarily has to go a systematic step beyond Kant's thought. I will now first clarify the systematic status of this claim by briefly turning to current debates about Kant, human dignity and human rights.

4.1 Human Dignity and Human Rights in Kant? A Look at Current Debates

Kant's practical philosophy is one of *the* historico-philosophical reference points for our modern understanding of human dignity and human rights. It is thereby often presupposed that he understood human dignity as an "absolute value"[564]. In numerous contributions to the human rights literature one encounters some version of the following view:

According to Kant, human dignity is an absolute value that all human beings possess, as opposed to the relative value or "price" of "things". Human beings have this special value because they are (partly) rational and as such capable of moral self-legislation or autonomy. It is because human beings have the value of human dignity that they morally ought to be treated as "ends in themselves", i.e. "never merely as a means but always also as an end". This moral idea also underlies Kant's human rights-based conception of law, an interpretation that is further backed by his affirmation of an innate right to freedom of all human beings in the *Doctrine of Right*.

The last years have seen an intensified scholarly discussion about whether this view is indeed rightly attributed to Kant.[565] This discussion is considerably complex, due to the variety of interpretative issues at stake as well as the intricate textual basis. Here I am concerned with these debates only insofar as they bear on my claim that a status-concept of human dignity in the sense explained above is Kantian. In order to

[564] For a critique of this view see Sensen 2011. See also Section 4.1.1.
[565] See e.g. the contributions in Mosayebi 2018.

see this more clearly, it is crucial to keep two pairs of questions apart in what follows: *Firstly*, we must distinguish the exegetical question whether Kant advocated a modern idea of human dignity and human rights from the systematic question whether these ideas systematically follow from certain elements of his philosophy. *Secondly*, what regards the exegetical question, we must distinguish the question how Kant used the terms '(human) dignity' and 'human right(s)' from the question whether we find a concept of human dignity and human rights in his work. Finally, although the questions whether Kant advocated a modern idea of human dignity and a modern idea of human rights are interrelated, these questions must yet be kept apart. I will therefore address them separately in what follows. Once again, the goal of this section is not to develop a piece of text interpretation but to make a systematic point so there is no need to go into text-exegetical matters in much detail.

4.1.1 Human Dignity in Kant: Concept versus Term

With regard to Kant's understanding of human dignity the pertinent critique has been advanced by Oliver Sensen.[566] Based on a detailed analysis of how Kant uses the *term* 'dignity' throughout his writings, Sensen argues "that Kant's conception of dignity is commonly misunderstood"[567], namely so as to conform to the "contemporary paradigm"[568] of human dignity. This contemporary paradigm, according to Sensen, is the view that "human dignity is a non-relational value property human beings possess that generates normative requirements to respect them"[569]. We should first of all note then that Sensen's analysis is restricted to how Kant used the term 'dignity', and that he identifies "the" modern dignity paradigm with a value-concept of human dignity only. It is important to keep this in mind in what follows. Sensen's thesis is that Kant's concept of human dignity that underlies

[566] See Sensen 2008, Sensen 2009, Sensen 2011 and Sensen 2011a.
[567] Sensen 2009, 309.
[568] Sensen 2009, 312.
[569] Sensen 2009, 312.

his usage of the term 'dignity' should not be identified with a contemporary "value paradigm" of human dignity.

Against this, Sensen argues that Kant championed a "traditional", Ciceronian dignity paradigm that differs from the "contemporary" paradigm in four core respects. *Firstly*, on the "traditional" view dignity is not an absolute inner value but "a relational property of being elevated"[570]: Human beings are raised upon the rest of nature in virtue of being free. Importantly, this property does in itself not have any normative implications, i.e. "it does not yet imply anything about how human beings should treat each other."[571] *Secondly*, dignity is neither inalienable nor independent of personal conduct. Rather, everyone has an "initial dignity" that however can be lost. Only some human beings succeed in realizing it and hence attain dignity at a higher level (one-level versus two-level conception of dignity). *Thirdly*, dignity does not ground rights but duties. *Finally*, these are not duties towards others but duties towards oneself. According to Sensen's analysis, Kant used the term 'dignity' in this traditional meaning.

Apart from his text-exegesis, Sensen advances a substantive argument that demonstrates the incompatibility of the "contemporary" dignity paradigm with two fundamental assumptions of Kant's practical philosophy. According to Sensen, it *firstly* conflicts with Kant's claim of the priority of duties to rights; and *secondly*, it replaces the absolute normative priority of the Categorical Imperative (i.e. a principle of right) with a value (i.e. a principle of the good).[572] I will briefly explain these two assumptions in turn.

In the *Doctrine of Right* Kant famously states:

> But why is the doctrine of morals usually called […] a doctrine of *duties* and not also a doctrine of *rights*, even though rights have reference to duties? – The reason is that we know our own freedom (from which all moral laws, and so all rights as well as duties proceed) only through the *moral imperative, which is a proposition commanding duty*, from which the

[570] Sensen 2009, 310.
[571] Sensen 2009, 313.
[572] See on this Sensen 2009, 317-318.

> capacity for putting others under obligation, that is, the concept of a right, can afterwards be explicated. (*MM* 239)[573]

On the contemporary view, human dignity is the ground of (moral) human rights, which again imply the correlative moral duty to act in accordance with the human rights of others. So rights come prior to duties in the justificatory chain; duties are derivative of rights. Kant conceives of this relationship in reverse order: The highest moral principle – the moral law, or for sensual-rational beings the Categorical Imperative – obligates every person to act in a morally good way (i.e. in accordance with the moral law for the sake of the moral law).[574] In brief, according to this view the notion of having a right to something is derivative of having a duty to something. The deeper reasons for this view need not concern us here; it suffices to note that Kant's ethics is notoriously "duty-centerd".

The *second* point that Sensen raises is more fundamental. Kant rigorously rejects the idea that what is morally right might be derived from what is morally good. In a nutshell, the reason is this: According to Kant, an action is morally good (as different from "pleasurable") precisely if it is performed "for the sake of the moral law", i.e. the action is "from duty". Only then is the will determined *a priori*, i.e. by its formal accordance with the moral law alone. In contrast to this, Kant holds that material (empirical) reasons or motives are altogether reducible to pursuing pleasure or seeking to avoid unpleasure, i.e. to amoral or even unmoral reasons or motives. Therefore, if one attempted to determine what is morally good without first determining *a priori* what is morally right, then one could only proceed from precisely those material determining grounds of the will. As a consequence, what is good would become what is pleasurable, and the autonomy of the will would become heteronomy. This is why Kant maintains that the highest moral principle

[573] Kant, *The Metaphysics of Morals*, hereinafter *MM*. All translations are from Immanuel Kant, *Practical Philosophy*, ed. M. Gregor (Kant 1999). Hereinafter I will refer to the pagination in the Akademie-Ausgabe and quote page numbers in brackets in the main text.

[574] More precisely, it obligates every person to *will* in a morally good way, where willing implies "the summoning of all means insofar as they are in our control". Kant, *Groundwork of the Metaphysics of Morals*, 394 (hereinafter *G*).

must be a principle of right (a law), not a principle of the good:[575] What is morally good follows (only) from the Categorical Imperative, not the other way around. This is fundamentally at odds with the assumption that the value of human dignity might ground moral duties or rights, according to Kant. Hence Sensen's conclusion:

> This general framework, in which a principle of right is prior to the good and duties are prior to rights […], is one of the strongest arguments against the view that Kant put forward the contemporary conception of dignity. The contemporary conception of dignity places the good prior to the right, and rights prior to duties. The absolute value of human beings (the good) generates what is right (to respect others), and this value generates rights (entitlements), from which one's duties towards others can be derived.[576]

Sensen's critique strikes me as entirely convincing as far as it goes.[577] However, it is important to be clear about its scope. Several claims need to be kept apart: *Firstly*, Kant's concept of human dignity that underlies his usage of the *term* 'dignity' is a traditional, Ciceronian rather than a contemporary one. Therefore, the assumption that Kant endorsed a modern, moral concept of human dignity, independently of how he used the term, must be distinguished from the different assumption that this is what Kant took 'dignity' to mean. Sensen has proven the second assumption to be wrong but not the first one (nor did he attempt to do so). My claim is that a modern, moral concept of human dignity lies at the heart of Kant's practical philosophy, independently of how he uses the term 'dignity', and nothing in Sensen's argument suggests otherwise. *Secondly*, Sensen's second substantive objection shows that it cannot coherently be maintained that Kant

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[575] Kant expresses this assumption in a prominent passage from the *Critique of Practical Reason* (hereinafter *CPrR*), in which he explains the "*paradox of method* in a *Critique of Practical Reason* – namely, that the concept of good and evil must not be determined before the moral law (for which, as it would seem, this concept would have to be made the basis) but only (as was done here) after it and by means of it." *CPrR* 62, emphasis added, original emphasis deleted. In this sense Kant already writes in the *Groundwork*: "[N]othing can have a worth other than that which the law determines for it." (*G* 436) The justification of the (highest) moral ought does here precisely not proceed from a highest good or absolute value. Rather, the moral ought does itself serve as the highest (and sole) criterion for determining what is morally good – which is nothing but a good will, i.e. a will that follows the highest principle of right or duty from duty.

[576] Sensen 2009, 317.

[577] Sensen's critique has been affirmatively taken up by a number of Kant scholars. See, for instance, Horn 2015.

endorsed a value-concept of human dignity. This is correct. However, clearly this is not the only way how to interpret the modern dignity paradigm, let alone the most philosophically plausible way. By contrast, it is precisely a modern status-concept of human dignity that can be explicated by reference to Kant's philosophy. *Finally*, we need to distinguish the question whether the Categorical Imperative is grounded in some value (which it clearly is not) from the question about the "duty-centeredness" of Kant's practical philosophy (rights derive from duties, not the other way around). This raises the systematic question whether it is possible to develop an interpretation of the highest principle of morality as a principle of (human) rights, based on Kantian premises – which, as Gewirth has shown, can be done. So, in short, while Sensen is right to point out that there is an important difference between Kant's and our contemporary understanding of human dignity what regards its function of grounding rights, from a systematic perspective this difference is less of a problem.

To sum up: Sensen's critique has the important merit that it has helped to clean up with certain misunderstandings what regards Kant's usage of the term 'dignity'. It does not affect – and indirectly even supports – the systematically more interesting point that it is precisely a status-concept of human dignity that follows from Kantian premises.

4.1.2 Human Rights in Kant?

Let us next turn to the question whether Kant advocated a modern human rights idea.[578] Regardless of the countless references to Kant in the human rights literature this question is strongly disputed among Kant-scholars. As indicated above, the discussion is considerably complex so I confine myself to a brief sketch here.

[578] For a recent discussion both of this question and the systematic potential of Kant's thought for interpreting the contemporary idea of human rights see Mosayebi 2018.

Those scholars who see in Kant an early advocate of the modern human rights idea[579] typically refer to his thoughts on the law of peoples in *On Perpetual Peace*, to the innate right to freedom from the *Doctrine of Right* (*MM* 237-238) and to the way he justifies the *exeundum* in the same work (*MM* 306). In addition to these elements of Kant's legal and political thought, they emphasize his idea of rational beings as "ends in themselves" (*G* 428-431), of the "dignity" of rational beings (*G* 434-440) and of "respect for persons" (*G* 401, *CPrR* 71-89) – all of which figure in contemporary conceptions of human rights. Apart from this, there is the general expectation that a moral universalist like Kant should be a political or rights-universalist as well[580] and that under the terms of his ethical standpoint he should at least defend a moral conception of law, if not a human rights-based conception.

Against this it has for instance been objected that Kant did not work out a human rights theory, nor did he explicitly and systematically introduce a concept of human rights. He uses expressions like "*Menschenrecht*", yet not in the sense of a subjective right of individuals. He does not develop a list of human rights as did for instance John Locke and political declarations at the time. Finally, he does not express his unequivocal commitment to (the major implications of) the human rights idea.[581] It has further been objected that the innate right to freedom is not properly interpreted as a subjective (moral) right in the first place, and that it does not play any role in the main text of the *Doctrine of Right* and hence in Kant's state.[582] Furthermore, Kant does not grant fundamental rights to human beings but only to citizens, and of course there is his rigid rejection of any right to resistance, which contradicts the basic moral and legal implications of a modern human rights idea.

From a bird's eye perspective (and leaving any further details aside) we are confronted with the following interpretative situation: From a number of theorems and assumptions that lie at the heart of Kant's ethics one should expect that Kant

[579] See for instance Höffe 2006.
[580] Cf. Horn 2014, 68.
[581] Cf. Horn 2014, 68-84.
[582] See Flikschuh 2015, 662-663 and Horn 2014, 115.

defended some idea of moral human rights, just as a human rights-based conception of law. This is to say that it seems strongly contradictory to hold that Kant defends, for instance, the absolute normative priority of the Categorical Imperative as well as the universality and categoricity of moral norms but assumes at the same time that a justification of law is independent of the Categorical Imperative. However, great parts of the textual basis of his politico-legal writings fail to meet this expectation – at the very least, they confront us with an ambiguous picture. What regards the systematic consequences of this, again several questions need to be kept apart. To claim that Kant *did* advocate a human rights idea seems highly dubitable, judged from the textual basis.[583] Apart from that there is the question whether Kant held the view that the Categorical Imperative is not only the highest principle of morality but also a principle that underlies law in some sense, which clearly follows from his early ethical writings but is to some extent an open question if one takes his later political writings into account. However, even if one holds the view that Kant did give up the categoricity of the Categorical Imperative in his later writings, there remains the crucial systematic question whether a human rights conception follows systematically from core theorems of his practical thought, i.e. whether it is possible to reconstruct a Kantian theory of human rights, starting from Kant's premises: Does a human rights theory follow from certain core elements of Kant's philosophical thinking (which would be a "Kantian" as distinguished from "Kant's" theory)? As this is highly disputed as well, let me finally address the possibility and plausibility of such a view.

Whether one deems a Kantian theory of human rights to be possible largely depends on what one understands as the core elements of his practical philosophy. For instance, Andrea Sangiovanni has recently defended the position that "there cannot be a truly Kantian theory of human rights"[584], because on his view it would only then be "truly Kantian" if it

[583] Cf. Flikschuh 2015, Horn 2014 and Sangiovanni 2015.
[584] Sangiovanni 2015.

> remains faithful to three constituent planks of Kant's practical philosophy, namely, (1) Kant's division between the domain of morality and the domain of right, (2) Kant's arguments for our moral obligation to exit the state of nature, and (3) Kant's arguments for unitary sovereignty.[585]

I do not agree with how Sangiovanni reconstructs these aspects but this would lead us too much into details here. A more fundamental point of disagreement is that I do not regard these theorems as "constituent planks of Kant's practical philosophy". They might be constitutive of his *political* philosophy (the first one clearly is). However, this just pushes the question one level up: How far can and should Kant's political philosophy be considered a "constituent plank" of his practical philosophy at all? In my view, in order to keep the distinction between "Kant's" and "Kantian" philosophy productive we should (re)construct the relevant Kantian premises as cautiously and sparingly as possible. Briefly, in light of the well-known interpretative and substantive problems with the *Doctrine of Right* this clearly speaks for a certain priority of his (early) ethical writings when it comes to formulating these premises: A systematic further development of Kant's philosophy ought to first of all take into account the views that he defends in the *Groundwork* and in the *Critique of Practical Reason*. Starting from here, it is at least an open question whether and how Kant's later political writings are compatible with these earlier views, for instance with regard to the Categorical Imperative as the sole principle of morality and as the source of categorical moral duties, which consequently cannot be independent from legal duties.

I want to suggest then that there are (at least) two such premises that arise from Kant's practical philosophy as a whole. The *first* premise is his method of transcendental arguing or the way he ties his ethical considerations to what it means for everyone of us to be a being with practical reason. The *second* premise is the categoricity of moral norms, as instantiated first and foremostly by the Categorical Imperative. From an exegetical perspective, there are strong reasons to conclude that Kant did not advocate an idea of human rights. However, starting from these

[585] Sangiovanni 2015, 671.

systematic premises it becomes clear that and how a human rights idea substantively follows from core elements of his practical philosophy. I will explain this in what follows.

4.2 The Self-Reflexive Moral Principle of Respect for Persons

In the preceding two sections I have clarified my basic stance on current debates about Kant, human dignity and human rights by mainly pointing out (negatively) the conceptual and systematic *limits* of certain lines of critique. From this arises the positive task to show that and how Kant's practical philosophy provides a serious basis for a systematic philosophical interpretation of the modern, moral understanding of human dignity and human rights. In what follows I will outline the core elements of what I consider as an adequate reconstruction of a Kantian understanding of human dignity. At the center of this understanding lies the *moral principle of respect for persons*, as expressed in the so-called "Humanity Formula" of the Categorical Imperative. Rather than being grounded in human dignity, as is often assumed, this principle *is* a principle of human dignity in the sense that it expresses the fundamental moral obligation to attribute a certain moral status to every human being. The key to a Kantian conception of human dignity does therefore not lie in the oft-cited passages from the *Groundwork* and the *Metaphysics of Morals* where Kant elaborates on the "absolute value" of persons. Rather than considering these passages largely in isolation from the rest of his practical thought – which, as we have already seen, leads to dubitable results – I suggest to adopt a broader perspective on Kant's work: The crucial questions are what *systematic place* the principle of respect for persons occupies in Kant's moral philosophy and how he *develops* this principle with the help of a *self-reflexive* movement of thought. I will address these questions in turn in the next two sections. Drawing on Gewirth, I then take up the question how it is possible, based on these Kantian premises, to justify a principle of human rights.

4.2.1 The Principle of Respect for Persons as the Highest Moral Principle

The moral principle of respect for persons is expressed in the so-called "Humanity Formula" of the Categorical Imperative – also referred to as "End-in-itself Formula" – that Kant develops in the *Groundwork*. It states:

> So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means. (*G* 429, emphasis deleted)

Although it does not contain the term 'respect', the content of this formula is usually (and rightly) understood as the moral obligation to respect human beings or persons in a particular way, namely as "ends in themselves" or simply *as* persons (see below).[586] I shall add two clarificatory notes right away. *Firstly*, the principle of respect for persons as expressed in this formula needs to be distinguished from Kant's concept of respect (for persons or the moral law) as the (sole) incentive or drive to morally good action. While Kant uses the term 'respect' [*Achtung*] in the latter sense, what I call the principle of respect in Kant is a non-literal circumscription of the content of the Humanity Formula. We can leave the question how these two concepts of respect relate to one another unconsidered for present purposes.[587] *Secondly*, the term 'humanity' is not an umbrella term that signifies the collectivity of all human beings (in the sense of "humankind"). Rather, it signifies the capacity of *pure practical reason*.[588] Let us now first consider more closely the systematic place of this principle in Kant's ethics.

It is important to note that the moral principle of respect for persons does not *follow* in some sense *from* the moral law. That is to say, it is not a specific moral obligation

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[586] Cf. *G* 428-431.

[587] Elsewhere I have argued that the moral obligation *to respect* human beings or persons and the moral obligation to *act out of respect* for human beings or persons come down to the same "foundational claim" on Kantian premises: They constitute two aspects of one and the same moral obligation to respect human beings as holders of moral rights. See Göbel 2017.

[588] This is how Kant commonly uses the term 'humanity'. See e.g. Hill 1992, 38-41, Hruschka 2002, 476 and Mohr 2007, 18-19. See also, for instance, *MM* 429: "The greatest violation of a human being's duty to himself *regarded merely as a moral being (the humanity in his own person)* is the contrary of truthfulness, lying […]." (emphasis added, original emphasis deleted)

alongside other obligations. Rather, it *is* the supreme principle of morality. I will now first explain this by briefly recalling the context of Kant's formulation of this principle in the *Groundwork*.

As is well-known, the goal of the *Groundwork* is "the search for and establishment of the *supreme principle of morality*" (*G* 392). The "search" for this principle is equivalent to an analysis of its meaning. To "establish" it means to justify its validity, i.e. to show that all rational beings are under a moral obligation to act according to this principle. Here we are only concerned with the first task, i.e. the "idea" of a supreme principle of morality rather than its "reality". Kant accomplishes this task by formulating the Categorical Imperative: It is the supreme principle of morality, which for beings that are not purely rational (like us) has the form of an imperative. As Kant notes, "[t]here is […] only a single categorical imperative and it is this: act only in accordance with that maxim through which you can at the same time will that it become a universal law." (*G* 421, emphasis deleted) Essentially, what this principle demands is that we adopt a universal standpoint in our actions.

After he has advanced this so-called "Universality Formula" of the Categorical Imperative, Kant develops three further "formulae" of the very same principle, one of which is the Humanity Formula. It is important to note that, according to Kant, these formulas are *equivalent*: "The […] three ways of representing the principle of morality are at bottom only so many formulae *of the very same law*, and any one of them of itself unites the other two in it." (*G* 436, emphasis added) He further notes that the difference between them "is […] subjectively rather than objectively practical, intended namely to bring an idea of reason closer to intuition (by a certain analogy) and thereby to feeling." (*G* 436) So the principle of respect for persons *is* the supreme moral principle, according to Kant.

What does it mean that the Categorical Imperative is the *highest* moral principle? Roughly, one might conceive of the supremacy of a moral principle or norm on two

models, only one of which adequately represents Kant's view.[589] *Firstly*, one might think of the entirety of moral norms as a hierarchy of moral norms, as comparable to a value hierarchy, with the Categorical Imperative occupying a special place within that hierarchy. The place of a norm within this hierarchy depends on the strength of its obligatory force, with higher norms "trumping" lower ones in case of moral conflict. On this model, the Categorical Imperative would be the highest principle of morality in the sense that it sits at the top of the hierarchy: It would be a moral norm *alongside* all other moral norms, with the difference that any moral obligation that follows from it trumps or overrides any moral obligation that follows from a norm that is lower in the hierarchy. Essentially, this would also make up its categoricity. *Secondly*, one might think of the Categorical Imperative as a moral principle that underlies this hierarchy rather than being a part of it, as the condition of its possibility. The difference to the first model might be illustrated with the help of a metaphor: If we picture this hierarchy as a (real) pyramid, then the Categorical Imperative would not be a stone in the pyramid (constituting its top) but the ground upon which it is build, so as to constitute a common ground for all stones and for the pyramid as a whole. The phrase of a *fundamental* moral principle captures this meaning better than the phrase of a highest or supreme moral principle (which is equivalent, of course). Leaving the picture behind again, on this model the Categorical Imperative would be the supreme principle of morality in that it expresses the fundamental idea of *being morally obligated at all*. For if there is no Categorical Imperative (or moral law) then there is no morality at all. So understood, the categoricity of the supreme moral principle would essentially mean that there is an unconditional moral obligation to adopt a moral standpoint in one's actions.

This comparison might be refined in many respects yet here the important point is what follows from it with regard to our understanding of human dignity. On the *first* model, the moral principle of human dignity – i.e. the moral obligation to respect persons as persons – would be a principle that concerns one aspect of morality.

[589] See on what follows also Rothhaar 2015, 202-206 and 325.

According to the *second* understanding, it would be a principle that underlies all moral claims in that it expresses as it were what morality is all about: The point of any moral norm is to express respect for persons. It is this latter view that constitutes Kant's view. I will say more about its practical implications below.[590]

So far I have argued that Kant's principle of respect for persons *is* the moral principle of human dignity, and that it does not express a specific moral duty among others but a moral obligation that is fundamental in the sense that it underlies all moral claims.

What does it mean that all human beings morally ought to act so as to "use humanity […] always at the same time as an end" (*G* 429)? To be clear about this, I am not (yet) concerned here with the justification of this principle nor with its more concrete normative consequences (which, as indicated above, I will address subsequently by reference to Gewirth's philosophy). The question at this point is what the Humanity Formula means more fundamentally, which becomes clear if we focus on how Kant develops this principle with the help of a self-reflexive or transcendental movement of thought. I will explain this in what follows.

4.2.2 The Self-Reflexive Form of the Moral Principle of Respect for Persons

What do the general demands of the moral principle of respect for persons entail? A useful way to approach this question is through recalling two fundamental premises that underlie Kant's practical philosophy, an ethical and a psychological or action-theoretical premise.[591] The *first*, ethical premise is: If there is morality at all, then moral norms must have two characteristic features, necessity and universality or strict generality. Moral principles express that certain actions are *objectively necessary*, i.e. it is morally obligatory to perform (or not to perform) them

[590] See Section 5.

[591] Kant has not systematically worked out a theory of action or motivation. For a systematic reconstruction of such a theory from Kant's work see Willaschek 1992.

irrespective of subjective, contingent inclinations or interests. So "unless we want to deny to the concept of morality any truth and any relation to some possible object, we cannot dispute that its law is so extensive in its import that it must hold […] not merely under contingent conditions and with exceptions but with *absolute necessity*" (*G* 408). The necessity of the moral law implies that it demands certain actions *unconditionally* or *categorically*: "The categorical imperative would be that which represented an action as objectively necessary of itself, without reference to another end" (*G* 414); "*it is based on no interest* and therefore, among all possible imperatives, can alone be *unconditional*" (*G* 432). The unconditional validity of the categorical imperative again implies its universality: Because its validity is independent of contingent subjective preconditions, "it must hold not only for human beings but for all *rational beings as such*" (*G* 408). The objectivity, necessity, universality and categoricity of moral norms are therefore inseparable on a Kantian approach.

The *second*, psychological or action-theoretical premise is: *Every* human action implies to set oneself an *end*. Human beings – we – are agents, i.e. beings that (have the capacity to) act. Morality is about acting, i.e. about how we morally ought to act. We act by pursuing ends, which (importantly) we set ourselves. This is an essential part of what makes us *rational* agents or beings with practical reason – in brief: beings that are not determined by their impulses so as to "act" in a quasi-automatic fashion (like animals, on Kant's view) but are "practically free" in that we choose what ends to pursue and by what means.[592] To set oneself an end therefore always implies *practical reasoning* (i.e. action-oriented reasoning, as distinguished from reasoning that aims primarily at theoretical understanding). We are beings that act for reasons. In order to see how these two premises bear upon the

[592] See e.g. *G* 446: "*Will* is a kind of causality of living beings insofar as they are rational, and *freedom* would be that property of such causality that it can be efficient independently of alien causes *determining* it, just as *natural necessity* is the property of the causality of of all nonrational beings to be determined to activity by the influence of alien causes."

question at hand, let us now first consider the second premise in some more detail.[593]

I set myself an end because I judge that it is good (for me), i.e. that it is worthy to pursue it, from my perspective. "Good" or "worthy" does not (necessarily) mean "morally good" or "morally worthy" here. Rather, it first of all simply means that I set myself an end because I presuppose that pursuing this end has some worth (for me). Accordingly, any action involves some kind of practical *judgment*: As beings that act for reasons, we judge that, from our perspective, it is good (for us) to pursue certain ends, and what kinds of actions the pursuance of these ends requires. Kant calls such judgments "imperatives" (or "objective practical principles"). The key to understanding their imperative or "necessitating" form is Kant's concept of "practical necessity". An action is "practically necessary" if it is necessary to perform it, *from the perspective of the agent*, i.e. "in the judgment" of the agent (she judges that it is necessary for her to perform the relevant action or pursue the relevant end). For instance, if I want to stay slim (i.e. I set myself the end of staying slim) then it is practically necessary for me to eat less candy, to go for a run from time to time and the like – provided that I am serious about my end of staying slim and pursue it in a reasonable fashion. Such practical judgments confront us (human beings) as an ought or as a "necessitation" because we are not purely rational – in short, we do not always do what is good (for us) even though we recognize that it is good (for us):

> All imperatives are expressed by an *ought* and indicate by this the relation of an objective law of reason to a will that by its subjective constitution is not necessarily determined by it (a necessitation). They say that to do or to omit something would be good, but they say it to a will that does not always do something just because it is represented to it that it would be good to do that thing. (*G* 413)

Crucially, who is "speaking" here – "All imperatives […] say that […]" – is not some other person but the agent himself or herself, i.e. his or her practical reason.

[593] The following reconstruction is guided by Steigleder 2002, 23-35 and 59-67.

Accordingly, an imperative as Kant conceives of it is not a judgment or principle that confronts the agent in an external fashion: *I* judge that *I* ought to eat less candy *because I* want to stay slim. There is an imperative *for me* because I have set myself this end. So imperatives express what is practically necessary for an agent to do, from her perspective; they are practical judgments that an agent makes, from her perspective, about herself.[594] An imperative is a *reflexive judgment*.[595]

Kant famously distinguishes between two kinds of imperatives: "[A]ll imperatives command either *hypothetically* or *categorically*." (*G* 414) The key to understanding their difference is once again the concept of practical necessity, or (in other words) the question why it is practically necessary for me to follow an imperative: Why ought I do what an imperative (my own reason) tells me to do? Let us begin with hypothetical imperatives. Human beings pursue all kinds of ends, depending on their subjective preferences, contingent personal interests under contingent personal circumstances, in short: their "inclinations". Kant calls such ends that are based upon subjective inclinations "subjective", "material" or "relative ends": They are "ends that a rational being proposes at his discretion as *effects* of his actions" (*G* 428). The worth or value of these ends – the reason why it is worthy to pursue them, from the perspective of the agent – is thus relative to or conditional on the individual preferences of this specific agent. Accordingly, the imperative or practical judgment that presents an action as a necessary means for achieving such effects or ends depends on these ends as well, i.e. it is "hypothetical": Hypothetical imperatives "represent the practical necessity of a possible action as a *means to achieving something else that one wills*" (*G* 414, emphasis added).[596] Accordingly, the imperative "necessitates" me because it represents the necessary means to a presupposed end: "Whoever wills the end also wills (insofar as reason has decisive influence on his actions) the indispensably necessary means to it that are within his

[594] See Steigleder 2002, 25.
[595] This "reflexive judgment" is not to be mixed up with Kant's "reflective judgments" in the *Critique of Judgment*.
[596] See also *G* 414: "[I]f the action would be good merely as a means *to something else* the imperative is *hypothetical*".

power." (*G* 417) This leads us back to the first, ethical premise explained in the beginning of this section.

Moral principles – this was the first premise – demand certain actions objectively, necessarily, universally and unconditionally: They represent the action not as good for this or that agent, but for all agents, i.e. as unconditionally good or good in itself. However, subjective ends

> are all only relative; for only their mere relation to a specially constituted faculty of desire on the part of the subject gives them their worth, which can therefore furnish no universal principles, no principles valid and necessary for all rational beings […]. Hence all these relative ends are only the ground of hypothetical imperatives. (*G* 428)

We arrive at the idea of an unconditional, necessary end *ex negativo*: If morality demands certain actions unconditionally, and if every action is directed towards an end, then if there were only subjective, conditional ends there could be no morality. Accordingly, the task of showing that there is morality at all presupposes to show that there is an end that is not conditional or relative in this sense. It would need to be an end that all human beings necessarily have to recognize as good and thus as an end *for them*, an end that they unconditionally ought to pursue in their actions. What could such an end be?

The ends that human beings pursue differ what regards their content or "matter". What all human actions have in common is *that* they involve end-setting, or *that* they involve practical reason(s) – this is what gives them a common "form". With regard to any end that is based upon an inclination, the role of reason is merely instrumental, and the relevant ought is conditional. Then there remains only one option: There must be an end that is "given" by practical reason alone (by "pure" practical reason) – reason itself must be the origin of that end. Consequently, that end must be practical reason itself – *practical reason must be an end for itself*: "Pure practical reason must necessarily be thought as *self-referential*"[597]. Less abstractly put, because every human being values certain ends, he or she must also

[597] Steigleder 2002, emphasis added, my translation.

value the condition of possibility of setting oneself an end at all, i.e. practical reason; and because the capability of end-setting does not exist in the abstract but is bound to someone who has this capacity, every human being has to contribute an unconditional worth to everyone who has this capacity. Every human being ought to respect every other human being in accordance with his or her status of having practical reason or of being an agent, i.e. somebody who sets his or her own ends – this is the gist of the Humanity Formula and thus the highest principle of morality, according to Kant.

To stress this one more time, what I have reconstructed thus far is how we generate the "idea" of a highest principle of morality. To show that we are indeed under an obligation to act according to this idea would require to prove its "reality", which in Kant is equivalent to the question whether and how pure reason can become practical. However, I will not pursue Kant's line of argument further at this point. Instead I suggest that, from a systematic perspective, it is more fruitful to turn to the philosophy of Alan Gewirth. Apart from the pragmatic advantage that this spares us to deal with numerous interpretative issues in Kant, the more important substantive reason is that Gewirth has developed an argument for a principle of human rights, starting from Kantian premises. Before explaining this in more detail, let me emphasize two points that are particularly important about the preceding reflections. *Firstly*, Kant's argument just outlined does not rely on a metaphysical value of human dignity at all. What it means to respect the dignity of all human beings, on this account, is to respect them as agents, which relies on a self-reflexive movement of thought. *Secondly* (and directly relatedly), it is clear that an account of practical reason is inseparable from an account of human nature. However, the force of Kant's argument does precisely not rely on attributing worth to reason from a third-person perspective – like when we say: Human beings have human dignity because they have a certain capacity that e.g. (many) animals do not have. Rather, Kant's argument for why we ought to attribute value to the capacity of reason (and thus to one another) is inseparable from the idea that each and every individual agent necessarily has to attribute worth to it, as soon as he or she begins to reflect upon

the preconditions of his or her own agency and thus on his or her necessary self-understanding as an agent. It is this aspect of Kant's philosophy that has been most forcefully taken up and developed further by Alan Gewirth.

Apart from numerous further parallels in their practical thought and their common goal to explicate and justify a supreme principle of morality, the methodological parallel is maybe the most important one. Like Kant, Gewirth proceeds from the fundamental premise that moral principles can only be understood and justified from the first-person perspective of agents. Accordingly, an argument for a highest moral principle needs to proceed from the contingent practical judgments that we (human agents) happen to make and spell out the necessary implications of these judgments, or what is necessarily involved in understanding ourselves as agents at all. Gewirth calls this the "dialectically necessary" method – I will say more about it in the next section.

Against this background, three main questions arise: *Firstly*, how can the moral principle of respect for persons be transformed into a principle of (human) rights? *Secondly*, how can it be shown that this principle is valid? *Thirdly*, what normative consequences follow from this principle more concretely? These are the questions that I will address in the next section.

Let me add a clarification in advance: Just as with Kant, I am interested in Gewirth's theory for systematic, not for exegetical reasons. So, once again, I am not interested in what Gewirth takes "dignity" to be.[598] Rather, I want to explore how the highest moral principle on his account can be *interpreted* as a dignity principle.

4.3 The Dialectical Necessity of the Moral Dignity Principle: Gewirth's Argument

In current philosophical human rights debates Gewirth's philosophy has a dubious fate: His name frequently crops up in overviews of the most important exponents of

[598] See Gewirth 1992. For several reasons, I assume that Gewirth's comments on human dignity in this paper as well as in *Reason and Morality* are not the most fruitful starting point for debates about human dignity. On Gewirth's concept of human dignity see also Beyleveld 2014.

a moral, universalist understanding of human rights – just to be put into the camp of "naturalistic" conceptions of human rights. So Gewirth is supposed to *somehow* – and often without further distinction or explanation – justify the validity of human rights by reference to (some feature of) human nature. Apart from that a serious engagement with his philosophy is largely missing from the discussion. This is both surprising and unfortunate. Not only is it misleading or even wrong to characterize Gewirth's approach as "naturalistic". It is also frequently overlooked that Gewirth is one of *the* scholars who has developed a moral human rights theory, based on the Kantian premises previously explained, even though he hardly discussed this affinity to the Kantian project.[599] In particular, he uses them to develop a justification of a supreme principle of morality, i.e. the "Principle of Generic Consistency" (PGC). I will give an outline of this argument in what follows.[600]

As already indicated, the main goal of Gewirth's philosophy is to establish an undeniable rational foundation for an objective, categorical and universal moral principle. He assumes that moral rights and duties can only be understood and justified from the internal perspective of agents, i.e. from the perspective of those who hold these rights and duties. Accordingly, the methodological starting point of Gewirth's project is the question if certain assumptions are "dialectically necessary" from the perspective of agents. "Dialectical" means "a method of argument that begins from assumptions, opinions, statements, or claims *made by protagonists* or interlocutors and then proceeds to examine *what these logically imply*."[601] Dialectically necessary judgments differ from assertoric judgments ("X is green") on the one hand and from dialectically contingent judgments ("A believes / thinks / hopes … (for contingent reasons) that X is green") on the other hand. Rather,

[599] For a comparison of Kant and Gewirth see Beyleveld 2015. See also Beyleveld 2017.
[600] For an analysis and systematic discussion of the argument see Beyleveld 1991 and Steigleder 1999. For further discussions see Bauhn 2016, Boylan 1999 and Regis Jr. 1984. The following explanations are guided by Beyleveld's reconstruction of the argument in Beyleveld 1991, 13-46.
[601] Gewirth 1978, 43, emphasis added.

dialectically necessary judgments are propositions that any particular (and at the same time: every) agent, from his or her perspective, necessarily has to affirm.[602]

Who is the relevant judging person or agent? According to Gewirth, (precisely) two conditions have to be fulfilled in order to be able to recognize the necessity of the propositions in question: *Firstly*, the judging person has to understand herself as an agent in a fundamental sense (see below); *secondly*, she needs to have basic rational capacities. This means that she has to be able to think consistently, i.e. to recognize and avoid (self-)contradictory propositions.[603]

From these methodological requirements follow three core demands regarding the argument to be developed: *Firstly*, the justification has to proceed systematically and in all steps from the first-person perspective of the agent. *Secondly*, all elements of the argument have to be formally and substantively necessary. Only then does the conclusion (the moral principle) follow with logical necessity from premises which the agent necessarily has to attribute to herself due to her self-understanding as an agent. *Thirdly*, this holds not only for the premises but also for all other steps of the argument (as implications of these premises).[604]

As indicated above, the core of Gewirth's argumentative strategy is to reveal the necessary moral implications of the necessary self-understanding of each and everyone of us as an agent by means of a self-reflexive movement of thought. Our self-understanding as agents is central in this respect. For agency figures in every moral judgment (be it well justified or not) and signifies a feature that all relevant persons who are engaged in practical judgment share. Two features are necessary and sufficient for agency, namely "voluntariness" and "purposiveness". They are the "generic features" of action.[605]

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[602] So Gewirth's argument is neither based on a description of the contingent convictions of particular judging subjects nor on an analysis of presuppositions, i.e. an analysis of the presuppositions and implications of (the semantics of) concepts like "action". Neither Gewirth nor his followers defend the assumption that the necessity in question might follow from a semantic analysis. See on this in more detail Steigleder 1999.

[603] Cf. Gewirth 1978, 46.

[604] Cf. Gewirth 1978, 47.

[605] See on these features Gewirth 1978, 21-42.

The starting point of Gewirth's argument is a reflection by the agents on themselves as agents.[606] It is important to note that Gewirth does not assume that agents will explicate this argument. Rather, the sequence of argument that he develops is a *reconstruction* of dialectically necessary convictions. He argues as follows: Agents pursue ends with their actions. It is contingent what ends they pursue. However, it is not contingent that they pursue ends at all. So, if action is the subject matter of moral judgments, then the same holds for ends as an essential component of acting. As a rational agent I have to understand myself as pursuing ends, at least from time to time, voluntarily (otherwise I would by definition not be a rational agent). My claim that I voluntarily pursue an end X (1) necessarily implies my claim that X is good (2). The predicate "good" does not mean "morally good" here but that X is sufficiently valuable or desirable for me, from my perspective, to move me to perform the relevant action.[607] So the necessity in question lies in a logical relation of implication between two judgments that are made from the perspective of the agent: To affirm (1) and negate (2) would imply a logical contradiction and thus cannot be consistently thought.[608]

When I judge that X is good then I also have to judge that the generically necessary conditions for pursuing X are good ("good" in the sense just explained). However, they can only be necessary if they are not the (contingent) conditions for the possibility to (contingently) pursue a particular end but the conditions for the possibility to pursue *any* end, i.e. to pursue an end *at all*. (Recall that all agents have in common *that* they pursue ends, no matter what these ends are.) Gewirth calls these conditions "freedom" and "well-being".[609] By 'freedom' Gewirth understands the ability to direct action voluntarily, which is constitutive for agency in general.

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[606] So the argument is *not* about explicating the (conceptual) implications of the concept of action. Rather, the goal is to point out those implications that an agent has to accept insofar as he or she reflects on his or her agency.

[607] Cf. Beyleveld 1991, 21. What is decisive here is again – just as for the entire argument – the difference between an assertoric and a dialectical method. See further on this Gewirth 1978, 44.

[608] Note that this necessity only follows if the relevant purposes are "genuine" purposes, i.e. purposes that the agent seriously pursues in some sense. For instance: If I want to be an excellent piano-player, yet I do not want to practice for several hours every day, then I do not pursue the purpose of being an excellent piano-player in the sense just explained.

[609] See further on these concepts Gewirth 1978, 48-63 as well as Beyleveld 1991, 18-21.

'Well-being' has a specific meaning in Gewirth: It is a generic term for the conditions that are necessary in order to realize ends. For this it is not sufficient to be free in a basic sense but also e.g. to have some security, a healthy environment etc., which are the conditions to realize goals in general. Consequently, every agent, from his perspective, has to regard freedom and well-being as necessary goods for him.

The question is now: How do we get from the assumption that I have to regard "freedom" and "well-being" as the generic conditions of my actions and thus as necessary goods for me to the further assumption that I have to maintain that I have a right to these conditions? In other words, why do I have to think that I can claim to have (access to) these goods, so that others have correlative duties? Without going into the entire discussion, in what follows I will confine myself to a short reconstruction.[610]

Every agent, from his perspective, has to regard freedom and well-being as necessary goods for him (because they are the necessary conditions for him to act or pursue his ends at all). This means first of all merely that I (the agent), from my (first-person) perspective, necessarily have to will that I have access to these generic goods, i.e. that they are available to me. This judgment, in itself, does not yet imply that others are under an obligation. Other agents enter the picture, as it were, via the condition that others may interfere with or limit my access to the relevant goods, or may have to support me in getting access to these goods if I need them. So, by judging that I ought to have access to the generic conditions of my agency, I judge at the same time that others ought not interfere with me having access to these conditions. It is important to see that the 'ought' in question is not (yet) a moral ought. Rather, it is dialectically necessary for me to want that others are under the obligation not to interfere with my generic goods and to give me support regarding the generic goods. However, the concept of a right furthermore presupposes that other agents have an influence on my access to these necessary

[610] Cf. Gewirth 1978, 63-103. For a further discussion see Beyleveld 1991, 163 ff and Steigleder 1999, 262 ff.

goods. Therefore, if I, as an agent, must necessarily want that I have access to these necessary goods, then I also necessarily have to want that other agents do not undermine my access to these goods. This is why a claim towards others is dialectically necessary from the perspective of the agent.

The crucial last step of the argument is to establish the claim that every agent necessarily has to judge not only that she herself has a right to the generic goods but also that every *other* agent has a right to the generic goods. Gewirth argues as follows. My (necessary) judgment that I have a right to these goods is merely based on (a reflection on) the necessary implications of my necessary self-understanding as a rational agent. I have to see myself as an agent who has to claim a right to the generic goods. However, that is only dialectically necessary insofar as I have to see me as an agent in general, not as the particular agent (or person) that I am. Consequently, I have to assume that the other agent is in the same position and has to make the same claim for himself insofar as he is an agent. It is important to note that this argumentative step is not based upon some contractualist form of agreement. Rather, it follows from a reflection on the necessary implications of my rational self-understanding as an agent.

Therefore, I necessarily have to accept that every other rational agent likewise has a right of this kind. Otherwise I logically contradict myself. This is why I necessarily have to judge that "[e]very (purposive prospective) agent has a (moral) claim right to his freedom and well-being."[611] Because every (moral) claim right correlates with a (moral) duty, this (and only this) last judgment can be reformulated as a moral principle, namely: "Act in accord with the generic rights of your recipients as well as of yourself."[612] Gewirth calls this the "Principle of Generic Consistency" (PGC).

This moral principle is necessarily valid in the judgment of all rational agents. Every rational agent therefore has a distinguished moral status as the holder of moral rights and duties. How does this moral principle relate to the moral demand

[611] Gewirth 1978, 133.
[612] Gewirth 1978, 135, emphasis deleted.

to respect the dignity of every human being?[613] To my mind, an appropriate answer to this question is to interpret the PGC itself as a dignity principle. For the basic moral demand that the PGC expresses is to recognize every rational agent as a holder of fundamental moral rights. On the highest level, these rights are specified as rights to freedom and well-being. The assumption that human beings have human dignity then means that they have the moral status of being a holder of these moral rights. Human dignity, so understood, is "a ground for the rights to the necessary conditions to live a life of one's own"[614], while the fundamental point of human rights is to enable and empower human beings "to live and flourish as an agent"[615], i.e. to set their own goals and to pursue these goals. The correlative moral duty of others (and of myself) to respect human dignity in their (and my) actions follows analytically from the correlative relationship between rights and duties.[616] For to assume that human beings are right-holders presupposes that they also stand in a relationship of reciprocal duties towards one another. I will now first highlight some further implications of this principle and then say more about its application and its relationship to law in particular.

In Chapter 2 I have raised the question whether it is plausible to assume that all, and maybe even any, moral rights are universal in the sense that they apply to all human beings and "independently of space and time".[617] When introducing the preliminary concept of 'moral human rights', I have at the same time included their universality in the (preliminary) definition of these rights, because universality is a feature that is commonly ascribed to them.[618] We may now further consider both assumptions in the light of the preceding reflections. To begin with, why should one think that moral rights are, or should be, universal in the first place? The basic idea is that all human beings ought to be recognized as equal subjects of moral concern, in a

[613] For Gewirth's own answer to this question see Gewirth 1992.
[614] Düwell 2014, 38.
[615] Düwell 2014, 38.
[616] Rights are here understood as (moral) "claim-rights" in a Hohfeldian sense, i.e. as rights that always correspond to (moral) duties. Cf. Hohfeld 1917.
[617] See Chapter 2, Section 2.2.
[618] See Chapter 2, Section 2.4.

fundamental sense, which on Gewirth's account means that they should be recognized as beings who have a fundamental moral right to the generic conditions of their agency. So it is first of all this principle that is universal, i.e. the moral obligation to respect each other's generic rights at all. Because all moral rights follow from this principle (in a sense to be specified – see below), *all* moral rights may then considered to be moral *human* rights in the following sense: They are rights that are *grounded* in our common "humanity", or in the recognition of our common agency. However, this does of course not mean that all moral rights that follow from this principle more concretely *apply* to all human beings, for what the generic conditions of agency are more specifically depends not only on numerous contingent empirical factors but also on the attributes of this particular agent. Now the moral rights to freedom and well-being, as the direct implications of the PGC, are universal – but they are also, of course, "very general"[619]. Starting from here, the question would be whether there are any anthropological conditions of successful agency that are necessary in all circumstances, for instance to be alive and to be healthy. However, when it comes to the question what moral rights should count as 'moral human rights', it is important to keep two questions apart. The PGC first of all expresses a fundamental moral obligation that everyone's moral right to the conditions of his or her agency morally ought to be respected, which implies that political and legal institutions and regulations must be justifiable by reference to that criterion. This also includes the criteria for the resolution of conflicts of rights: They "stem from the PGC's central requirement that there must be mutual respect for freedom and well-being among all prospective purposive agents."[620] A different question is which human rights belong on certain human rights lists. These rights ought to have some degree of importance, i.e. they must have a high degree of necessity for agency for at least a great number of agents. However, *firstly*, it is not clear why these rights would need to be strictly speaking universal. And *secondly*, the more important point is how these rights can be translated into

[619] Gewirth 1982, 55.
[620] Gewirth 1982, 58.

concrete politics and law, which makes a criterion for the specification and hierarchization of these norms more important. This makes it clear that to primarily think of the universality of moral rights in terms of their universal *applicability* is misleading from the start: To say that moral norms are universal means first of all that they are universally valid in the sense that they must be rationally justifiable to everyone. So considered, it is not contradictory to assume that there are moral rights that only apply to particular persons or "vulnerable groups": There is no contradiction in holding that it is universally justifiable that a particular person or group is morally entitled to something that another person or group is not, due to contingent personal properties or societal conditions.

So the PGC guides our actions in general, it determines what legitimate institutions should look like and how to weigh contested claims. With this as a background, let us now look more closely at the application of the PGC.

How can we further specify the content and normative consequences of the PGC? And in what sense does (and morally ought) the PGC serve as a basis to justify political and legal institutions? Gewirth elaborates on these questions in much detail but here I will merely emphasize the most important points. To begin with, the PGC is not a formal or substantively neutral principle. The prime criteria for the specification of rights are the moral rights to freedom and well-being, as the most general implications of a moral right to the conditions of one's agency. As already indicated, the principle of agency serves at the same time as a principle for the resolution of conflicts among rights and for putting them in a hierarchy, namely by reference to the necessity of the relevant goods for action. Importantly, this does at the same time not mean that all rights can simply be deduced from the PGC. Rather, its content depends on numerous contingent factors of life. At the same time there are some rights that are so immediately relevant for agency that they can hardly be up for discussion (see below). Moreover, the moral rights to freedom and well-being, as substantial implications of the dignity principle, serve as an ineluctable reference point and guidance for settling concrete practical matters. I will further explain this in what follows.

The fundamental point of rights is to enable and empower every agent to live a life of his or her own. On the highest level, this presupposes that every agent has a moral right to freedom and well-being. So all moral rights must be regarded as further specifications of these "very general"[621] moral rights. What does this mean more concretely? The well-being aspect of human dignity, according to Gewirth, implies a moral claim-right to three kinds of goods. *Firstly*, there are the "basic goods", i.e. "the essential preconditions of action, such as life, physical integrity, and mental equilibrium."[622] *Secondly*, there are the "[n]onsubtractive goods", i.e. "the abilities and conditions required for maintaining undiminished one's level of purpose-fulfillment and one's capabilities for particular actions"[623]. This moral right is violated, for instance, when an agent is "adversely affected in his abilities to plan for the future"[624]. *Finally*, there are the "[a]dditive goods", i.e. "the abilities and conditions required for increasing one's level of purpose-fulfillment and one's capabilities for particular actions"[625]. This moral right is violated, for instance, when one is denied access to education or when one is discriminated against on religious, racial or other grounds.[626] The freedom-aspect of human dignity, according to Gewirth, "consists in a person's controlling his actions and his participation in transactions by his own unforced choice or consent and with knowledge of relevant circumstances, so that his behavior is neither compelled nor prevented by the actions of other persons."[627] So these moral rights follow directly from the PGC while – once again – their further specification cannot be directly deduced from it. What does this imply for their institutional protection?

Gewirth distinguishes between two kinds of applications of the PGC, the applications that derive from its freedom-component ("procedural applications") and the ones that derive from its well-being component ("instrumental

[621] Gewirth 1982, 55.
[622] Gewirth 1982, 55-56.
[623] Gewirth 1982, 56.
[624] Gewirth 1982, 56.
[625] Gewirth 1982, 56.
[626] Gewirth 1982, 56.
[627] Gewirth 1982, 56.

applications"). The *first*, procedural applications "provide that social rules and institutions are morally right insofar as the persons subject to them have freely consented to accept them or have certain consensual procedures freely available to them."[628] The *second*, instrumental applications "provide that social rules and institutions are morally right insofar as they operate to protect and support the well-being of all persons."[629]. Let us finally consider what this means with regard to law more concretely: Which (moral) human rights should receive legal enforcement?

Gewirth argues that the PGC requires "that three kinds of rights receive legal enforcement and protection: the personal-security rights protected by the criminal law, the social and economic rights protected by the supportive state, and the political and civil rights and liberties protected by the Constitution with its method of consent."[630] The second aspect requires particular attention: It is a direct implication of the PGC that legal norms ought not only protect human beings from interference with their agency. Rather, law ought to recognize "that persons are dispositionally unequal in their actual ability to attain and protect their generic rights, especially their rights to basic well-being, and it provides for social rules that serve to remove this inequality."[631] So the assumption that all human beings have an equal right to well-being includes the "positive" right to be supported in one's capability to improve one's well-being.

It is clear that I discussed neither Kant's nor Gewirth's moral theory in all relevant details. Neither did I engage in all the relevant criticisms and discussions around their approaches – which would be a topic for a thesis of its own. For the purpose of this thesis, it was important to develop a basic understanding of what the conceptualization of human dignity, human rights and their implications for our understanding of the politico-legal realm could look like. Let me summarize the most important points that result for our understanding of human dignity from the discussion of Kant and Gewirth.

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[628] Gewirth 1982, 61.
[629] Gewirth 1982, 61.
[630] Gewirth 1982, 63.
[631] Gewirth 1982, 62.

Human dignity is not a value, fact or feature of human nature but a moral status that all human beings morally ought to and necessarily have to ascribe to one another in the light of their self-understanding of beings with practical reason or agents. Human dignity so understood is the core of a moral obligation to respect all human beings as holders of moral rights to the generic conditions of their agency. This obligation is fundamental in the sense that it is a precondition for coherently reflecting upon moral rights and obligations at all and expresses the ground of all moral claims. Because the moral status of human dignity so understood is inseparable from the moral principle to respect that status, we might just as well say that human dignity *is* such a principle: Human dignity is neither a value nor a specific right or obligation but a moral principle that underlies the human rights. This principle does not prescribe what human rights there are once and for all but it implies a substantive, overarching criterion for specifying and weighing rights-claims. While certain core rights that follow from this principle can hardly be subject to negotiation, numerous further aspects may and can only be specified in a context-specific manner.

5. Human Dignity in the German Constitutional Debate

So far in this chapter I have elaborated the main elements and implications of a plausible philosophical interpretation of the moral concept of human dignity, based on Kantian premises. In the next chapter I will take up the question whether this conception ought to be adopted in law, i.e. whether it should guide judicial interpretations of human rights. Building a bridge to this discussion, in this final section I want to point out some significant divergences between the human dignity conception advanced thus far and judicial interpretations of human dignity in the context of the German constitutional discourse. This example suggests itself for three reasons: *Firstly*, this discourse is particularly rich, due to the special place of the human dignity provision in the German Basic Law. This is why, *secondly*, the

German dignity jurisdiction is widely received beyond German borders, e.g. in the transnational comparative constitutional discourse. *Finally*, a certain (mis)interpretation of Kant's conception of human dignity constitutes an important reference point for the legal interpretation of the German human dignity provision within the German constitutional context, which allows for a direct comparison with the Kantian conception defended here. I will limit my explanations to three points: *(1)* human dignity as a *principle* and as a *right*; *(2)* "*subjectivist*" and "*objectivist*" interpretations of human dignity; *(3)* the "*absoluteness*" of human dignity as a principle and as a right. I shall stress that the aim is certainly not an extensive engagement with the scholarly literature about this topic. Moreover, let me emphasize that the point of the following considerations is not merely an exegetical one. The main concern is not that certain interpreters of the human dignity provision "got it wrong" with regard to Kant – which might not be considered problematic from a legal point of view. The point is rather that this misinterpretation leads to highly problematic consequences within the constitutional doctrine itself, and that these and further problems in the constitutional doctrine would not occur if a more plausible Kantian conception of human dignity were taken as an interpretative guideline. There is thus a significant gap between the systematic potential that Kant's human dignity conception offers with regard to a coherent and plausible interpretation of the human dignity provision in the German constitution, and the lack of exploiting this potential by taking his (alleged) thoughts on the matter into the wrong direction. This should become clear in what follows.

As already indicated in Chapter 5, human dignity occupies a prominent place in the German Basic Law as the highest principle of the entire legal order. This is expressed in Article 1 of the Basic Law that states:

> (1) Human dignity is intouchable [*ist unantastbar*]. To respect and protect it shall be the duty of all state authority.
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

> (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.[632]

A central question in the German constitutional discourse is how one ought to interpret the relationship between the human dignity provision and the basic rights. It is closely related to another question that regards the status of the dignity provision in Article 1.1: There is a broad consensus among its interpreters that it is a *legal principle* – the principle or ground of the human or basic rights –, for this is clearly indicated by the term "therefore" in Article 1.2. What is debated, however, is whether it has *only* the character of a *legal principle* or *also* of a *basic right*.[633] Starting from here, following Markus Rothhaar we can divide the variety of interpretations of the dignity provision within the German constitutional discourse into two broad categories: a *principialist-reductionist* interpretation and an understanding of human dignity as a *specific basic right*.[634] Conveniently, I will refer to the latter as a "*right-interpretation*" of human dignity, where 'right' ought to be read as 'specific basic right'.[635] The main difference between these two understandings can be explained as follows. According to the principialist-reductionist interpretation, human dignity is

> (1) the ground, the principle and/or the quintessence of the basic or human rights; and
>
> (2) it is legally protected *via* the legal protection of the basic or human rights in their entirety.[636]

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[632] As already noted above, the official translation of "ist unantastbar" is "shall be inviolable". It is important to note that this is not a literal translation: "ist unantastbar" literally means "is untouchable", a phrase that is in need of interpretation in English just as in German. See also Barak 2015, 225-227. The official translation, by contrast, already presupposes a particular interpretation of the phrase, based on a certain interpretation of human dignity.

[633] See Rothhaar 2015, 32-33. Throughout this section I draw on Rothhaar 2015, 32-100.

[634] See Rothhaar 2015, 32-43.

[635] See Rothhaar 2015, 32-43. The German phrase for the second category that Rothhaar uses is "subjektiv-rechtliche Interpretation", the literal translation of which would be "interpretation as a subjective right".

[636] Losely translated and slightly adapted for present purposes from Rothhaar 2015, 33-34. See on what follows Rothhaar 2015, 33-37.

What regards the perceived relationship between human dignity and human rights, the Kantian conception of human dignity developed above is one specific version of such a principialist-reductionist understanding. (The relevant difference is, of course, that in the context of the German constitutional debate the *legal* status of the dignity *provision* and the respective *legal* consequences are disputed.) On this view, human dignity is a principle that *underlies* the basic rights (which might then e.g. be further interpreted as a status and/or meta-right, i.e. a right to have rights). However, and crucially, human dignity is itself not a basic right: There is no "(basic) right to human dignity", or a basic right to the respect or non-violation of one's human dignity, *in addition* to the (other) basic rights. Rather, the *legal content* of the dignity provision is *fully covered* by the basic rights: The scope of protection of the human dignity guarantee does not go beyond the scope of protection that the basic rights, taken together, guarantee. This understanding is then "reductionist" in the sense that the legal consequences that follow from human dignity are strictly equivalent to the entirety of the legal consequences that follow from the basic rights. Accordingly, there is no specific violation of human dignity: Either human dignity cannot be violated at all (for how could a principle ever be violated?), or *any* violation of a basic right is a violation of human dignity (i.e. of a normative consequence of human dignity). Importantly, this interpretation is reductionist *only* with regard to the legal consequences of human dignity: It is only in this regard that human dignity and the basic rights are equivalent. In contrast to this, it does precisely not imply that human dignity and basic rights are the same: Being the *ground* of the basic rights, to hold that human dignity *is* (at the same time) a basic right would mean to commit a category mistake.

According to the right-interpretation of human dignity, by contrast, the dignity provision

> (1) justifies a subjective legal entitlement with its own scope of protection. The scope of protection of human dignity can be distinguished from the scope of protection that is guaranteed by the entirety of the (other) basic or human rights.

Moreover,

> (2) human dignity is not a meta-right but is situated on the same logical-normative level as the (other) basic rights.[637]

This is how human dignity is predominantly interpreted in the legal literature on the Basic Law and in the jurisdiction by the Federal Constitutional Court. On this understanding, human dignity is itself a right or a subjective legal entitlement analogous to a right (see below). Crucially, this implies that the action that constitutes a violation of human dignity differs from the action that constitutes a violation of any (other) basic right. So the scope of protection of human dignity differs from the scope of protection that is guaranteed by the basic rights, both individually and in their entirety.

As should be clear by now, the assumption that human dignity is a subjective right or a specific legal entitlement is fundamentally at odds with a Kantian understanding of human dignity. However, in the German constitutional discourse it is precisely this *right*-interpretation of human dignity that is frequently explicated by reference to Kant. The most prominent and influential example is Günter Dürig's so-called "object formula" [*Objektformel*]. According to Dürig, the dignity provision should be interpreted in light of Kant's Humanity Formula, which he (mis)interprets so as to express a *particular* moral obligation to not "instrumentalize" human beings: According to Dürig's "object formula", human dignity is limited if a concrete human being is degraded to an object, to a mere means.[638] What regards the Kant reception in the German constitutional discourse, this interpretation has been so influential that it has lead to an *identification* of Kant's Humanity Formula and Dürig's "object formula".[639] What regards the legal

[637] Losely translated and slightly adapted for present purposes from Rothhaar 2015, 38. See on what follows Rothhaar 2015, 37-41.

[638] See Dürig 1971, 127: "Die Menschenwürde als solche ist getroffen, wenn der konkrete Mensch zum Objekt, zu einem bloßen Mittel, zur vertretbaren Größe herabgewürdigt wird." (emphasis deleted)

[639] For instance, Christian Starck writes in his legal commentary on the German Basic Law: "The Object Formula *originates from* [*stammt von*] Kant and reads: 'So act that you use humanity, whether

constitutional doctrine, Dürig's proposal has lead to the following interpretation: An action constitutes a violation of human dignity precisely if it has a certain *quality*, namely that it implies the *instrumentalization* or *objectification* of the person affected (as is manifested, for instance, in the "humiliating or degrading treatment" of a person). This implies that no violation of a basic right is as such a violation of human dignity, unless it has this additional quality.

There are two points to be noted here. The *first* point is that this is a misinterpretation of Kant's Humanity Formula. This formula expresses, as we have seen, the fundamental moral principle that all human beings morally ought to recognize one another as "moral subjects", that is, as beings that have the moral status of being holders of rights and obligations. We might then say that to disrespect this fundamental obligation means to "objectify" human beings, i.e. to disregard them as moral subjects. However, this is not a *specific* moral obligation to not "instrumentalize" human beings, next to a moral obligation to respect the (other) human rights. By contrast, the Humanity Formula is correctly interpreted precisely in the opposite way, namely as the *principle* or *ground* of human rights, which follow from it as its normative consequences. Large parts of the German legal Kant reception are therefore based on a "grave misunderstanding"[640] of the meaning and systematic place of the Humanity Formula in Kant's practical philosophy, and of his conception of human dignity accordingly.

Secondly, from a systematic standpoint "[t]he consequence of such an understanding is […] not only that human dignity is more and more decoupled from human rights but that it is even increasingly brought into opposition with them."[641] On the one hand, even the gravest violation of a human right might not constitute a violation of human dignity. On the other hand, minor misdeeds that do not even

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in your own person or in the person of any other, always at the same time as an end, never merely as a means.'" Starck 2010, 37, my translation, emphasis added.

[640] Rothhaar 2015, 203, my translation. See also Rothhaar 2015, 202-206.

[641] Rothhaar 2015, 324, my translation.

constitute a violation of any legal right might yet constitute a violation of human dignity.[642]

This problem becomes even more virulent if one takes two further aspects of German judicial interpretations of human dignity into account: its "objectivist" interpretation and its "absoluteness". In the German constitutional discourse human dignity is predominantly understood as an "intrinsic value"[643] or "pre-positive moral value"[644] that inheres in human beings by virtue of being human. Human dignity is at the same time the "highest value"[645] of the constitutional order: The commitment to inalienable human dignity is "the most important value decision of the GG [i.e. Basic Law, M.G.]"[646]. So understood, Article 1 expresses the core element of an "objective value order" of the German Basic Law that – crucially – is itself put under legal protection. Combined with the preceding remarks about the rights-interpretation of human dignity, this "objectivist" understanding leads essentially to the following legal construction: Human dignity is an objective value that deserves (absolute) protection by law; this objective value grounds a subjective entitlement, analogous to a right, that one's dignity ought to be protected. However, because the underlying value is "objective", it is not up to me to decide whether I want my dignity to be protected by law in a concrete case. So the subjective entitlement differs from a "true" right in the decisive way that it cannot be waived. This interpretation is for instance expressed in the prominent "peep show judgment" by the German Federal Constitutional Court, where the court gave the following explanation for its decision to prohibit such shows, even against the will of the women participating in them: "The dignity of the human being is an objective value

[642] See Rothhaar 2015, 61-65.
[643] Hofmann 2008, 112, my translation, and Starck 2010, 29, my translation.
[644] Hofmann 2008, 109, my translation.
[645] Herdegen 2009, 7, my translation.
[646] Jarass 2011, 40, my translation. On the "fundamental value-orientation of the constitution" (Lorz 1993, 272, my translation) see also Lorz 1993, 271-272.

that is not at anybody's disposal [*unverfügbar*] […], [and] an individual cannot effectively waive the protection of that value […]."[647]

This leads to the paradoxical situation that human dignity, the alleged ground of basic rights, leads to the disrespect of the legal subjects as the holders of those rights that allegedly follow from human dignity. This interpretation of human dignity is hence not only utterly incoherent; human dignity so understood is also a "gateway for a paternalistic moralization of law"[648].

This makes it clear that this is not merely an exegetical point. Rather, the (dominant) legal interpretation of human dignity as an objective legal principle *and a subjective right* leads to serious systematic problems within the constitutional doctrine itself, problems that would not occur in the first place if one interpreted the dignity provision as a principle (only), and furthermore in a Kantian sense as outlined above.

To complement this picture, let me close with a remark about the "untouchability" of human dignity. In the German constitutional discourse the "untouchability" of human dignity is predominantly interpreted as the absoluteness of human dignity as a (quasi-)right: While all basic rights can be weighed against one another and are hence "relative", human dignity is absolute in that it cannot be weighed at all [*Unabwägbarkeit*]. In effect, human dignity becomes some kind of "super-right" or "super-value" that in case of conflict "trumps" any (other) basic right, thus eventually allowing to undermine the basic rights. This is all the more problematic in light of the largely undetermined meaning of human dignity, which opens the interpretation of human dignity to various kinds of manipulation. I will say more about this indeterminacy in the next chapter.

According to the alternative route that was suggested in this chapter, human dignity would be the highest principle of the constitution that has a different status and

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[647] *Bundesverwaltungsgerichts-Entscheidung (BVerwGE) 64, 274 vom 15.12.1981 (Sittenwidrigkeit von peep-shows)*, paragraph 12, quoted from Rothhaar 2015, 42, my translation. The original wording is: "Die Würde des Menschen ist ein objektiver, unverfügbarer Wert […], auf dessen Beachtung der einzelne nicht wirksam verzichten kann."

[648] Rothhaar 2015, 43, my translation.

function than the human rights. It entails a criterion that allows to weigh different normative claims and to structure the rights and institutional implications according to their relative weight. This principialist interpretation can still account for some intuitions that underlie the understanding of human dignity as a prohibition of objectification. We may still say that some rights violations are more severe than others because of the fact that they infringe upon the necessary goods for agents in a particularly severe and often irreversible way. Murder, torture and brainwashing – to mention just some examples – infringe upon the basic conditions of human life in such a fundamental way that one might say that they violate the essence of what it means to be a human being. Accordingly, one might say that the right of human beings to be protected against such infringements is so fundamental that it cannot be weighed against other rights. However, this would still not mean that there is a specific "right to human dignity" here. Rather, an appropriate understanding of these severe violations of human dignity can only be gained from a broader understanding of human dignity as the ground of the normative order of rights in general.

7. Legal Dignity-Pluralism Reconsidered

1. Introduction

In Chapter 5 I have argued that the common legal recognition of human dignity as the moral ground of (legal) human rights is reflected in the fact that human dignity plays a central practical role in the judicial interpretation of legal human rights norms: In legal practice, the concrete legal implications of human rights claims are frequently specified by reference to their underlying moral purpose of protecting human dignity. However, and without yet exploring this line further, I have also indicated a certain tension that characterizes human dignity as a legal, i.e. legally interpreted concept: its presumed morality and universality on the one hand; and the context-specific and thus (potentially) plural substantive legal interpretation of human dignity on the other hand. In order to see more clearly how, from a legal perspective, the moral-philosophical interpretation of the moral concept of human dignity as proposed in the preceding chapter bears upon legal interpretations of the legal concept of human dignity, the picture of human dignity in judicial human rights adjudication that has emerged thus far needs to be complemented in a crucial regard. Obviously, the observation that human dignity serves as a substantive interpretative guideline in judicial interpretations of human rights leads to the further question how human dignity *itself* is substantively interpreted in legal practice: What does human dignity *mean* in legal context?, or more precisely: in plural legal contexts? The result will be that judicial interpretations of human dignity are not only context-specific but *radically* context-specific, in that no context-transcending substantive meaning of human dignity in law can be discerned: The alleged universality of human dignity in human rights adjudication is essentially the universality of a placeholder that is filled with radically different, "culturally relative" content. I will refer to this descriptive thesis as "*radical legal*

dignity-pluralism". Against this background, the question is whether the complete interpretative openness of human dignity in law can be consistently supported from the perspective of legal practice itself: Should the interpretative openness of the legal concept of human dignity be restricted so as to limit the scope of its possible substantive interpretations? Or should the interpretation of the normative content of human dignity be left to legal discourse(s) alone? I will argue that the latter assumption is at odds with the fact that, by incorporating a moral principle of human dignity into law, legal practice commits itself to a standard of consistency what regards the legal understanding of this principle. The core content of the legal concept of human dignity is not a result of legal discourse or interpretation but a precondition for its consistency and justifiability. To incorporate the core elements of the moral conception of human dignity proposed in the preceding chapter into law is therefore not only a requirement from a moral-philosophical perspective; the legal human rights practice would thereby also do justice to its own standards.

The argument is structured as follows. In a first step, I justify the descriptive claim of radical legal dignity-pluralism by drawing on a recent scholarly debate between Christopher McCrudden and Paolo G. Carozza about the role of a universal principle of human dignity in human rights adjudication *(2)*. I argue that this debate gives us reason to think that, in the future, a substantive consolidation of the meaning of human dignity in law might not be achievable via a continued consensus-seeking judicial dialogue *(2.3)*. The primary question is then whether or not legitimate legal dignity-pluralism presupposes that the scope of judicial interpretations of human dignity is restricted *(3)*. I then first draw the attention to the general precondition of legitimate pluralism, namely that it must be principled pluralism *(3.1)*: In order to be legitimate, radical legal dignity-pluralism would need to be justifiable by reference to some "external" principle, where that principle can only be human dignity itself. Consequently, in a next step *(3.2)* I take up the question whether it is possible to coherently interpret human dignity as a principle the content of which is specified in discourse alone, which would be a procedural or discourse-ethical understanding of human dignity. I argue that this position cannot

be coherently defended and that, consequently, one substantive conception of human dignity should be adopted in law. In a final step I spell out what follows from this more concretely with regard to legal interpretations of human dignity *(4)*.

2. The Radical Plurality of Judicial Dignity Interpretations

Due to its vagueness, due to its embeddedness in a dynamic context of legal interpretation, and due to the structural plurality of these contexts (legal systems) within the global legal order, the *substantive meaning* of the legal concept of human dignity is flexible and open (rather than fixed) and context-bound (rather than context-independent).[649] For one thing this opens up the *possibility* that judicial interpretations of human dignity (and human rights) may in fact diverge. For another thing, it makes divergence *likely*, and to some extent *structurally intended* and *inevitable*: As we have seen, it is one of the merits of the often criticized vagueness of the legal concept of human dignity that it allows and indeed calls for its context-specific concretization and (re)interpretation.[650] The question is therefore not *whether* judicial interpretations of human dignity diverge but *how* they do so, and *to what extent*, and how this affects the judicial interpretation of *human rights*: Is there, apart from contextual divergence, an overarching judicial consensus about the meaning of human dignity?

In this section I address this question by drawing on the recent debate between two legal scholars, Christopher McCrudden and Paolo G. Carozza.[651] Both of them diagnose "the existence of a sizable and important gap between the universal idea of human dignity […] and its deployment in the concrete practice of judicial interpretation of human rights."[652] They disagree, however, about the exact size of this gap, and about the normative consequences that one should draw from it accordingly: McCrudden argues that the alleged universality of human dignity in

[649] See Chapter 5.
[650] See Chapter 5, Section 2.
[651] See McCrudden 2008 and Carozza 2008.
[652] Carozza 2008, 939.

human rights adjudication is, after all, nothing but a sham; human dignity serves as a substantive placeholder that is filled with radically context-specific content instead. On Carozza's more "optimistic" view, a universal principle of human dignity is truly "at work" in judicial practice. Accordingly, while Carozza maintains that a more "legitimate pluralism" in judicial interpretations of human dignity (and human rights) might be achieved through a continued judicial dialogue on human dignity, McCrudden suggests that we should turn our attention from the content of the legal dignity principle towards its "institutional"[653] or "rhetorical"[654] functions in the context of human rights adjudication.

I will now first focus on McCrudden's argument *(2.1)*. Then I will show that Carozza does not successfully challenge McCrudden's more "pessimistic" conclusion *(2.2)*. I will therefore presuppose the accuracy of McCrudden's descriptive result of radical legal dignity-pluralism in the remainder of this chapter. I then argue that this debate confronts us with the question how we should assess the radical plurality of legal dignity interpretations in want of a reasonable hope that a substantive consolidation of the meaning of human dignity might be achievable via a continued dialogue *(2.3)*.

I shall stress that, what regards McCrudden's and Carozza's respective analyses of human dignity in judicial practice, I am clearly not in a position to judge these matters, so this part of the argument will be purely reconstructive. What can be assessed, however, is how they interpret their empirical results. It is in this regard that McCrudden's argument strikes me as more convincing.

2.1 McCrudden's (Radical) "Divergence Thesis"

McCrudden starts from the observation that one can identify a common *concept* of human dignity in its various legal and non-legal uses – "a basic *minimum content* of 'human dignity' that all who used the term historically and all those who include it

[653] McCrudden 2008, 713-724.
[654] McCrudden 2008, 722.

in human rights texts appear to agree is the core, whether they approve of it or disapprove of it."[655] He refers to this as the "*minimum core*"[656] of the concept of human dignity. It has three elements: The *first* element is the "*'ontological' claim*"[657] "that every human being possesses an intrinsic worth, merely by being human."[658] The *second* element is the "*'relational' claim*"[659] "that this intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth."[660] The *third* element is the "limited-state claim"[661] "that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa."[662] Because the second and third claim express different aspects of the same norm that the "intrinsic worth" of human beings ought to be respected, for present purposes we can subsume them both under the relational claim ("relational" in the sense that it regards the practical, intersubjective dimension of human dignity: rights and duties). So the relational claim expresses the (practical) *principle* of human dignity, the ontological claim the *ground* of that principle.

It is clear that debates about human dignity do usually not concern this minimum concept as such, but its further interpretation, i.e. the question about the most plausible dignity *conception*, about which "there appears to be no consensus politically or philosophically."[663] The question that McCrudden poses is whether that is any different in "the judicial world"[664]: Can an overlapping judicial consensus about a substantive dignity conception be identified that goes beyond

[655] McCrudden 2008, 679, emphasis added.
[656] See McCrudden 2008, 679, emphasis added.
[657] McCrudden 2008, 679, emphasis added.
[658] McCrudden 2008, 679.
[659] McCrudden 2008, 679, emphasis added.
[660] McCrudden 2008, 679.
[661] McCrudden 2008, 679.
[662] McCrudden 2008, 679.
[663] McCrudden 2008, 679-680.
[664] McCrudden 2008, 680.

accepting the minimum concept of human dignity?[665] To anticipate, his answer will be "no".[666]

Before we consider the reasons for this conclusion, we need to be clear about why this question is important. To this end it is useful to make a short detour to the drafting history of the Universal Declaration of Human Rights.[667] As is well-known, the UDHR recognizes the inherent dignity of all human beings yet does not contain any further specification what human dignity is, why human beings have it and how human rights follow from it. As the drafting history shows, what this reflects is not a "shortage of theories seeking to support human rights"[668] at the time but a lack of *political consensus* about any such theory – which is unsurprising if one considers the global context of the drafting process: "To achieve a successful outcome, it was necessary to persuade states of vastly different ideological hue that the Declaration was consistent with their conceptions of human rights."[669] So political efficiency demanded to focus on coming to an agreement about a list of rights and prohibitions, while leaving the question about the theoretical foundation of human rights open. The significance of human dignity lies in its function as a "placeholder" or "signifier" in this regard:[670]

> Dignity was included in that part of any discussion or text where the absence of a theory of human rights would have been embarrassing. Its utility was to enable those participating in the debate to *insert their own theory*. Everyone could agree that human dignity was central, but not why or how.[671]

Note that this does not mean that human dignity was an "*empty* signifier", i.e. a linguistic pointer without any content: "Unlike in linguistics, where a placeholder

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[665] Cf. McCrudden 2008, 680.
[666] See McCrudden 2008, 697.
[667] Cf. McCrudden 2008, 675-678.
[668] McCrudden 2008, 677-678, reference deleted.
[669] McCrudden 2008, 677.
[670] McCrudden 2008, 677: "[T]he significance of human dignity, at the time of the drafting of the UN Charter and the UDHR (and since then in the drafting of other human rights instruments), was that it supplied a theoretical basis for the human rights movement in the absence of any other basis for consensus."
[671] McCrudden 2008, 678, emphasis added.

carries no semantic information, dignity carried an enormous amount of content, but *different content for different people*."[672] We should first of all note, then, that dispensing with an official theory of human dignity (and human rights) was a precondition for joint political action in want of a political consensus on such a theory. It was precisely the vagueness and placeholder function of human dignity that helped the human rights movement off the ground – that served to bridge the gap, at least for a start, between the *common recognition* of the *universality* of human rights and their moral ground, and the *dissensus* about the most plausible *interpretation* of this ground in the light of the factual *particularity* and *plurality* of worldviews.

This prompts the question: Why would one expect that this might (or ought to) have changed in the meantime? In other words, why might it be "normatively disappointing"[673] (and possibly normatively problematic) to find that, in judicial practice, human dignity *still* serves as a placeholder that carries "different content for different people"[674], but that no "substantive consolidation of the meaning of human dignity"[675] has taken place? The answer lies in the *universality* of human rights on the one hand, and the *practical role* that human dignity has come to play in the *judicial interpretation of human rights* on the other hand. As explained above, human dignity "serves as the single most widely recognized and invoked basis for *grounding the idea of human rights* generally, and *simultaneously* as an exceptionally widespread tool in judicial discourse about *the content and scope of specific rights.*"[676] The universality of human rights implies that what follows from them in a concrete case cannot be *entirely* context-specific (or "culturally relative"): If human rights are grounded in the universal moral principle of human dignity – which, to repeat, is commonly recognized in law –, and if human rights claims are specified and weighed by reference to human dignity, then there must be *some*

[672] McCrudden 2008, 678, emphasis added.
[673] McCrudden 2008, 712.
[674] McCrudden 2008, 678.
[675] McCrudden 2008, 712.
[676] Carozza 2008, 932, emphasis added. See Chapter 5, Section 4.

consensus about what human dignity substantively means and requires that reflects this universal claim. This is why a need for *judicial consensus* arises in the first place.[677]

With this in mind, it is crucial to see that the "relational element" of the legal concept of human dignity – the principle-aspect or rights-related aspect – is *substantively empty*: To say that there is a judicial consensus about this element is to say nothing more than that it is consensual that *some* rights and obligations follow from human dignity. However, it does in itself not entail any *substantive specification* or *criterion* what rights that are and what follows from their possession practically, i.e. how one should concretely interpret human rights claims or weigh conflicting claims in judicial practice. This is why the consensus in question needs to be a conceptual consensus "*beyond the minimum core*"[678] of the concept of human dignity.

How far-reaching would this consensus need to be? We may roughly distinguish between two general situations (which clearly allow for further gradations). *Firstly*, there might be a full consensus about one comprehensive theory of human dignity – a theory, that is, that answers all the main questions about the ground, ontological mode and normative consequences of human dignity, and its relationship to human rights. Provided the global legal context that we are grappling with, this might be too much to ask. *Secondly*, we might expect an "agreement on what the *effect of applying the principle* is"[679], while there remains disagreement "on what a full theoretical basis for the principle may be"[680]. So, for instance, judiciary A interprets human dignity as a transcendentally justified status, while judiciary B understands it as a natural value property, but they both agree that it follows from human dignity that the death penalty ought to be prohibited. This weaker form of consensus seems like a more reasonable expectation to begin with. Note, however, that even this

[677] It is clear that such a consensus, if it existed, might of course still refer to a human dignity conception that is morally unjustifiable. So judicial consensus does not equal moral justifiability.
[678] McCrudden 2008, 697, emphasis added.
[679] McCrudden 2008, 697, emphasis added.
[680] McCrudden 2008, 697.

limited consensus about the legal consequences of human dignity would need to be grounded in a common substantive conception of human dignity: It presupposes *some* shared idea of *why* it is that the prohibition of the death penalty follows from human dignity and when, maybe, the corresponding right may be *legitimately restricted*. Otherwise we might well say that there is a judicial consensus about the prohibition of the death penalty, but we will not say that this consensus is *grounded* in or follows from an *application* of the universal principle of human dignity.

The result of McCrudden's analysis of judicial uses of human dignity is that even this weaker form of consensus does not exist – and that, consequently, there is no commonly shared conception of human dignity in law beyond its minimum core:

> Can we say […] that we are any further advanced in identifying a common conception of human dignity, either in any particular jurisdiction or transnationally? The answer […] is 'no'. There are significantly differing expressions of the relationship between human rights and dignity, and significant variations between jurisdictions in how dignity affects similar substantive issues.[681]

McCrudden shows this by drawing on a wide range of examples of judicial uses of human dignity. These examples demonstrate, *firstly*, significant differences in the general understanding of human dignity and its relationship to human rights. For instance, in some jurisdictions human dignity is regarded as absolute, in others as relative; there are individualistic as well as communitarian conceptions of human dignity; sometimes human dignity is regarded as rights-supporting, sometimes as rights-constraining; and so on. *Secondly*, and more importantly, these differences are not merely "theoretically-abstract" but reflected in the strongly diverging results of applying dignity arguments to human rights cases:

> In practice, very different outcomes are derived from the application of dignity arguments. This is startingly apparent when we look at the differing role that dignity has played in different jurisdictions in several quite similar factual contexts: abortion, incitement to racial hatred, obscenity, and socio-economic rights. In each, the dignity argument is often to be found on both

[681] McCrudden 2008, 697.

> sides of the argument, and in different jurisdictions supporting opposite conclusions.[682]

It is crucial to be aware of McCrudden's argumentative strategy here. Nothing in the universalist *language* of human dignity that is frequently employed in judicial decisionmaking tells us whether this language reflects an actual commitment to a universal principle of human dignity or is mere rhetoric. Likewise, a judicial consensus about human rights norms on a rather abstract level does not yet count as evidence that this consensus is grounded in a joint substantive conception of human dignity. This is why we would need to be able to *discern* this universal commitment, if it existed, in judicial decisions about human rights cases that are *not consensual anyway* – like "abortion, incitement to racial hatred, obscenity, and socio-economic rights"[683]. If, in such cases, the use of dignity arguments generated comparably similar substantive outcomes, then we might conclude that these controversial cases have been decided on the basis of a joint substantive criterion provided by human dignity (i.e. some consensual conception, apart from rather obvious theoretical disagreement). If we find, by contrast, that the employment of dignity arguments in such cases has lead to strongly diverging and even opposite practical outcomes, then we have reason to conclude that the underlying dignity principle is not universal after all but filled with different content in different contexts.[684] Anticipating the discussion of Carozza's reply in the next section, we can formulate the structure of this argument as a more general rule: If two judiciaries seek a decision about (1) a relevantly similar case (2) in relevantly similar circumstances (3) by reference to the same universal principle yet (4) come to strongly diverging or opposite conclusions what this principle requires in the case

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[682] McCrudden 2008, 698. More specifically, these differences concern (McCrudden 2008, 698-710): (1) The legal status and weight of human dignity; (2) individualistic versus communitarian conceptions of dignity; (3) dignity as rights-supporting, or rights-constraining; (4) the possibility or non-possibility to waive dignity; (5) the question who or what decides whether dignity has been violated; (6) the question who should judge dignity claims; (7) and the question who, or what, is protected by a claim to human dignity.
[683] McCrudden 2008, 698.
[684] McCrudden 2008, 712.

at hand, then, provided that (1), (2) and (4) are correct, by implication they cannot have referred to the same universal principle – *unless this principle is substantively empty*. We will then also not regard the two decisions as judicial *specifications* or *context-specific applications* of *the same universal moral norm*.

These variations, according to McCrudden, are significant enough to justify what he calls the "*divergence thesis*"[685] – due to its centrality for the argument in this section I quote it in full length:

> The apparently common recognition of the worth of the human person as a fundamental principle to which the positive law should be accountable […] seems to camouflage the use of dignity in human rights adjudication to incorporate *significantly different theoretical conceptions of the meaning and implications of such worth*, enabling the incorporation of just the type of ideological, religious, and cultural differences that a common theory of human rights would need to transcend. By its very openness and non-specificity, by its manipulability, by its *appearance of universality* disguising the extent to which *cultural context is determining its meaning,* dignity has enabled East and West, capitalist and non-capitalist, religious and anti-religious to agree (at least superficially) on a common concept. But this success should not blind us to the fact that *where dignity is used either as an interpretive principle or as the basis for specific norms, the appearance of commonality and universality dissolves on closer scrutiny, and significantly different conceptions of dignity emerge.*[686]

So, if we follow McCrudden's analysis, then human dignity is still a placeholder, a "smokescreen"[687] behind which radically culturally different dignity interpretations hide.

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[685] McCrudden 2008, 711, emphasis added.

[686] McCrudden 2008, 710, emphases added. Note that the thesis starts out from a direct reference to Carozza: According to Carozza, the "common recognition of the worth of the human person as a fundamental principle to which the positive law should be accountable" is a "paradigmatic example" of a "naturalist foundation at work" in legal practice, which is precisely the claim that McCrudden rejects. I will explain this in the next section.

[687] McCrudden 2008, 722.

2.2 Carozza's "Convergence Thesis": A Challenge to McCrudden's Argument?

To recognize the main thrust of McCrudden's "divergence thesis", we need to see that it is partly directed against a more "optimistic" picture that Paolo G. Carozza draws in his study about "[t]he death penalty and the global *ius commune* of human rights"[688]. For present purposes, we can disregard any details of the argument that Carozza advances in this study. Considering the "divergence thesis" in this broader context – including Carozza's reply to McCrudden's critique[689] – is illuminative for two reasons. *Firstly*, as I will argue now, in his reply Carozza does not offer a compelling argument against McCrudden's conclusion. Instead it occurs that Carozza's counter-thesis is overly optimistic after all. Within the limited context provided by this debate, this gives us a rather strong reason to accept McCrudden's thesis as the more accurate description of the current role of human dignity in judicial practice. *Secondly*, the dissensus between Carozza and McCrudden is instructive when it comes to the question what normative consequences one should draw from the gap between the universal claim of human dignity and its particular legal interpretations. I will explain this in the next section.

In a nutshell, in the study just mentioned Carozza argues that "*the common recognition of the worth of the human person as a fundamental principle to which the positive law should be accountable*"[690] motivates a transnational judicial dialogue that is guided, at least in part, by the joint aspiration to give this common recognition *universal expression* in the transnational jurisprudence of human rights. The dialogue aims, in other words, at a *harmonization* of the human rights adjudication across jurisdictions, *based* on the recognition of human dignity as the universal moral ground of human rights. According to Carozza, this process leads in fact to a growing *convergence* of certain human rights regulations, or to what he

[688] See Carozza 2003.
[689] See Carozza 2008.
[690] Carozza 2003, 1082, emphasis added.

calls a "growing globalization of human rights norms"[691]. He argues that the context of the death penalty is "an especially clear example"[692] of this process, which has lead to an increasing prohibition of the death penalty on a global scale:

> [I]t is very clear that one of the strongest, most central foundations of the transnational jurisprudence of human rights in these cases [regarding the death penalty, M.G.] is the recognition of our common humanity, our shared human nature.[693]

He concludes that "the tendency of courts in the death penalty cases [...] to consistently place their appeal to foreign sources on the level of the shared premise of the fundamental value of human dignity is a paradigmatic example of *naturalist foundations at work*"[694]. This is why this process might be characterized as "*the working out of the practical implications, in differing concrete contexts, of human dignity*"[695].

To stress this one more time, I am not in a position to assess the accuracy of Carozza's empirical analysis as such. One might, however, have some reasonable doubts about the conclusions he draws from his analysis with regard to the role of a universal principle of human dignity in judicial practice. I will explain this in what follows.

Recall that the gist of McCrudden's "divergence thesis" is that (1) the content of the legal concept of dignity is radically context-dependent, which is why (2) it does not provide a universal substantive guideline for human rights adjudication. This implies that (3) the alleged universality of human dignity in judicial practice is merely the universality of a placeholder, and that (4) human rights claims are in fact interpreted according to "culturally relative" rather than universal standards. We may then formulate Carozza's "convergence thesis" (as I will conveniently call it) as follows: (1) The common legal recognition of human dignity as a universal moral

[691] Carozza 2003, 1034.
[692] Carozza 2003, 1035.
[693] Carozza 2003, 1080, reference deleted.
[694] Carozza 2003, 1082, emphasis added.
[695] Carozza 2003, 1082, emphasis added.

principle that ought to be implemented in law (2) leads – via a consensus-seeking judicial dialogue – to a growing consensus about the concrete legal implications of more abstractly stated human rights norms, which suggests that (3) there is also a growing consensus about the substantive meaning of human dignity. This allows the more optimistic conclusion that (4) a universal moral principle of human dignity plays a genuine role in the judicial interpretation of human rights.

We need to be clear about where precisely the matter of dispute lies (and does *not* lie) here. Carozza's and McCrudden's accounts differ in the relative weight they attribute to converging and diverging interpretations of human rights, based on the recognition of human dignity. In short, while Carozza argues that human dignity has generated at least *some* judicial consensus about *some* human rights norms, McCrudden's analysis suggests that this is not the case. However, neither McCrudden nor Carozza denies that there is judicial consensus as well as dissensus about human rights. It is also at least secondary whether *this* consensus is growing or not. The crucial question is rather whether judicial consensus about human rights norms is *grounded* in a *substantive conception* of human dignity – whether the *content* of the legal dignity principle has a "consensus-generating function" with regard to judicial interpretations of human rights. It is important to keep this in mind in what follows.

In his reply to McCrudden, Carozza objects that McCrudden "is a little too quick to declare the minimum core unhelpfully vacuous"[696]. Rather, "the minimum core may be a little *thicker* than McCrudden acknowledges, and accordingly *more useful* to judicial interpretation and protection of human rights"[697]:

> [E]ven *the claims contained in the most broad and general statement of the status and basic principle of human dignity* have some important traction, and are sufficient to exclude from reasonable consideration many political and social systems that, for instance, engage in gross and systematic violations of the life, liberty, integrity, and equality of their people. […] [F]or many, perhaps most, countries of the world the problems of

[696] Carozza 2008, 936.
[697] Carozza 2008, 937, emphasis added.

> extrajudicial killings, arbitrary detentions, systematic discrimination, disappearances, torture, or unspeakably inhuman prison conditions – *to name just a few of the issues that are extremely close to the inviolable core of human dignity* – are much more vital to people's daily struggles and concerns than are (for instance) the legal and ethical dilemmas surrounding the end of life […].[698]

We need to be careful about what this means. What I understand Carozza to be saying is that, *even though* there is (still) no judicial consensus about the substantive meaning of human dignity beyond its minimum core, there *is* a judicial consensus about the most direct and important *normative consequences* of human dignity, e.g. the prohibition of "extrajudicial killings". This invites several critical questions.

To begin with, this does not mean, by implication, that the minimum core of the legal concept of human dignity is any "thicker" than McCrudden suggests – where I understand "thicker" to mean: "including more normative content". The antonym of "thick" in this context is not "thin" but "empty" or "open". As noted above, considered as a universal moral principle, this concept of human dignity is substantively empty or merely formal. The (human rights) "claims" that Carozza lists are therefore precisely not "contained" in this concept. By contrast, considered as a legal principle, this concept of dignity is enormously "thick" to begin with: In judicial practice, its emptiness becomes interpretative openness, as it were, resulting in an affluence of meaning. Its "useful[ness]" for judicial interpretations of human rights lies then in the fact that it has a content-carrying function (as a placeholder) – however, not necessarily the function of carrying *universal content*. The function of human dignity as a "universal placeholder" is therefore not to be mixed up with its function of providing "universal content".

This is not just some conceptual pedantry. It serves, rather, to reinforce the earlier point that judicial consensus about the human rights norms that Carozza lists – protection of life, liberty, equality and so on – does in itself not give us reason to think that things are any different than during the drafting of the UDHR: People agree on a list of rights that (allegedly) follow from human dignity, yet on the

[698] Carozza 2008, 936, emphasis added.

condition that nobody asks why. It does not tell us, in other words, whether agreement about these human rights norms is grounded in a common conception of human dignity, and whether what is concretely derived from these generally stated norms with the help of dignity arguments might not be entirely culturally relative.

Now Carozza's analysis of the growing globalization of the prohibition of the death penalty suggests that things *are* different. He interprets this process as "the working out of the practical implications, in differing concrete contexts, of human dignity for the rights to life and physical integrity."[699] This suggests that, in this "paradigmatic example"[700], one concrete legal consequence of a more abstractly stated human right has been specified by reference to a universal principle of human dignity.[701] However, this is at least dubitable, for the following reason.

Even if Carozza is right to maintain that, in judicial practice, the common recognition of human dignity leads to a "growing globalization of human rights norms"[702], one might have doubts about whether it is really the *universal content* of the dignity principle that is carrying the burden in this process. Instead one might wonder: Might not *just any* principle have this structural effect, as long as it is (1) commonly legally recognized as (2) a fundamental, universal and suprapositive (moral) principle that (3) ought to be legally implemented? In other words, to what extent does this process reflect, and presuppose, a *common substantive conception* of human dignity? Let me illustrate the point with an example.

Imagine that in a number of transnationally well-received cases, the constitutional courts in countries A, B and C would successfully argue for the reintroduction of the death penalty by employing dignity arguments. Suppose also that these arguments reflected a relevantly similar conception of human dignity. Now assume further that no other jurisdiction in the world adopted this conception. And yet the

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[699] Carozza 2008, 1082, reference deleted.
[700] Carozza 2008, 1082.
[701] This would also suggest an alternative reading of Carozza's "thickness objection" quoted above: After all, he might not be maintaining that the minimum core *that McCrudden identifies* is anything but formal. He might instead mean that McCrudden *identified the wrong core*, while the concept(ion) of human dignity that is commonly applied in judicial reasoning does include universal normative content.
[702] Carozza 2008, 1034.

search for harmonization in human rights adjudication, motivated by the common recognition of the universality of human dignity, would prompt them to reconsider their own prohibition of the death penalty in the light of their local dignity conceptions. Through just the kind of transnational judicial dialogue that Carozza describes, this might lead to a "growing globalization" of this "human rights" norm, i.e. the reintroduction of the death penalty on a global scale.

This imaginary example is, of course, strongly simplified, and not meant to reflect a realistic scenario. It serves to illustrate two points. *Firstly*, it is unclear why the consensus-generating function of human dignity that Carozza identifies should presuppose an overarching judicial consensus about its substantive meaning. Its function in this context is that of a *trigger for consensus-seeking dialogue about human rights norms*, which does not mean, by implication, that the consensus achieved is grounded in a substantive criterion provided by human dignity. Carozza has therefore not offered a compelling argument why we should infer from the growing globalization of certain human rights norms that, contra McCrudden, a "substantive consolidation of the meaning of dignity" in law has taken place.

Secondly, this further suggests that Carozza's "optimistic" conclusion that in the death penalty cases a "naturalist foundation" has been "*at work*" depends rather heavily on the contingent fact that in these cases the application of dignity arguments has lead to a morally preferable outcome – the prohibition of the death penalty – rather than to a morally dubious result as in the imaginary example just given or in the variety of actual examples that McCrudden gives.

If these objections are sound, then Carozza has given us no reason to reject McCrudden's "divergence thesis" in favour of a more "optimistic" view of the role of human dignity in judicial practice. The point is not that "[t]he most broad and general"[703] formulations of human rights norms do not have "some important traction". The point is rather that a substantive consolidation of the meaning of human dignity would need to be discernable in questions such as euthanasia or abortion that are not consensual anyway. If a "moral ground" is meant to be

[703] Carozza 2008, 936.

anything more than a moral principle that one can interpret however one pleases, we should reject Carozza's conclusion that human dignity is an example of "naturalist foundations at work"[704] in judicial practice.

The argument just developed is, of course, not comprehensive. It leads us to the modest conclusion that, within the limited scope of this scholarly debate, we have reason to accept the "divergence thesis" as the more accurate description of the role of human dignity in current judicial interpretations of human rights. I will presuppose this result in what follows. Judicial practice is then currently characterized by what I want to call "*radical legal dignity-pluralism*": A plurality of legal conceptions of human dignity that is "radical" in that it is not based on any substantive agreement about what human dignity is and requires, apart from a merely formal conceptual core.

2.3 Legitimate Pluralism via a Consensus-Seeking Dialogue?

How should we assess radical legal dignity-pluralism? Before we turn to this question in the next section, we need to add a final consideration that bears crucially upon its proper understanding. So far we have focused on human dignity in *current* judicial practice. In the light of this empirical result, what may we reasonably expect in the future?

It is a direct consequence of McCrudden's analysis that what *explains* the widespread use of dignity arguments in judicial practice is not, contra first appearance, that the legal concept of human dignity provides a common substantive guideline for the judicial resolution of human rights claims.[705] Should we conclude, then, that human dignity is *useless* for judicial practice? McCrudden suggests that we might instead wonder if it is "too ambitious to assess the utility of dignity in human rights adjudication"[706] on this basis. He points out that human dignity has

[704] Carozza 2008, 1082.
[705] McCrudden 2008, 712.
[706] McCrudden 2008, 712.

"an important *legal-institutional function*"[707]: "[T]he concept of human dignity provides a useful, but limited, language with which to address certain institutional difficulties to which human rights adjudication gives rise."[708] In short, these difficulties are:[709] *Firstly*, the problem of resolving conflicts of otherwise incommensurable values – for instance, the right to life of the foetus and the mother's right to freedom of decision in the context of abortion. In such cases, "[o]ne important institutional function of dignity is to provide a language in which courts can indicate the weighting given to particular rights and other values in this context."[710] *Secondly*, human dignity plays an important role in "domesticating and contextualizing human rights"[711]. It facilitates the adaptation of international human rights standards to local context by providing a language to indicate what these standards mean and require in local context: "Dignity allows each jurisdiction to develop its own practice of human rights."[712] *Thirdly*, human dignity "justifies the creation of new, and the extension of existing, rights"[713]. For instance, in Israel, where a right to equality was deliberately excluded from the constitution, at a later point "the Court asserted that the right to equality could be derived from human dignity and as a consequence merited constitutional protection"[714]. By fulfilling these institutional functions, the legal concept of human dignity contributes to "the establishment of a recognizably workable system of judicial interpretation and application of human rights."[715] Should we be satisfied with this?

We need to be aware how far these "institutional functions" of human dignity have taken us away from the initial expectation that the (alleged) legal recognition of human dignity as the universal moral ground of human rights is reflected in the universal moral guideline it provides for human rights adjudication. To find the

[707] McCrudden 2008, 713, emphasis added.
[708] McCrudden 2008, 713.
[709] I also draw here on Carozza's summary at Carozza 2008, 939.
[710] McCrudden 2008, 716.
[711] McCrudden 2008, 719-720.
[712] McCrudden 2008, 720.
[713] McCrudden 2008, 721-722.
[714] McCrudden 2008, 721.
[715] McCrudden 2008, 713.

utility of human dignity in these institutional functions means to radically decouple its rhetorical utility from any substantive claim to universality or universal moral justifiability. It is clear that radical legal dignity-pluralism and these institutional functions of human dignity are just two sides of the same coin. They can be morally legitimate only if radical legal dignity-pluralism is morally justifiable – or if they are, as a matter of fact, inevitable.

McCrudden makes it unequivocally clear that, when identifying these legal-institutional functions of human dignity, his "only purpose is […] to *explain* the increasing popularity of the concept of dignity among judges and advocates, not to justify these uses of dignity."[716] So, just as the divergence thesis, this is a descriptive not a normative thesis.[717] And yet, as Carozza notes – correctly, I think – McCrudden does seem to suggest that when we assess the utility of human dignity for judicial practice, we *should* shift our focus from the substantive meaning of the legal concept of human dignity towards its utility with regard to specific problems of human rights adjudication.[718] So he does seem to suggest that this is, in a way, *as good as it can get*.

In his reply to McCrudden, Carozza resists this conclusion rather vehemently. He objects that "McCrudden's own work helps to show why a continued committed engagement in *substantive dialogue* about the status and basic principle of human dignity is […] indispensable to the future of the global human rights enterprise"[719]. The goal ought to be to arrive at "*legitimate pluralism* in the specification of the underlying justifying value of human dignity"[720], "and so the dialogue on human dignity has an evident place within the judicial sphere."[721] To my mind both points, *taken separately*, are entirely correct: Legitimate pluralism should be the goal and substantive dialogue about human dignity should continue. The point that Carozza

[716] McCrudden 2008, 722, emphasis added.
[717] He further notes that this is "an apparently descriptively more accurate, but normatively disappointing, conclusion." McCrudden 2008, 712.
[718] This is in line with Carozza 2008, 939.
[719] Carozza 2008, 939.
[720] Carozza 2008, 940, emphasis added.
[721] Carozza 2008, 944.

misses, I guess, is that if we follow McCrudden's analysis, legitimate pluralism just might not be *achievable via* substantive dialogue. Contrary to what Carozza suggests, clearly McCrudden does not argue that substantive dialogue on human dignity should *stop*. Rather, the institutional functions of human dignity that McCrudden identifies *are* "dialogical" functions: The use of dignity lies in judicial dialogue. However, it lies in the *process* of dialogue rather than in its (consensual or morally justifiable) *outcome*. It does, in other words, lie in the fact that it *encourages, triggers and enables* discourse about human dignity and human rights, even if this might frequently lead to substantive results that are morally dubious or plainly unjustifiable.

This is not to say that there are not better or worse interpretations of human dignity in law. Nor is it to say that moral reasoning about human dignity does not play a role in its legal interpretation. Nor, finally, is it to say that there are not plausible conceptions of human dignity outside law. However, McCrudden notes that "*when any one of these conceptions is adopted, dignity loses its attractiveness as a basis for generating consensus with those who do not share that tradition*."[722] I assume that there are two implicit assumptions at stake in this claim.[723] The *first* assumption is that it is at least *unlikely* that the gap between the universality of human dignity and an overarching consensus about its normative implications will be significantly diminished or even closed in the future. So understood, McCrudden's divergence thesis does not only take stock of the judicial dignity discourse of the last (roughly) seventy years (which has not lead to a growing judicial consensus about the substantive meaning of human dignity). It also entails a prognosis of what we may reasonably expect in the future: Due to the strongly diverging practical self-understandings of plural legal communities, it might simply not be realistic to expect that judicial interpretations of human dignity will ever be anything but context-specific. This does not mean that we should stop trying to build more consensus. It does, however, suggest that we might think of the moral desirability of

[722] McCrudden 2008, 724, emphasis added.
[723] This is my interpretation, McCrudden does not state this explicitly.

the human rights enterprise – and of the role of human dignity within that enterprise – in more modest terms: After all, a *continued judicial dialogue* about human rights questions – including the firm place of moral argument in legal reasoning that this implies – is *worth something*, even if we may reasonably have to give up the expection that the moral universality of human dignity and human rights has been, or ever will be, truly incorporated into law. The *second* assumption is that such an "open judicial dialogue" about human dignity (and human rights), even though it is clearly not morally unproblematic, is preferable to the only other option that remains: that some substantive conception of human dignity is adopted in law in lack of an actual consensus about such a conception. In this case, it seems, human dignity might eventually become some kind of dialogue-stopper rather than a dialogue-trigger. It would lose precisely that function that has made up its utility so far, which might completely undermine its "attractiveness" in the long run.

What I understand McCrudden to be saying then is that human dignity provides human rights adjudication with the *flexibility* and *discursive openness* it requires to be "recognizably workable" *at all*: to resolve conflicts of human rights in want of a universal substantive criterion for conflict resolution; to contextualize rights in want of a universally shared moral worldview; to create new rights in the light of changing circumstances; and thus to continue the dialogue on human rights rather than to stop it altogether.

For the question about the justifiability of radical legal dignity-pluralism these reflections have two core consequences. *Firstly*, I suggest that we should accept the unlikeliness of achieving an overarching consensus on one human dignity conception as a "modest empirical feasibility constraint" what regards the possible outcome of judicial dialogue. It is "modest" because it is based on an experience in the past and present and might thus be disproven in the future (which is why we should continue to seek such a consensus). However, at least for the time being, we should not hide in the cloud-castle of a future consensus – let alone a morally justifiable one – but face the task of assessing *continued* radical legal dignity-pluralism as the more probable option.

The crucial question is then – *secondly* – whether the legal concept of human dignity should remain completely interpretatively open or whether the scope of its possible interpretations should be restricted. In other words, should the interpretation of the core content and legal consequences of human dignity be *left to the (legal) discourse alone*, or should we regard human dignity as a *presupposition* for *legitimate* legal dignity discourse? In what follows I will argue that the first assumption – the complete discursive openness of human dignity – is indefensible from the perspective of legal practice itself: The claim to consistency that is presupposed in legal interpretation requires that the conceptual core of human dignity may not be interpreted however one pleases.

3. How "Open" Should the Legal Concept of Human Dignity Be?

Can one consistently maintain, from the perspective of legal practice, that the legal concept of human dignity should remain substantively completely open, allowing for the kind of radical legal dignity-pluralism identified in the last section? Or should one substantive conception of human dignity be adopted in law, thus restricting the scope of possible judicial interpretations of the legal concept of human dignity? In addressing these questions in what follows, I take my cue from a line of argument that Turkuler Isiksel pursues in her paper "Global Legal Pluralism as Fact and Norm"[724]. Isiksel investigates certain parallels between classical debates about "value pluralism" in moral and political theory (especially in the political liberalist tradition) and more recent legal debates about "global legal pluralism". She argues that value pluralist debates are instructive to get a clearer grasp of the main issues at stake in justifying global legal pluralism. In this section I use this basic idea as guidance to develop my own argument for the need to restrict legal dignity-pluralism. I will now first focus on pluralism as a normative philosophical position more generally, and here more specifically on Isaiah Berlin's thoughts on

[724] Isiksel 2013.

the matter *(3.1)*. The result will be that legitimate pluralism is always principled pluralism. This leads to the further question whether it is possible to interpret human dignity as a principle the content of which is fully determined in discourse *(3.2)*. I will argue that such an interpretation is implausible and that, consequently, the scope of judicial interpretations of human dignity ought to be restricted.

Pluralism may be associated with a myriad of different positions and academic debates. Because these differences do not concern us here, I shall simply stipulate and clarify my use of the term in the course of this section.

3.1 Pluralism as a Norm: The Inescapable Need for *Principled* Pluralism

To begin with, we observe that 'pluralism'

> is a Janus-faced term: it is rooted in an empirical observation about plurality, but ends in an '-ism' that is characteristic of ideological positions or normative commitments. In other words, pluralism may be a *descriptive* thesis about the coexistence of many 'unlikes' within a given order, or it may be a *prescriptive* stance in favour of such diversity.[725]

So 'pluralism' might either denote a fact or norm. In the former case, a pluralist thesis is a descriptive statement about some empirically observable factual plurality ("legal dignity-pluralism" is a descriptive pluralist thesis in this sense). In the latter case, it is a normative statement about the value or desirability of some factual plurality. As a normative position, pluralism presupposes an argument that shows why some factual plurality is valuable and when, maybe, it ceases to be so.[726]

People have different moral ideas, religious beliefs, political views, personal ideas of what constitutes a good life, and so on. For brevity, we might say that people have different *values*, in the wide sense that they hold different views on what is normatively (most) important: justice, equality, liberty, solidarity, piety, etc. A '*value*', so understood, is something that people actually and subjectively have

[725] Isiksel 2013, 160, emphasis added, reference deleted.
[726] Cf. Isiksel 2013, 160-161.

(rather than morally ought to have, or that exists in some objective value order). '*Value pluralism*' is then a descriptive thesis about the diversity of values, grounded in empirical observation, that is beyond any reasonable doubt. The question is what follows normatively from this fact.

Two implications of value pluralism are crucial in this regard. *Firstly*, values may conflict with one another and may be incommensurable. If you believe that homosexuality is a crime (based e.g. on your religious worldview) while I believe that any discrimination against homosexuals is morally wrong (based, maybe, on my "enlightened"-rationalist worldview) then our values are, as a matter of fact, incommensurable. So unless one of us "gives up" her value – which, realistically, is often not going to happen – our values "clash". *Secondly*, this conflict concerns not only particular beliefs but also "belief systems", i.e. "comprehensive worldviews" or "doctrines".[727] Even if, for instance, I provide a perfectly sound argument for why homosexuals morally ought to be treated as equals – an argument that, in my view, is universally valid and thus cannot be rationally denied by anyone –, realistically quite some people will not be convinced – for instance because they "cannot connect" to my standard of universal rational justifiability in the first place but believe that God's or Allah's will is what counts instead. Value pluralism therefore implies a constitutive gap between (assumed) *moral validity* and *actual consensus* – a gap that one might strive to diminish in the future but that is most likely not going to be closed, and that should thus be accepted as a fact that we reasonably have to deal with.

'*Political pluralism*', as I will refer to it here, is a particular *normative* position about what morally follows from value pluralism. It is associated with the tradition of political liberalism. This tradition is, of course, enormously rich, but because I draw on it for systematic reasons only I will restrict myself to the philosophy of Isaiah Berlin in what follows. So when I speak of political pluralism I refer to his position more particularly. Note that the term 'political' is not meant as an opposite to 'moral' or 'legal' here: Political pluralism is essentially concerned with the

[727] Cf. Rawls 2005, 3-4.

consequences that one *morally ought* to draw from value pluralism with regard to the public realm, i.e. politics *and law*.[728]

Political pluralism is first of all *anti-monism.* We shall therefore begin by clarifying what monism is and spell out the relevant counter-view from there. The concept of "monism", in this context, was coined by Isaiah Berlin. Leaving complexities aside, for a start we may identify monism with a philosophical position that is distinguished by the following assumptions:

> (1) To every question there is a single true answer.
> (2) All true answers can, in principle, be found.
> (3) "The true answers, when found, will be compatible with one another, forming a single whole; for one truth cannot be incompatible with another."[729]

Consequently, there must be a *single criterion of truth* or some *highest truth* – for otherwise the discovered true answers might not be compatible with one another –, a criterion that integrates all particular truths into a coherent, harmonious whole. "Monist" philosophical thinking is therefore first of all characterized by the "*faith in a single criterion*"[730].

We can broadly distinguish two lines of criticism of this position. *Firstly*, there is the metaethical critique that there is no universal criterion or principle of this kind. It forms the basis of the metaethical position of "moral value pluralism" that we can leave unconsidered for present purposes. The *second*, more interesting (and more influential) line of critique is to call attention to the "*devastating effects*"[731] of this kind of philosophical thinking. As Berlin forcefully puts it: "[P]hilosophical concepts nurtured in the stillness of a professor's study could destroy a civilisation."[732] Because philosophical enquiry is "indissolubly intertwined"[733] with

[728] Cf. Berlin 2002, 168: "Political theory is a branch of moral philosophy, which starts from the discovery, or application, of moral notions in the sphere of political relations."
[729] Cherniss / Hardy 2018, Section 4.1. The rest of this summary is a simplified reformulation of the summary given in Cherniss / Hardy 2018, Section 4.1.
[730] Berlin 2002, 216, emphasis added.
[731] Berlin 2002, 167, emphasis added.
[732] Berlin 2002, 167.

politics, there is the virulent danger that the belief in some single, highest truth becomes a guiding principle of politics. The "devastating effects"[734] that Berlin has in mind are "grand political projects"[735]: attempts to shape and organize society according to an overarching, absolute, highest principle or ideal that constitutes, as it were, the political extension of a single criterion of truth – "like the final triumph of reason or the proletarian revolution"[736]. What these political projects have in common is that they absolutize one goal that all human beings ought to strive for, while degrading "the fact that human goals are many"[737] to something that must be overcome. "Monist" political projects are therefore essentially attempts to transcend the actual plurality of human ends and values, as opposed to an attempt to find morally legitimate ways of coexistence, *based on the recognition of this plurality*. Note that "monism" is then not so much a particular philosophical position but a way of thinking that might take hold of the theoretical as well as practical realm, a thinking that aims at *substituting plurality with unity*. Because value pluralism is part of the "human condition"[738], this higher ideal can only be sought within an authoritarian, oppressive, deeply undemocratic political order, "the vivisection of actual human societies into some fixed pattern dictated by our fallible understanding of a largely imaginary past or a wholly imaginary future."[739] As history teaches us, this is politically and morally disastrous. So political pluralism is an appeal to take value pluralism seriously as an uncircumventable fact, as part of the human condition. It is a "more humane ideal"[740] than monism.

We should first of all note, then, that political pluralism has its roots in the critique of a very specific philosophical tradition ("a Platonic ideal and its Western follow-ups") and its assumed relationship with certain grand political projects, i.e. above all totalitarianism. I emphasize this point not in order to downplay the contribution

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[733] Berlin 2002, 167.
[734] Berlin 2002, 167.
[735] Isiksel 2013, 176.
[736] Berlin 2002, 166.
[737] Berlin 2002, 216.
[738] Berlin 2002, 214.
[739] Berlin 2002, 216.
[740] Berlin 2002, 216.

of political pluralism for a critique of that tradition. However, in contemporary ethical debates the term 'monism' has sometimes come to be used as a sort of catch-all-phrase that is meant to disqualify *any* kind of principle-guided or universalist ethical approach. As I will explain in a moment, things are not as simple as that, and Berlin's own thought makes clear that the need for *principled* pluralism is clearly recognized in the political pluralist tradition itself.

Political pluralism tells us that, if the only choice available were between monism and radical pluralism, the latter would be preferable after all. However, "one hardly needs to be a radical pluralist to acknowledge the oppressive potential"[741] of an authoritarian, anti-democratic, "closed" political order. So the point "anti-monism" in itself is systematically very limited. The question is rather: What should be the alternative?

It is important to note that political pluralism does not equal relativism. After all, one of the driving motives behind a pluralist approach is precisely a moral one (to call attention to the deeply immoral consequences of "monist" thinking). So political pluralism does not amount to the relativist position that it is impossible to decide on the basis of rational criteria whether some principle or value is morally good or bad, better or worse. Rather, it implies that value pluralism morally ought to be respected, which presupposes a *moral criterion* for why this should be so. This leads to the well-known problem what that criterion might be, on pluralist premises. There are two ways for the political pluralist to go about. As a *first* option, he might attempt to show that value pluralism is *intrinsically worthy*. However, this position is untenable, for two reasons. *Firstly*, it is self-contradictory: It means, in effect, that pluralism itself becomes the kind of highest principle or "monist" super-value that the political pluralist position rejects. *Secondly*, political pluralism would become indistinguishable from relativism: It is a normative thesis about the moral desirability of "the coexistence of many 'unlikes' within a given order"[742] but it does in itself not imply a moral qualification of these "unlikes".

[741] Isiksel 2013, 178.
[742] Isiksel 2013, 160, reference deleted.

Clearly a political pluralist would not argue that it is, as a matter of principle, better to have at least *some* totalitarian systems than, say, only liberal-democratic ones, or that *any* values or goals deserve equal political and legal protection. Rather, the problem of conflicting and sometimes incommensurable values and the potential for social conflict that comes along with it is an integral part of value pluralism. This is why politics as well as law, as an attempt to guarantee order in the light of value pluralism, *always* presuppose to put values in a moral hierarchy, which implies the acceptance of some purposes and the rejection of others. So the plurality that the political pluralist defends is always a *morally qualified* plurality, and political pluralism does in itself not provide a criterion for what makes it morally qualified. The *second* and only tenable option is therefore that political pluralism must draw on some "external" moral principle that allows us to distinguish morally legitimate from illegitimate forms of pluralism: Just as value pluralism is not intrinsically worthy, so political pluralism is not a self-contained normative position but aquires justificatory force only as *principled* political pluralism, where that principle is not pluralism itself.[743]

This points to a tension that is fundamental for a liberal-democratic understanding of politics and law: the tension between *freedom* (or liberty) and *other principles* like justice or equality that indicate when and how freedom may and ought to be justifiedly restricted in order to guarantee a certain amount of freedom for all. Accordingly, "[t]he extent of a man's, or a people's, liberty to choose to live as he or they desire must be *weighed against the claims of many other values,* of which equality, or justice, or happiness, or security, or public order are perhaps the most

[743] Isiksel puts this point well in the following passage: "In responding to problems that are themselves the consequence of pluralism, including those of conflict and uncertainty, pluralism cannot be our sole guiding principle. The distinction between values that are worthy of protection and those that are not, between legitimate and illegitimate manifestations of pluralism, cannot be drawn without the aid of some external principle. That principle may be liberty or equality or justice or community, but it cannot be pluralism *simpliciter*. Those who espouse value pluralism as a normative position rather than a merely descriptive one seem inevitably to elevate some good, some principle, some norm, above the hubbub of a pluralistic moral universe as that by which we must open Pandora's box." Isiksel 2013, 184, reference deleted.

obvious examples."[744] So there is a *variety* of principles that constitute different aspects of what it means to restrict freedom in a morally justified way, all of which are rooted in the *one* fundamental moral demand that the freedom of everyone morally ought to be respected.

This raises the question: How should *these* principles be weighed? As Berlin notes, this is "a matter of infinite debate"[745] and we should not expect to ever decide this once and for all. It is important to see, however, that whatever answer one proposes to this question will be grounded in some *substantive interpretation* of what human freedom is and requires. According to Berlin, it will be based on some conception of human nature, "of the basic demands of this nature"[746] and "of what constitutes a fulfilled human life"[747]. So, to cut the matter short, the respect for the plurality of human values and the freedom to pursue them inevitably leads to the moral requirement to restrict this freedom and weigh those values by reference to a variety of moral principles. These principles are themselves grounded in the one fundamental moral principle of respect for freedom and must be balanced against one another by reference to this principle. Without such a principle, pluralism relapses into relativism.

We need to remember at this point that human rights are the modern expression, as it were, of the fundamental assumption that any legal and political order can only be morally justified if it respects, and protects, the essential social conditions of a "fulfilled human life"[748]. Accordingly, the different kinds of rights that we encounter in common human rights lists – rights to democratic participation, freedom of expression, certain material conditions etc. – reflect a variety of principles that constitute such conditions. Crucially, this does precisely not mean that these aspects are *internally unrelated* to one another. Rather, the common recognition (in law and outside law) that human rights have a *single moral ground*

[744] Berlin 2002, 215, emphasis added.
[745] Berlin 2002, 173.
[746] Berlin 2002, 215.
[747] Berlin 2002, 215. See also Berlin 2002, 173-174 and 214-215.
[748] Berlin 2002, 215.

expresses the basic idea that these rights give expression to the fundamental moral principle that every human being morally ought to be treated in a particular way. In current legal practice, the only commonly recognized ground of human rights is human dignity. What follows from these reflections for the question at hand?

Firstly, we may accept that radical legal dignity-pluralism is preferable to some kind of "dignity monism".[749] However, this assumption in itself will not bring us very far, for there are clearly "non-monist" conceptions of human dignity as well. So we may accept that discursive openness is important but this does not yet tell us whether this openness should be complete. By contrast, we *secondly* observe that such "monist" conceptions are found in law itself.[750] Apart from that, there is – *thirdly* – a more fundamental consequence. Provided that radical legal dignity-pluralism were justifiable, then there would need to be a principle that justifies this plurality. However, this principle could only be human dignity itself. In other words, it would have to be possible to give a consistent interpretation of human dignity as the ground of human rights as a principle the content and normative consequences of which – the human rights – are determined in concrete local discourse only. This would be a discourse-ethical or procedural understanding of human dignity. In the next section I will argue that such an understanding of human dignity cannot be upheld.

[749] Put in considerably general terms, we may think of such a "dignity monism" along the following lines: (1) Human dignity is a highest, absolute moral principle or value that expresses an overarching substantive idea of the good that all particular human goals or values must be subordinated to. (2) The fundamental task of law is to protect this objective value, even against the will of the legal subjects concerned. (3) What is morally right or wrong can be deduced, in every single case, from this highest principle or value. (4) Every single objective moral truth that follows from human dignity ought to be "translated" into a legal norm. Legal reasoning about human dignity is essentially a matter of detecting these objectively existing true answers.

[750] I take it that the interpretation of human dignity as an absolute "super-value" or non-waivable "super-right" by the German Federal Constitutional Court comes at least precariously close to such an understanding. See above, Chapter 6, Section 5.

3.2 Should We Give Discourse the Last Word?[751]

By incorporating a moral principle of human dignity into law, the legal practice commits itself to certain standards of consistency what regards the understanding of this principle. On a meta level this means that if it were a coherent claim that the interpretation of the substantive meaning and legal consequences of human dignity should be left to local discourses, thus allowing for a radical variety of such interpretations, then there would need to be a plausible interpretation of human dignity that allows this. This is why in what follows I will turn to the philosophical tradition that has defended this claim, namely discourse theory. It is clear that I cannot fully do justice to the discourse-ethical tradition here. The goal is merely to indicate what I regard as the core limits of a discourse-ethical understanding of human dignity.

To begin with, it is useful to distinguish between two general ways how to interpret the normative content of the moral principle of human dignity: a *procedural* or discourse-ethical understanding on the one hand and a more *substantive* understanding on the other hand, like e.g. the Kantian-Gewirthian conception of human dignity as outlined in the preceding chapter. According to both views, human dignity is a moral principle that grounds human rights, i.e. it expresses the fundamental moral obligation to respect one another in a certain way. To decide what this means and implies in a concrete situation (i.e. the "application" of this principle) presupposes to enter into a *discourse* about moral questions: It cannot simply be "deduced" from this principle but requires discursive reasoning and contextual balancing of various kinds. The crucial difference between these two interpretations may be summarized as follows: According to the *first*, procedural understanding, the moral principle of human dignity expresses a moral obligation that all human beings ought to mutually recognize one another as equal participants in the discourse on moral questions, while the substantive *outcome* of this discourse is in principle open. The content of the dignity principle is therefore a result, not a

[751] Parts of this section have formerly been published in Düwell / Göbel 2017.

presupposition of moral discourse. For instance, one might hold that the meta-principle of human dignity expresses a fundamental moral "right to justification", which implies that no human being may morally act towards any other human being in a way that is not rationally justifiable to him or her, while what this concretely means can only be determined via a reciprocal process of reason-giving (see below). This procedural approach is to be distinguished from an account that assumes that the principle of human dignity does not only maintain procedural commitments but likewise substantive criteria. According to this *second*, more substantive understanding, the moral principle of human dignity implies a substantive criterion of what it means to respect one another in that way. There are at least some moral duties as well as a substantive guideline for specifying and balancing rights that follow directly from this principle. So the core content of the dignity principle is a *presupposition* for rather than a result of (legitimate) discourse. Consequently, in order to understand its core content I do not need to enter into discourse. I will now first explain what is wrong with the first option and then return to the second one.

Discourse ethics relies on the fundamental premise that the answers to moral questions can in principle only be discursively generated: What is morally right or wrong, whether or not a moral claim is valid, can only be established in discourse.[752] So morality is in a way nothing but a process of reciprocal reason-giving. Accordingly, moral reasoning does not begin, as it were, with the question what claims every individual human agent necessarily has to endorse in order to understand him- or herself consistently, but with a reflection on the necessary presuppositions of dialogue or intersubjective communication. According to discourse theory, every "real" discourse needs to be based on the recognition of certain "rules of argumentation" or "conditions of communication" like universality, reciprocity and equal opportunities to make one's reasons heard that are to guarantee that the viewpoint of every participant in the dialogue is equally

[752] I disregard here the various differences between discourse-ethical approaches. For a comparison of different versions of discourse ethics see Werner 2011.

taken into account.[753] So, while from a discourse-ethical perspective the answers to moral questions ought to be (and can only be) generated in a dialogical fashion, this dialogue needs to have a certain quality to count as a dialogue "proper" and thus to yield morally legitimate results. As these criteria constitute the fundamental presuppositions for any fair or proper dialogue, they cannot themselves be up for debate.[754] Rather, according to discourse theory, they cannot be rationally denied by anyone who enters the "reason-giving game".[755] This is why, on a discourse-ethical view, the moral principle of human dignity expresses procedural requirements for a fair discourse, while the substantive content of that principle (e.g. what human rights we have) can only be specified in discourse. In other words, what can be inferred from the content of this principle is not which human rights we have or which substantive criteria should guide the interpretation of human rights but which procedural criteria ought to guide the discourse in which they are determined and interpreted.

Such a procedural understanding of the content of human dignity is for instance defended by Rainer Forst.[756] As already explained above, Forst argues that human rights, in all of their different facets (moral, legal, social etc.), are grounded in one fundamental moral right, the "right to justification".[757] This right, according to Forst, is also

> the true ground for the claim of having one's dignity respected: [...] To possess human dignity means being an equal member in the realm of subjects and authorities of justification and to be respected as such.[758]

So, to have (a moral claim to) human dignity means to have a moral right to justification, which again is "the right to be respected as a moral person who is *autonomous* at least in the sense that he or she must not be treated in any manner for

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[753] Cf. Habermas 1983.
[754] See further on this Düwell / Göbel 2017.
[755] See Habermas 1983, 99-100.
[756] See Forst 2011. For a recent critique along the lines presented here see Düwell 2016.
[757] See Chapter 4, Section 2.
[758] Forst 2011, 965.

which *adequate reasons* cannot be provided."[759] In other words, to have a moral (meta-)right to have one's human dignity respected means that human beings morally ought "to be respected as autonomous agents who have the right not to be subjected to certain actions or institutional norms that cannot be *adequately justified* to them."[760] Crucially, Forst adds that "*[m]oral persons themselves decide about the 'adequacy' of these reasons in concrete dialogue with others*."[761] "[A]bstractly stated", these "are reasons which can be *reciprocally and generally justified* – or better, which cannot be rejected – without violating the respect for others as beings with their own perspectives, needs and interests"[762]. So, in short: On the politico-legal level, the moral right to justification essentially implies that human beings ought not be subjected to actions or institutional structures that are not justifiable to them. *Which* structures are not justifiable to them can only be decided in discourse. All that human dignity grounds is the procedural requirement that all citizens should be respected as equal participants in moral, political and legal discourses, i.e. in discourses that concern their interests. Accordingly, the discourse decides about the content of the human rights: The citizens should themselves determine which rights and duties should govern this order.[763] For anything else would mean to disrespect the autonomy of the citizens, according to Forst.

There are two main problems with this view. Because both of them apply to discourse theory more broadly, I will disregard the further details of Forst's approach in what follows. The *first* problem regards its cogency as a philosophical position, the *second* – and directly related – problem concerns the question of its applicability, or how it may be translated into (legal) practice. I will explain both points in turn.

The "concrete dialogue" in which citizens jointly decide what human rights they have (and should be protected by law) is, of course, a *morally qualified* dialogue in

[759] Forst 1999, 40, emphasis added.
[760] Forst 2010, 712, emphasis added.
[761] Forst 1999, 40, emphasis added.
[762] Forst 1999, 40, emphasis added.
[763] Cf. Düwell 2016, 36.

the sense indicated above: It is not a dialogue in which, for instance, the well-educated, eloquent, rich or otherwise powerful citizens determine the discursive result, for instance by convincing other citizens that something is in their interest which is "actually" not justifiable to them. Nor is the outcome of the dialogue simply decided by the majority. The underlying idea is rather that it is a dialogue in which everybody's reasons and perspectives are equally taken into account, and that the outcome of the dialogue reflects these reasons and perspectives. But what does this mean?

The dialogue in question, even ideally, will inevitably be one in which human beings with significantly different "perspectives, needs and interests"[764] get together to decide about the laws that should govern their community. Now, on ideal grounds, they will have an equal opportunity to bring these perspectives to bear. However, this does not change the fact that human beings deem all kinds of things to not be justifiable to them, and what they regard as such will often be incompatible with one another, even if one starts from the "ideal" precondition that they do enter into a dialogue, listen to one another, etc. Imagine, for instance, that the homosexual and the Christian fundamentalist homophobic members of a community enter into a dialogue about which laws should govern their society, say: whether there is or should be a human right to marry and found a family that holds for heterosexuals and homosexuals alike. We may be tempted to say then that the discursive contributions of the Christian fundamentalists "count less" because they disrespect homosexuals as equals. But this would be shortsighted: Provided their religious commitments, to "subscribe" to a law that recognizes homosexuals as equals is unjustifiable to them, from their perspective. Now the discourse theorist would have to resolve this situation in the following way: He would have to argue that precisely because the equal moral status of all discourse participants morally ought to be respected, any discursive contributions that disrespect that status will be disqualified. In other words, he would have to say that the position of the homophobic is unjustifiable. But on what grounds? If the "adequacy" of the reasons

[764] Forst 1999, 40.

he gives are to be determined in discourse, then there is no way to arrive at an answer by looking at discourse only. This has three crucial implications. *Firstly*, if the dialogue is to generate a justifiable outcome, then it cannot just be about *reason-giving*. It must be about giving reasons that are themselves *reasonable* ones, which means that what counts as reasonable or not cannot be decided in discourse, no matter how ideal it is. There must therefore be a criterion of consistency or reasonableness that does not rely on discourse itself but is presupposed in the discursive setting. *Secondly*, this implies that the principle that underlies the discourse – for instance to be respected as a moral person who is autonomous – cannot be purely procedural. Rather, there must be some substantive criterion that enables us to distinguish morally legitimate from morally illegitimate discursive contributions that does not rely on discourse itself. The very idea of reasonableness or moral justifiability that is inscribed in a discourse ethical view makes it impossible that it is completely left to the discourse what this reasonableness substantively means and implies. This *thirdly* means that the discourse participants need to have some shared understanding of what it means to respect one another as equals before they enter the discourse, an understanding that is rooted in their shared practical *self*-understanding of moral persons who give reasons.

Provided that the moral principle of human dignity (or the moral right to justification) is the quintessence of criteria that distinguish just any discourse from a morally qualified discourse, this only allows for two conclusions: *Either* that principle does not contain normative content prior to discourse, in which case there remains no substantive criterion for the moral qualification of discursive settings. Any discursively achieved result, no matter how morally problematic, would then have to count as morally valid. *Or* it does contain normative content that is *prior* to discourse. In that case the claim that human beings fully decide what human rights they have in discourse becomes untenable. The "dialogical" discourse theoretical approach becomes indistinguishable from a "monological" approach what regards the discourse-antecedent content of the dignity principle. This provided, it is unclear why we should not be able to explicate the core content of the moral principle to

respect everyone's human dignity prior to discourse. In other words, the core content of the moral principle of human dignity is not a result of (reasonable) dialogue but its fundamental presupposition.

So far I have explained what I regard as deeply incoherent about the moral idea of legitimate discourse that is grounded in intersubjective procedural requirements only. A second set of problems arises when it comes to the application of this idea. To begin with, one might wonder whether to participate as an equal in societal dialogue about fundamental moral and political questions does not itself depend on presuppositions that human rights are there to protect: for instance, a certain degree of education, of social security, of free time and so on.[765] But then such regulations cannot be the result of the dialogue. Moreover, it is clear that in complex societies the possibilities of *actual* dialogue are very limited. Bluntly, it is not possible to solve fundamental moral and political questions via some sort of round-table discussion in which each and every citizen brings his or her reasons to bear. So we must first of all see that the discourse ethical claim that citizens should themselves decide about the laws and institutions in their society has its flipside in the fact that one reason why we have these laws and institutions are precisely the structural limits of direct democratic dialogue. Rather, there is an inevitable need to fix certain standards of communal life, at least for the time being, without constantly (re)debating them from the ground up. However, this of course leads to the question: What should these standards be, at this point in time? On his or her own premises, the discourse ethicist's answer would have to be that this depends on the outcome of the discourse – which, from a practical perspective, leads nowhere.

There are two further important implications of this point. *Firstly*, it is a direct consequence of the structural limits of actual dialogue that decisions about moral, political and legal questions are to some extent delegated to institutions, for instance to parliament. However, these discursive settings are, of course, precisely not ideal ones. In short, the decisions reached may be morally problematic or illegitimate, due to exactly those factors that the moral idea of a (legitimate) discourse is meant

[765] Cf. Düwell 2016.

to exclude: power imbalance, a lack of justifiability in terms of universality, equality and reciprocity, and so on. So, from a practical perspective, we run into the same problems as already indicated above: The criteria of reasonableness and their substantive implications that ought to guide these discourses cannot arise out of these discourses themselves but must confront them as external constraints. In other words, in a world characterized by oppression, power struggles and so on, certain fundamental moral questions should simply not be up for discussion. In that regard, law ought not only guarantee the possibility of dialogue; it also ought to restrict the scope of possible outcomes of dialogue.

However, the same point holds (*secondly*) for the possible outcomes of *judicial* dialogue as well. We must not miss the obvious, namely that when we speak of the "interpretative openness" of human dignity as a legal concept, we refer first of all to its openness within a professional discourse among legal scholars rather than some kind of direct democratic discourse. Bluntly, *someone* will decide what its normative consequences are, and that someone will be a judge. This finally leads us back to the initial question. The claim that the last word regarding the normative content of human dignity should be given to (legal) discourse(s) is not only morally problematic because it may lead to morally unjustifiable decisions. More fundamentally, it is also untenable from the perspective of legal interpretation itself: One cannot consistently maintain that human dignity is the moral ground of human rights *and* that human dignity has no normative content whatsoever that is prior to discourse, i.e. here: its legal interpretation, and thus constitutes a constraint on the possible outcomes of this interpretation. This standard of consistency and justifiability is presupposed in the process of interpretation and in the perspective of the interpreter itself. This is why, from a moral-philosophical and from a legal perspective, judicial interpretations of human rights ought to be guided and limited by a substantive conception of human dignity.

This claim raises, of course, numerous questions when it comes to details, questions that I will not be able to address in the scope of this study. Instead, in the following final section I will indicate some of the concrete implications that it would have if

judicial interpretations of human dignity and human rights were guided by the moral conception of human dignity that I have proposed in Chapter 6.

4. Incorporating the Moral Dignity Principle into Law

In Chapter 6 I have argued that the moral concept of human dignity should be interpreted as a moral principle that is grounded in the necessary practical self-understanding of human agents. What would it entail more concretely if this moral principle were incorporated into law, i.e. if judicial interpretations of human dignity and human rights were guided by this conception of human dignity? And what would it imply for our understanding of the relationship between the moral and legal dimension of human dignity and human rights? I will now first briefly recapitulate the main line of argumentation of this study. Then I will outline the central implications of this argument in terms of the questions just posed.

4.1 Summary of the Argument

At the beginning of this study I have formulated two questions: How do human rights, understood as a specific kind of moral rights, and human rights, understood as a specific kind of legal rights, relate to one another? And how may the concept of human dignity help us in making sense of their relationship? The systematic pursuance of these questions in this study was prompted, among other things, by two opposed worries that we encounter in current human rights debates: worries that concern the role of moral justification in our understanding of legal human rights norms, or the implications of the assumption that legal human rights norms have a moral ground. On the one hand, there is the worry that this might mean to undermine the ideological neutrality of law and the self-determination of legal communities. On the other hand, in want of an overarching moral criterion that guides our understanding of these norms, human rights might be interpreted in entirely culturally relative or arbitrary ways.

These concerns first of all have to be taken seriously. However, in current human rights debates they partly lead to onesided views about the relationship between moral and legal human rights: Either legal human rights norms appear to be little more than "embodiments" of time- and spaceless natural rights, or it seems that we can understand the legal dimension of human rights without any reference to an underlying moral dimension. Against this background, I have formulated the main goal of this study as follows: to show that and how a moral idea of human dignity and human rights bears upon a proper understanding of the nature and justifiability of legal human rights norms.

Taking up this task, in a *first* step I have stressed the importance of several conceptual and methodological presuppositions. In the light of the irreducibility of the moral and legal dimension of human rights to one another I have emphasized the need to conceptually distinguish between moral and legal human rights. The need for this conceptual distinction also arises because there is, at the moment, no common concept of human rights, which makes it necessary to clarify one's preunderstanding of 'human rights' in order to enter into a meaningful discussion about human rights-related questions (the alternatives being conceptual confusion and "conceptual imperialism"[766]). What regards the further refinement and substantiation of these concepts, I have argued that the common opposition between "bottom-up" and "top-down" approaches to human rights falls short of the dynamic and inevitably circular character of concept and conception formation. It requires not only to move back and forth between preunderstanding and substantive normative-systematic reflection, but also between different contexts of human rights: morality and law, theory and practice, history and present, and so forth. Finally, I have stressed the need to distinguish between questions of "practice-(in)dependency" on the level of conceptualization, justification and application.

In a *second* step, I have employed these conceptual and methodological tools for an analysis of current debates about the "moral", "political" and/or "practical" character of human rights, which are sometimes summarized as the "Moral-Political

[766] See Buchanan 2013, 10-11, and above, Chapter 2, Section 3.1.

Debate". I have focused on the arguments by Griffin, Gewirth, Beitz and Raz. I have argued, *firstly*, that central points of contention between "moral" and "political" or "practical" approaches turn out to be misguided as soon as we reconsider them in the light of different preconcepts of human rights and different levels of "practice-(in)dependency". *Secondly*, at closer look the labels "moral" or "naturalist" and "political" or "practical" cover a large variety of substantive positions and claims that again concern very different aspects of the "moral", "political" and "practical" dimensions of human rights. To phrase these points of disagreement in terms of an alleged contrast between the morality and the practice of human rights is therefore fundamentally misguided. The debate first of all indicates the need to arrive at a more nuanced view of how these aspects relate to one another, rather than to think of them in dichotomic terms.

In a *third* step, I have drawn concrete systematic conclusions from this discussion with regard to the main goal of this study. I have argued that in order to move beyond the false alternative of understanding human rights "in terms of natural rights" or "in terms of their practical functions", we need to develop a clearer idea what it means that human rights have a moral ground or (in other words) that it is one of their fundamental moral functions to protect human dignity. What regards human dignity as the ground of moral human rights, this requires to show that a plausible philosophical interpretation of this claim does not necessarily commit one to the "Mirroring View". What regards human dignity as the ground of legal human rights, I have stressed that we need to arrive at a clearer idea what this means from the perspective of legal practice. I have argued that proponents of "moral" and "practical" approaches commit a similar mistake: a focus on legal text and thus a static understanding of legal human rights while paying too little attention to the nature of legal human rights as practiced rights. This leads to the question what it means, from the perspective of legal practice, that it is a fundamental moral purpose of these norms to protect human dignity. Finally, I have argued that this requires a hermeneutical approach to legal human rights that takes seriously the nature of law as an interpretative practice.

In a *fourth* step, I have taken up this task with regard to legal human rights. I have begun with a further substantiation of the concept of legal human rights, arguing that legal human rights are human rights that are instantiated in domestic and international law. Not only do legal human rights comprise domestic and international human rights; the transnational dynamic of the human rights practice also indicates the mutual relationship between human rights on the international and domestic level, and in particular the dynamic between minimal and vague human rights guarantees and their context-specific (re)interpretation. Drawing on Barak's account, I have then focused more closely on the question what role constitutional principles or "values" like human dignity play in the construction of the purposes of domestic legal human rights. Finally, I have argued that the assumption that legal human rights have a moral ground – human dignity – has practical effects in judicial interpretations of human rights by reference to their moral purpose of protecting human dignity. Once we approach the practice of legal human rights in this way it becomes clear that the normative purposes of legal human rights and a moral idea of human dignity and human rights are not only not opposed to one another – they are intimately connected. This analysis has at the same time revealed a certain tension what regards the vagueness or interpretative openness of the legal concept of human dignity: a commitment to human dignity as a universal moral principle or "value" on the one hand, and the context-specific interpretation of the normative implications of human dignity on the other hand.

In a *fifth* step, I have focused on a moral-philosophical interpretation of the moral concept of human dignity. I have proposed that human dignity is neither best understood as a value nor on moral realist premises. Rather, I have taken seriously the fact that moral reasoning takes the form of self-reflection, and further argued that we find the central lines of reference for a self-reflexive understanding of human dignity in the Kantian tradition. I have proposed to interpret human dignity as a universal and necessary moral principle that expresses the fundamental moral obligation to respect all human beings as the holders of moral human rights. This principle is grounded in the necessary practical self-understanding of every human

agent. It contains two rights – well-being and freedom – as well as a substantive criterion for specifying and weighing the concrete moral obligations that follow from these rights, i.e. the criterion of the relative weight in necessity of agency. This dignity principle is a principle of human rights not in the sense that it is the highest obligation but that the human rights follow from it as its normative consequences.

Finally, in this chapter I have taken up the line of thought from Chapter 5 again and considered more closely the tension between the universal moral implications of the legal concept of human dignity and its particular, context-specific legal interpretation. The result was that the legal concept of human dignity is interpreted in radically divergent ways, and that one may have reasonable doubts about whether a further consolidation of its substantive meaning in law might be achievable via continued judicial dialogue. While it is clear that radical legal dignity-pluralism (as I have called it) is morally problematic, I have raised the question whether the complete interpretative openness of the legal concept of human dignity can be consistently defended from the perspective of legal practice itself. Drawing on Berlin's thoughts about political pluralism, I have then first recalled that legitimate pluralism is always principled pluralism. Consequently, for radical legal dignity-pluralism to be justifiable, it would need to be possible to consistently interpret human dignity as a principle the normative content of which is fully determined in (legal) discourse. Such a procedural understanding of human dignity is defended by discourse-ethical approaches. Finally, I have argued that this understanding is untenable, both for philosophical and for practical reasons: The core content of the moral principle of human dignity is not a result of but a presupposition for legitimate discourse. Radical legal dignity-pluralism is therefore not only problematic from a moral perspective, it is also unjustifiable from a legal perspective. Therefore, if we take seriously the claim to moral justifiability that is implied in the legal understanding of human dignity, then judicial interpretations of human dignity and human rights ought to be guided by a conception of human dignity that gives these interpretations more consistency.

In a final step, let me address the question what it would mean more concretely if judicial interpretations of human rights were guided by the moral conception of human dignity that I have proposed above.

4.2 Conclusions: The Moral Dignity Principle as a Legal Principle

I have interpreted human dignity as a moral principle that grounds the human rights, in the following sense: It expresses the fundamental moral obligation to respect every human being or agent as somebody who is morally entitled to the generic conditions of his or her agency; and it entails a substantive criterion for concretizing and weighing human rights claims, namely by reference to the necessity of the relevant goods for agency. In this final section I want to indicate some of the main practical consequences of this conception for our understanding of human dignity as the moral ground of legal human rights, provided that judicial interpretations of human rights were guided by this conception.

As explained above,[767] this conception would imply a "principialist-reductionist" understanding of human dignity and its relationship to (legal) human rights: As a legal concept, human dignity would not be a specific subjective right, nor a subjective legal entitlement analogous to a right. Rather, it would be a legal principle that grounds (legal) human rights, while the normative consequences of this principle are *fully covered* by the human rights. (Note that this implies that human dignity would also be the highest legal or constitutional norm.) One immediate consequence of this understanding is that it is impossible that human dignity is brought into *opposition* with the human rights: There can be no conflict between a "right to human dignity" and some (other) human right. Nor can human dignity "trump" some (other) human right. Rather, any violation of a human right means to violate, or more precisely disrespect, the dignity principle, for all that human dignity as a legal principle requires is to respect the legal human rights.

[767] See above, Chapter 6, Section 5.

Human dignity so understood is not a value, let alone some kind of "super-value" like in the German constitutional context. Accordingly, the fundamental purpose of human rights laws is not to protect an "objective value order", nor to protect a value that "inheres" in human beings in some sense. The assumption that human rights are grounded in an objective – and maybe even absolute – value of human dignity is not only untenable from a moral-philosophical perspective but also deeply problematic from a legal-practical perspective. What human dignity is and implies is then largely left to intuition or to an alleged societal consensus, i.e. eventually to what Böckenförde calls the "positivism of daily value judgments"[768]. Accordingly, a value understanding of human dignity opens the door for legal paternalism and for a "moralization" of law in the sense that it is eventually left to the intuition of the judge what constitutes a violation of human dignity: In short, a value is something that "exists", as distinguished from a normative claim that requires rational justification and is thus "communicable"[769]. Moreover, following Waldron, we might say that a value is something that requires *protection*, whereas a status requires to be *respected*.[770] To understand human dignity as a value means to disconnect it from the self-understanding of those who this value is supposed to protect, as is evident from judicial decisions that state that the human dignity of human beings has to be protected even against their (declared) will. By contrast, the possibility of protecting someone's human dignity against his or her own will is a *contradictio in adiecto* according to the understanding of human dignity that I have proposed: *Firstly*, as noted above, to protect human dignity means to protect the human rights, and rights can be waived. *Secondly*, a paternalistic moralization of law by prohibiting certain actions on (alleged) moral grounds that are not anchored in a human right is impossible. A legal argument like "Even though you freely choose to engage in sodomy, we prohibit your action because you violate your own dignity" is simply not possible on such a conception. Such a paternalistic

[768] Böckenförde 1987, 20, my translation.
[769] See Böckenförde 1987, 12-13.
[770] See Waldron 2009, 218.

interpretation of human dignity that is deeply at odds with the recognition of human beings as agents who set their own ends is therefore excluded on this human dignity conception. It is, therefore, an *empowerment* rather than a *constraint* conception of human dignity[771] – it is a "rights-supporting" rather than a "rights-constraining" principle:[772] Human rights are based on the respect for human beings as legitimate makers of claims, rather than on an idea of human beings who need to be protected from their own actions. Accordingly, human dignity neither expresses nor presupposes some highest, substantive idea of the good – some overarching end that all human beings ought to strive for. On the contrary, to respect somebody as an *agent* precisely means to respect him or her as somebody who chooses and pursues *his or her own ends*. In this regard, the dignity principle is an essentially "liberal" principle that is based on the recognition of the plurality of human ends.

Let us next turn to the *content* of the dignity principle. To begin with, human dignity is not just the quintessence of the human rights, in which case it would not provide a substantive criterion for concretizing and weighing human rights claims. Rather, to think of it as a principle presupposes that there is a logical distance and categorial difference between human dignity and its normative consequences (i.e. the human rights). It is a common feature of certain "suprapositive" as well as "positivist" conceptions of human dignity that they lack any criterion for concretizing rights claims.[773] One might think, however, that it is one of the primary requirements of a conception of human dignity as the ground of and interpretative principle for human rights that it entails such a criterion. This does not mean, of course, that the right answers in concrete human rights cases can just be deduced from the dignity principle. It rather first of all means that the legal interpreter should be forced to justify his or her conclusions on the basis of rational argument. The moral principle of human dignity, so understood, first of all represents an

[771] See Beyleveld / Brownsword 2001 and Brownsword 2014.
[772] Cf. Düwell 2014.
[773] See Böckenförde 2003 and Herdegen 2005. See also Düwell 2010, 65-67.

overarching standpoint for specifying rights claims and for putting them into a hierarchy.

To understand human dignity as a "fundamental" or "highest" principle in the sense explained above[774] has consequences for the concrete duties that follow from human dignity. To begin with, the scope of protection of human dignity is significantly larger than for instance a mere "non-instrumentalization" or the legal prohibition of particular "dignitarian harms", such as torture or genocide. Rather, *firstly*, human rights can then no longer be regarded as being only or primarily rights *against* certain state practices – e.g. institutionalized torture or political prosecution. The scope of protection of the human rights is considerably broader than this: If human rights are rights to the necessary conditions of agency, then the state will be as much required to refrain from certain actions as to *provide* (access to) certain goods. The understanding of human dignity does, in other words, have immediate implications with regard to the much debated issue of socio-economic rights. *Secondly*, the dignity principle implies a strong moral claim that not only the members of this or that legal community but all human beings ought to be taken into account. Clearly this does not mean that a state might not have different moral duties regarding its own citizens than towards the people in some other country, nor that it might not be considerably complex to identify the relevant duty-bearers. However, to recognize the dignity principle as the fundamental principle of a politico-legal order does not allow the state to simply look away when e.g. the lives of human beings are threatened. If we think, for instance, of refugees drowning in the Mediterranean Sea, or of prolonged drought in certain African regions, then the mere fact that the human beings concerned belong to a different legal community does simply not count as an argument. In such severe cases at least, the dignity principle involves a strong moral-legal obligation to take all appropriate counter-measures at one's disposal. This does not mean that such problems can be solved by legal means. However, to recognize the dignity principle in law does at least mean

[774] See Chapter 6, Section 4.2.1.

to recognize a legal duty to deliberate on these problems, and for instance to establish institutions that can deal with them.[775]

Which rights follow from human dignity and what does it mean more specifically that these rights are being fleshed out with the help of human dignity? *Firstly*, there are certain core rights that are so fundamental for human agency that they can hardly be up for discussion, e.g. being alive, having access to health care, having some basic social and financial security, etc. However, *secondly*, it is also clear that to determine what these (and other) rights require in concrete circumstances always allows and calls for contextual balancing of various kinds: in terms of empirical factors that need to be taken into account; in terms of newly arising problems (think, for instance, of a right to natural ressources or a right to privacy); in terms of the concrete history and self-understanding of a community (think, for instance, of the prohibition of the Holocaust denial in Germany); and in terms of the justification of subprinciples that are required to solve these matters. So it is impossible to determine from the outset what these rights require more concretely. Accordingly, such answers cannot be deduced from (the principle of) human dignity. The dignity principle first of all protects a complex legal framework that ensures that individuals have certain core rights and that whatever is concretely derived from these more general norms must be rationally justifiable by reference to the criterion of agency. So, human dignity *enables* a context-specific discourse about human rights, it entails the *duty* to engage in that discourse, it sets the *limits* of the possible outcomes of that discourse and it provides a *criterion* for it. Human dignity is – or ought to be – neither a "super-value" nor an "argumentative bat", neither an "empty formula" nor a "conversation-stopper". As a legal principle, it obligates law to enter into rationally justifiable moral argument about the human rights.

[775] Cf. Pogge 1998.

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Samenvatting

Het moderne concept van mensenrechten bevat een morele, een politieke en een juridische dimensie die nauw met elkaar verbonden zijn. De focus van mijn proefschrift ligt op de morele en juridische dimensie van mensenrechten: Hoe kunnen wij de relatie tussen deze twee dimensies van mensenrechten beter begrijpen? En welke rol speelt daarbij het concept van menselijke waardigheid? Dit zijn de centralen vragen van mijn proefschrift. Mijn hoofdstelling is dat het concept van menselijke waardigheid niet alleen fundamenteel belangrijk is voor een goed begrip van zowel de morele als de juridische dimensie van mensenrechten; het constitueert ook de centrale link tussen een moreel en een juridisch begrip van mensenrechten. De sleutel voor een goed inzicht in de relatie tussen de morele en juridische dimensie van mensenrechten is de notie dat menselijke waardigheid de morele grond van mensenrechten is – een aanname die centraal staat in documenten en debatten over mensenrechten, maar die tegelijkertijd heel omstreden is.

Aangaande deze aanname komt men in huidige debatten over mensenrechten twee tegengestelde zorgen tegen: Aan de ene kant is er een scepsis over hoe afhankelijk de mensenrechtenwetgeving is van universele morele principes. De zorg bestaat dat dit de ideologische neutraliteit van de wet en de democratische soevereiniteit van juridische gemeenschappen zou kunnen ondermijnen. Sommige mensen geloven daarom dat juridische mensenrechts-normen een specifiek politieke vorm van rechtvaardiging vereisen. Aan de andere kant is er de zorg dat mensenrechten op een arbitraire of cultuur-relativistische manier geïnterpreteerd worden. Daarmee wordt dan benadrukt dat een aanspraak op universele morele rechtvaardigbaarheid een vast deel van ons begrip van de politieke en juridische dimensie van mensenrechten vormt.

Hoewel beide zorgen serieus moeten genomen worden, worden zij in huidige filosofische debatten over de natuur en rechtvaardiging van mensenrechten vaak op

een eenzijdige manier angepakt. We zien hier vaak de volgende veronderstelde tegenstelling (zie ook beneden): Ofwel zijn juridische mensenrechts-normen maar belichamingen van tijdloze natuurrechts-normen; of ze zijn volledig onafhankelijk van een onderliggende morele dimensie. Een van de hoofddoelen van mijn proefschrift is dan ook om een genuanceerdere interpretatie van menselijke waardigheid als morele grond van mensenrechten te ontwikkelen. Deze interpretatie moet de morele en juridische dimensies van mensenrechten serieus nemen, maar ook duidelijk maken dat en hoe zij met elkaar verbonden zijn.

Voor de aanpak van deze taak doe ik twee fundamentele aannames. Ten eerste ga ik ervan uit dat er (minstens) twee concepten van mensenrechten bestaan: een concept van mensenrechten als een specifiek soort moreel recht en als een specifiek soort juridisch recht. Daarbij interpreteer ik juridische mensenrechten als rechten die feitelijk zijn erkend in de wet (te onderscheiden van mensenrechten die vanuit een moreel perspectief erkend zouden moeten worden). Daarbij is het belangrijk om op te merken dat ik er niet ervan uitga dat zij onafhankelijk van elkaar zijn maar alleen dat ze niet tot elkaar zijn te reduceren. Een systematisch onderscheid tussen deze twee concepten is dus de voorwaarde om de relatie tussen hen beter te begrijpen.

Ten tweede staat met betrekking tot deze vraag een bepaalde metanormatieve aanname centraal, namelijk: Normative principes (dus hier: morele en juridische mensenrechten) zouden niet begrepen moeten worden als iets wat gegeven of feitelijk is. Ze zijn ook niet gebaseerd op iets wat gegeven of feitelijk is, bijvoorbeeld op bepaalde “waardes”. In plaats daarvan ga ik ervan uit dat normative principes het resultaat zijn van een proces van zelf-interpretatie: De aanname dat alle mensen bepaalde morele (mensen)rechten hebben komt voort uit een reflectie op onszelf als menselijke actoren. Morele mensenrechten moeten daarom niet op een moreel-realistische maar op een zelf-reflexieve manier gerechtvaardigd worden. In de juridische praktijk worden juridische mensenrechten in relatie tot het praktisch zelf-begrip van juridische gemeenschappen gespecificeerd. Morele theorie en de juridische praktijk zijn dan twee hermeneutische contexten van menselijke waardigheid en mensenrechten die verschillend maar niet onafhankelijk zijn van

elkaar. Deze twee contexten zijn verbonden door de aanname dat menselijke waardigheid de grond van mensenrechten vormt.

Deze fundamentele gedachtengang leg ik in *hoofdstuk 1* verder uit. Daarnast bestaat het proefschrift uit twee hoofddelen. In het eerste deel (hoofdstukken 2 en 3) ontwikkel ik een systematische basis voor mijn hoofdargument: Ik maak duidelijk wat de belangrijkste conceptuele en methodologische veronderstellingen zijn en ik refereer aan belangrijke vragen die we in actuele mensenrechten-debatten tegenkomen. Hoofdstuk 4 vormt de transitie tussen die twee delen. Het centrale argument wordt in het tweede deel ontwikkeld (hoofdstukken 5-7). De specifieke stappen in het argument kunnen zoals volgt worden samengevat.

In *hoofdstuk 2* maak ik duidelijk op welke centrale conceptuele en methodologische premissen mijn argument gebaseerd is. De belangrijkste concepten hier zijn die van morele en juridische mensenrechten zoals ik ze in hoofdstuk 1 heb geïntroduceerd. In het begin leg ik mijn fundamentele positie over morele en juridische normativiteit uit. Op basis hiervan introduceer ik een eerste, vorlopige definitie van de concepten van morele mensenrechten en juridische mensenrechten: Juridische mensenrechten zijn alle mensenrechten die erkend zijn in de wet. Morele mensenrechten zijn alle universele morele rechten die moreel gezien erkend zouden moeten worden in de politiek en de wet. Het is belangrijk om op te merken dat dit werkdefinities zijn: Ze worden in het vervolg van mijn proefschrift verder gespecificeerd.

In de moderne filosofie van de mensenrechten is het niet gebruikelijk om verschillende concepten van mensenrechten expliciet van elkaar te onderscheiden. In een volgende stap reflecteer ik daarom op de vraag hoe een concept en een conceptie van mensenrechten gecreëerd kan worden. Ik ga ervan uit dat er op dit moment geen algemeen gedeeld concept van mensenrechten bestaat. Dat maakt het belangrijk om ons preconcept van mensenrechten te expliciteren. In dit verband benadruk ik vooral het noodzakkelijk circulaire karacter van elke poging tot concept-formatie: De poging een concept van mensenrechten te definiëren is altijd een heen-en-weer tussen preconcept, een substantiële reflectie op dit preconcept,

enz. Hetzelfde geldt mutatis mutandis voor een begrip van mensenrechten. Hier bekritiseer ik vooral de gebruikelijke tegenstelling tussen een "top down" en "bottom up"-aanpak van mensenrechten, en de daarmee verbonden vraag waar een theorie van mensenrechten "moet beginnen": met een analyse van de praktijk van mensenrechten of met een filosofische theorie. Ik beargumenteer dat deze vraag fundamenteel verkeerd gesteld is: De ontwikkeling van een begrip van mensenrechten vereist ook een heen-en-weer tussen verschillende contexten van mensenrechten: moreel en juridisch, theorie en praktijk, geschiedenis en de huidige tijd, enz. Ten slotte relateer ik deze reflecties nog aan de daarmee verbonden vragen over de "praktijk-(on)afhankelijkheid" van een morele mensenrechtentheorie en benadruk dat het belangrijk is om daarbij een onderscheid te maken tussen de toegepaste, conceptuele en rechtvaardigheidsdimensie. Deze reflecties zijn tegelijkertijd een voorbereiding op de discussie van het zogenoemde moreel-politiek debat ("Moral-Political Debate") in het volgende hoofdstuk.

Met deze conceptuele en methodologische reflecties als basis richt ik in *hoofdstuk 3* mijn blik naar een aantal filosofische debatten die het veronderstelde contrast tussen zogenaamde "morele" (of "naturalistische") en "politieke" (of "praktische") concepties van mensenrechten betreffen. Deze debatten staan centraal in de moderne filosofie van mensenrechten. Algemeen geformuleerd gaan deze debatten over de vraag naar de juiste conceptie van de "natuur" en rechtvaardiging van mensenrechten. Naar deze debatten worden soms gerefereerd als *het* "moreel-politiek debat", maar het is belangrijk om te zien dat het hierbij niet om een coherente debat tussen twee coherente filosofische posities gaat (een "morele" en een "politieke" of "praktische" positie). In plaats daarvan gaat het om een verscheidenheid aan (met elkaar verbondene) vragen, posities en argumenten die die "morele", "politieke" en "praktische" dimensies van mensenrechten betreffen. Het contrast tussen die twee posities wordt vaak zo geformuleerd: Of we begrijpen politieke en rechtelijke mensenrechten alleen als een belichaming van morele mensenrechten; of we focussen op hun "praktische functies". Door middel van een gedetailleerde analyse van vier argumenten die centraal staan in deze debatten –

namelijk die van James Griffin, Alan Gewirth, Charles Beitz en Joseph Raz – laat ik nu *ten eerste* zien dat het verkeerd is om het verschil tussen hun posities als een alternatief tussen een morele of praktische conceptie van mensenrechten te begrijpen. Liever, verschillende twistpunten verdwijnen als we hun argumenten systematisch relateren aan een concept van morele en juridische mensenrechten en aan verschillende dimensies van "praktijk-(on)afhankelijkheid" zoals ik in hoofdstuk 2 uitgelegd heb. Dat leidt *ten tweede* naar de centrale these van dit hoofdstuk, namelijk: in het zogenoemde "moreel-politiek-debat" komt het centrale filosofische desideratum naar voren dat we beter moeten begrijpen hoe de verschillende aspecten van de morele en de juridisch-politieke dimensies van de mensenrechtenpraktijk zich tot elkaar verhouden. In het bijzonder moeten we beter begrijpen wat de morele implicaties van mensenrechten zijn vanuit het perspectief van de juridische praktijk, en wat de juridische implicaties van mensenrechten zijn vanuit de perspectief van morele theorie.

In *hoofdstuk 4* trek ik systematische conclusies uit de voorafgaande discussie met betrekking tot deze taak. De centrale aanname van "politieke" mensenrechtenconcepties dat men kan begrijpen wat juridische mensenrechten zijn zonder hun morele dimensie in ogenschouw te nemen is fundamenteel verkeerd. In plaats daarvan moeten we beter begrijpen wat het betekent en impliceert dat juridische mensenrechten een "morele grond" hebben – menselijke waardigheid. Daarvoor is het echter tegelijkertijd belangrijk om er rekening mee te houden dat filosofische theorie en de juridische praktijk twee zelfstandige – maar niet onafhankelijke – hermeneutische contexten van mensenrechten en menselijke waardigheid zijn. Het is dus niet voldoende om te expliciteren wat het vanuit het filosofisch perspectief betekent dat menselijke waardigheid de grond van mensenrechten is. Het moet ook duidelijker worden wat dit vanuit het perspectief van de juridische praktijk betekent en impliceert. Morele filosofen moeten daarom de methodologische voorwaarde serieus nemen die voorstanders van een "praktische" mensenrechten-conceptie terecht benadrukken: Filosofen moeten hun

blik richten naar de functies die mensenrechten in de juridische praktijk vervullen. Maar hoe? En wat betekent "functie" hier?

Mijn hoofdstelling in dit verband is: de belangrijkste zwakke plek van "praktische" mensenrechtenconcepties is een ontoereikende reflectie op het concept van een "functie" en op de methodologische vraag hoe men zoiets als een "morele functie" (zoals menselijke waardigheid) van mensenrechten überhaupt zou kunnen bepalen. Ik beargumenteer eerst dat het concept van een functie in feite een concept van een (moreel) *doel* is: De vraag is of juridische mensenrechten in een verder te specifierende zin "ervoor zijn" om menselijke waardigheid te beschermen. Ik beargumenteer dan verder dat de bepaling van zo'n moreel doel van een institutie of praktijk een *hermeneutische* methode vereist: Met behulp van Dworkin leg ik uit dat de juridische praktijk zelfs een *interpretatieve* praktijk is, die bovendien streeft naar de constructie van het doel van een rechtsnorm. De praktische functies van juridische mensenrechten zijn dus niet gegeven maar worden in de juridische praktijk zelf reconstrueerd. Dit voert dan vervolgens naar de centrale gedachte die in hoofdstuk 5 verder ontwikkeld wordt: De aanname dat mensenrechten een morele grond hebben heeft praktische effecten in de juridische praktijk daardoor dat die juridische implicaties van mensenrechten in het concreet geval met de hulp van hun aangenomen onderliggende doel gespecificeerd worden menselijke waardigheid te beschermen.

Hierop aansluitend gaat het in *hoofdstuk 5* vooral daarom een moreel concept van menselijke waardigheid in het zelfbegrip van de juridische mensenrechtspraktijk te "lokaliseren": Wat betekent het, vanuit het perspectief van de juridische praktijk, dat (juridische) mensenrechten een morele grond hebben – menselijke waardigheid –, en wat zijn de praktische effecten van deze aanname wat betreft de juridische interpretatie van (de doelen van) mensenrechten? Ik ontwikkel mijn argument in drie stappen. In de *eerste* stap beargumenteer ik dat het verkeerd is om mensenrechten – zoals in moderne filosofische debatten meestal wordt aangenomen – als "essentieel internationale" mensenrechten te begrijpen. In plaats daarvan verdedig ik de aanname dat een concept van mensenrechten nationale

(‘constitutionele’) en internationale (‘mensen’)rechten omvat, en dat de juridische mensenrechtenpraktijk vooral door een specifieke, “transnationale” dynamiek tussen de internationale en nationale dimensie van mensenrechten gecaracteriseerd is. Een belangrijke deel van deze dynamiek is dat mensenrechten die op internationaal niveau redelijk abstract en vaag geformuleerd worden, op binnenlands niveau op een context-afhankelijke manier gespecificeerd en geïnterpreteerd worden.

In een *tweede* stap kijk ik daarom specifiek daarnaar hoe de “doelen” van rechtsnormen in de juridische praktijk überhaupt gespecificeerd worden, en welke rol daarbij constitutionele “waarden” (zoals menselijke waardigheid) spelen. Dat doe ik met behulp van Aharon Barak’s theorie van “purposive interpretation in law”. Het belangrijkste resultaat hiervan voor de vraag van dit hoofdstuk is dat het zogenoemde “objectieve doel” van elke rechtsnorm – en dus ook van binnenlandse juridische mensenrechten – aan de hand van het fundamentale zelfbegrip van een juridisch systeem gespecificeerd wordt, waarbij constitutionele “waardes” zoals menselijke waardigheid een centrale rol spelen.

In een *derde* stap laat ik zien dat menselijke waardigheid inderdaad een centrale rol in huidige juridische interpretaties van mensenrechten speelt. Daarbij wordt tegelijkertijd een spanning duidelijk die belangrijk is om de rol van menselijke waardigheid in de juridische praktijk te begrijpen: de spanning tussen de aanname dat menselijke waardigheid de universele morele grond van mensenrechten is die in de juridische praktijk algemeen erkend wordt; en de context-afhankelijke interpretatie van de bedoeling en normative implicaties van menselijke waardigheid. Hierop kom ik in hoofdstuk 7 terug.

In *hoofdstuk 6* ontwikkel ik een voorstel voor een filosofische interpretatie van het *morele* concept van mensenrechten en menselijke waardigheid. Dat doe ik met behulp van Kant’s en Alan Gewirth’s morele filosofie. De centrale stelling van dit hoofdstuk is dat menselijke waardigheid geïnterpreteerd zou moeten worden als een universele morele status die gebaseerd is op het noodzakkelijke praktische zelf-begrip van menselijke actoren. Dit is geen metafysische waarde, en het wordt niet

als beste begrepen met de hulp van moreel realisme. In plaats daarvan ga ik uit van de fundamentele aanname dat de vraag waarom we zouden moeten denken dat mensen menselijke waardigheid hebben en wat dat betekent essentieel hermeneutisch is: Dit vereist niet een filosofisch "bewijs" van het bestaan van een moreel feit en een "deductie" van een tijdloze mensenrechten-catalogus. In plaats daarvan hebben we het argument nodig dat we onszelf niet coherent als rationale actoren kunnen begrijpen zonder dat we elkaar de morele status van menselijke waardigheid toeschrijven. Menselijke waardigheid is dan de kern van een universeel moreel principe, een principe dat de fundamentele morele verplichting uitdrukt ons elkaar als morele subjecten te herkennen, wat inhoudt dat we elkaar als houders van (morele) mensenrechten respecteren. Dit is wat het betekent dat menselijke waardigheid de "grond" van mensenrechten is. De grond van menselijke waardigheid zelf is een zelf-reflexieve denkbeweging die laat zien dat geen enkele menselijke actor de validiteit van dit principe op coherente wijze kan negeren. Dit morele principle is niet substantieel leeg, maar het schrijft ook niet universeel voor welke mensenrechten er zijn. Het bevat een substantieel criterium – het criterium van de noodzakelijkheid van agency – om te bepalen welke mensenrechten er zijn en ze in een hierarchie te plaatsen, terwijl de concrete implicaties van deze rechten veel context-specifieke reflectie vereisen en dus niet gemakkelijk uit menselijke waardigheid gededuceerd kunnen worden.

In *hoofdstuk 7* stel ik de vraag wat de voorafgaande reflecties impliceren voor het juridische begrip van mensenrechten (en menselijke waardigheid). Hiervoor behandel ik ten eerste een vraag die ik in hoofdstuk 5 nog buiten beschouwing had gelaten: in het bovenstaande is duidelijk geworden dat de mensenrechten in de juridische praktijk met behulp van het juridische concept van menselijke waardigheid en tegelijkertijd op een context-afhankelijke manier geïnterpreteerd worden. Maar hoe wordt menselijke waardigheid zelf geïnterpreteerd in de juridische praktijk? Vanwege de context-specifiteit van juridische interpretaties in het algemeen valt er te verwachten dat er ook verschil bestaat dussen deze interpretaties. De vraag is daarom of er, ondanks deze verschillen, een "conceptuele

kern" van de betekenis van menselijke waardigheid in de juridische praktijk is die universeel te noemen is. Het eerste resultaat van dit hoofdstuk is dat dit niet het geval is: In de moderne juridische praktijk wordt menselijke waardigheid niet alleen op verschillende, maar op *radicaal* verschillende manieren geïnterpreteerd. Deze descriptieve stelling noem ik "radical legal dignity-pluralism". Verder beargumenteer ik dat het niet waarschijnlijk is dat er in de toekomst door een voortgaande inhoudelijke gerechtelijke dialoog een verdere invulling van het juridische concept van menselijke waardigheid te verwachten is. De centrale vraag is dan of die volledige interpretatieve openheid van het juridische concept van menselijke waardigheid vanuit het perspectief van de juridische praktijk zelfs verdedigbaar is: Zullen de betekenis en normatieve implicaties van menselijke waardigheid alleen in de verschillende gerechtelijke verhandelingen (en dus op een radicaal context-afhankelijke manier) bepaald worden, of impliceert het juridische concept van menselijke waardigheid bepaalde inhoudelijke grenzen wat betreft haar interpretatie?

Betreffend deze vraag beroep ik me ten eerste op een fundamentele implicatie van pluralisme, namelijk dat pluralisme nooit op zichzelf gerechtvaardigd of legitiem is. Pluralisme als een normatieve positie vereist een "extern" criterium of principe dat het mogelijk maakt legitieme van illegitieme vormen van pluralisme te onderscheiden. De rechtmatigheidscriteria van radicaal juridisch waardigheid-pluralisme betreffen het principe van menselijke waardigheid zelf. Dat leidt vervolgens tot de volgende vraag, namelijk: Is het mogelijk om een coherente interpretatie van menselijke waardigheid als de grond van mensenrechten te ontwikkelen volgens welke de inhoud en normatieve consequenties (de mensenrechten) van menselijke waardigheid alleen in het lokale discours gespecificeerd worden? Ik beargumenteer dat zo'n discours-theoretisch begrip van menselijke waardigheid onhoudbaar is, vanuit filosofisch en vanuit praktisch perspectief. In plaats daarvan wil ik voorstellen dat het juridische concept van menselijke waardigheid een kerninhoud heeft die niet het resultaat van maar een voorwaarde is voor de juridische discours over menselijke waardigheid en

mensenrechten, of zou moeten zijn. Mijn conclusie is daarom dat juridische interpretaties van mensenrechten en menselijke waardigheid zich zouden moeten oriënteren aan de hand van de morele conceptie van menselijke waardigheid die ik in hoofdstuk 6 heb ontwikkeld. Dat betekent vooral dat bepaalde kernrechten niet ter discussie kunnen staan, en dat de nadere specificering van de inhoud van de mensenrechten in de juridische praktijk moet voldoen aan het criterium van de noodzakelijkheid van agency. Wat uit de notie van menselijke waardigheid volgt is dus niet arbitrair of volledig context-afhankelijk. Aan de andere kant betekent dit niet dat de normative consequenties van menselijke waardigheid simpelweg gededuceerd kunnen worden vanuit dit principe. Deze specificatie vereist daarentegen context-afhankelijke overwegingen van vele soorten. De progressie naar universele morele gerechtvaardigheid en de democratische zelfbeschikking van juridische gemeenschappen worden zo in de juridische praktijk samengebracht.

Curriculum Vitae

Marie Göbel studied Philosophy (major), Political Science (minor) and New German Literature (minor) in Bonn, Germany and Easton, Massachusetts (*Magister* course of study). She received her degree *Magistra Artium* from the Rheinische Friedrich Wilhelms-University of Bonn (2009, *cum laude*). After that she worked for a couple of years at the Institute of Science and Ethics in Bonn, at the de Gruyter publishing house in Berlin and at a non-profit educational organization in Düsseldorf (2009-2013). From 2013 to 2018 she wrote her PhD thesis at the Ethics Institute of Utrecht University, in the context of the NWO research group "Human dignity as the foundation of human rights?". During that time she was also a visiting scholar at King's College London (January 2016) and at Queen's University Belfast (April to May 2016 and October 2017). Marie Göbel is currently a Postdoc researcher in the project "Norms and Values in the European Migration and Refugee Crisis" (NoVaMigra).

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