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THE CONCEPT OF HUMAN DIGNITY AND THE REALISTIC UTOPIA OF HUMAN RIGHTS

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Abstract: Human rights developed in response to specific violations of human dignity, and can therefore be conceived as specifications of human dignity, their moral source. This internal relationship explains the moral content and moreover the distinguishing feature of human rights: they are designed for an effective implementation of the core moral values of an egalitarian universalism in terms of coercive law. This essay is an attempt to explain this moral-legal Janus face of human rights through the mediating role of the concept of human dignity. This concept is due to a remarkable generalization of the particularistic meanings of those "dignities" that once were attached to specific honorific functions and memberships. In spite of its abstract meaning, "human dignity" still retains from its particularistic precursor concepts the connotation of depending on the social recognition of a status—in this case, the status of democratic citizenship. Only membership in a constitutional political community can protect, by granting equal rights, the equal human dignity of everybody.

Keywords: civil rights, collective, conceptual connection, human dignity, human rights, individual, Kant, legal concept, legal duty, liberal rights, morality.

Article 1 of the Universal Declaration of Human Rights, which was adopted by the United Nations on December 10, 1948, begins with the statement: "All human beings are born free and equal in dignity and rights."[1] The Preamble to the Declaration also speaks of human dignity and human rights in the same breath. It reaffirms the "faith in fundamental human rights, in the dignity and worth of the human person." The Basic Law for the Federal Republic of Germany, which was enacted some sixty years ago, begins with a section on basic rights. Article 1 of this section opens with the statement: "Human dignity is inviolable." Prior to this, similar formulations appeared in three of the five German state constitutions enacted between 1946 and 1949. Today "human dignity" features prominently in human rights discourse and in judicial decision making (Denninger 2009a).

[1] The first sentence of the Preamble calls at the same time for recognition of the "inherent dignity" and the "equal and inalienable rights of all members of the human family."

The inviolability of human dignity commanded the attention of the German public in 2006 when the Federal Constitutional Court declared the Aviation Security Act to be unconstitutional. When it was enacted, the German Parliament had in mind the scenario of 9/11, the terrorist attack on the Twin Towers of New York's World Trade Center and the Pentagon; the intention of the bill was to authorize the armed forces in such a situation to shoot down a passenger aircraft that had been transformed into a living missile in order to avert the threat to an indeterminately large number of people on the ground. However, the Court took the view that the killing of passengers by agencies of the state under such circumstances would be unconstitutional. It argued that the duty of the state (according to Article 2.2 of the Federal Constitution)[2] to protect the lives of the potential victims of a terrorist attack is secondary to the duty to respect the human dignity of the passengers: "With their lives being disposed of unilaterally by the state, the persons on board the aircraft . . . are denied the value which is due to a human being for his or her own sake."[3] The echo of Kant's categorical imperative is unmistakable in these words of the Court. The respect for the dignity of every person forbids the state to dispose of any individual merely as a means to another end, even if that end be to save the lives of many other people.[4]

It is an interesting fact that it was only after the Second World War that the philosophical concept of human dignity, which had already existed in antiquity and acquired its current canonical expression in Kant, found its way into texts of international law and recent national constitutions. Only during the past few decades has it also played a central role in international jurisdiction. By contrast, the notion of human dignity featured as a legal concept neither in the classical human rights declarations of the eighteenth century nor in the codifications of the nineteenth century (McCrudden 2008). Why does talk of "human rights" feature so much earlier in the law than talk of "human dignity"? Certainly the founding documents of United Nations, which drew an explicit connection between human rights and human dignity, were clearly a response to the mass crimes committed under the Nazi regime and to the massacres of the Second World War. Does this also account for the prominent place accorded human dignity in the postwar constitutions of Germany, Italy, and Japan, thus of the successor regimes of the countries that caused and participated directly in this twentieth-century moral catastrophe? Is it only against the historical background of the Holocaust

[2] "Every person has the right to life and physical integrity."

[3] BverfG, 1 BvR 357/05 vom 15.02.2006, Absatz-Nr. 124. English translation available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215_1bvr035705en.html

[4] Kant defines the concept of dignity in the context of the moral injunction to treat every person as an end in himself as follows: "[E]verything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity." Kant 1998, 42 [4:434].

that the idea of *human rights* becomes, as it were, retrospectively morally charged—and possibly overcharged—with the concept of *human dignity*?

The recent career of the concept of "human dignity" in constitutional and international legal discussions tends to support this idea. There is just one exception, from the mid-nineteenth century. In the justification of the abolition of the death penalty and of corporal punishment in § 139 of the German Constitution of March 1849, we find the statement: "A free people must respect human dignity even in the case of a criminal" (Denninger 2009a, 1). However, this constitution, which was the product of the first bourgeois revolution in Germany, never came into force. One way or another, there is a striking temporal dislocation between the history of *human rights* dating back to the seventeenth century and the relatively recent currency of the concept of *human dignity* in codifications of national and international law, and in the administration of justice, over the past half century.

Contrary to the assumption of a retrospective moral charging of human rights, I would like to defend the thesis that an intimate, if initially only implicit, *conceptual* connection has existed from the very beginning. Our intuition tells us anyway that human rights have always been the product of resistance to despotism, oppression, and humiliation. Today nobody can utter these venerable articles—for example, the proposition "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Article 5 of the Universal Declaration)—without hearing the echo of the outcry of countless tortured and murdered human creatures that resonates in them. The appeal to human rights feeds off the outrage of the humiliated at the violation of their human dignity. If this forms the historical starting point, traces of a conceptual connection between human dignity and human rights should be evident from early on in the development of law itself. Thus we face the question of whether "human dignity" signifies a substantive normative concept from which human rights can be deduced by specifying the conditions under which human dignity is violated. Or does the expression merely provide an empty formula that summarizes a catalogue of individual, unrelated human rights?

In section 1, I present some legal reasons in support of the claim that "human dignity" is not merely a classificatory expression, an empty placeholder, as it were, that lumps a multiplicity of different phenomena together but the moral "source"[5] from which all of the basic rights derive their meaning. In section 2, I then present, in terms of a conceptual history, an analysis of the catalytic role played by the concept of dignity in the construction of human rights out of the components of rational morality, on the one hand, and of the form of subjective rights, on the other. Finally, the origin of human rights in the moral notion of human dignity explains the explosive political force of a concrete utopia, which I would like to defend (in section 3) against the blanket dismissal of human

[5] As stated in the constitution of the state of Saxony enacted in 1989.

rights (as by Carl Schmitt), on the one hand, and against more recent attempts to blunt their radical thrust, on the other.

1

Because of their abstract character, basic rights need to be spelled out in concrete terms in each particular case. In the process, lawmakers and judges often arrive at different results in different cultural contexts; today this is apparent, for example, in the regulation of controversial ethical issues, such as assisted suicide, abortion, and genetic enhancement. It is also uncontroversial that, because of this need for interpretation, universal legal concepts facilitate negotiated compromises. Thus, appealing to the concept of human dignity undoubtedly made it easier to reach an overlapping consensus, for example during the founding of the United Nations, and more generally when negotiating human rights agreements and international legal conventions, and when adjudicating international legal disputes between parties from different cultures. "Everyone could agree that human dignity was central, but not why or how."[6]

In spite of this observation, the juridical meaning of human dignity is not *exhausted* by the function of erecting a smokescreen for disguising more profound differences. The fact that the concept of human dignity can also occasionally facilitate compromises when specifying and extending human rights by neutralizing unbridgeable differences cannot explain its belated emergence *as a legal concept*. I would like to argue that changing historical conditions have merely made us aware of something that was inscribed in human rights implicitly from the outset—the normative substance of the equal dignity of every human being that human rights only spell out. So judges appeal to the protection of human dignity when, for instance, the unforeseen risks of new invasive technologies lead them to introduce a new right, such as a right to informational self-determination.[7]

Thus, the experience of the violation of human dignity has performed, and can still perform, an inventive function in many cases: be it in view of the unbearable social conditions and the marginalization of impoverished social classes; or in view of the unequal treatment of women and men in the workplace, and of discrimination against foreigners and against cultural, linguistic, religious, and racial minorities; or in view of the ordeal of young women from immigrant families who have to liberate themselves from the violence of a traditional code of honor; or finally, in view of the brutal expulsion of illegal immigrants and asylum seekers. In the light of such specific challenges, different aspects of the meaning of

[6] McCrudden 2008, 678. The author speaks in this connection (pp. 719ff.) of "domesticating and contextualizing human rights."

[7] In this connection, McCrudden (2008, 721) speaks of "justifying the creation of new, and the extension of existing rights."

human dignity emerge from the plethora of experiences of what it means to be humiliated and be deeply hurt. The features of human dignity specified and actualized in this way can then lead both to a *more complete* exhaustion of existing civil rights and to the discovery and construction of new ones. Through this process the background intuition of humiliation forces its way first into the consciousness of suffering individuals and then into the legal texts, where it finds conceptual articulation and elaboration.

The 1919 Constitution of the Weimar Republic, which pioneered the introduction of social rights, provides an example of this. In Article 151 the text speaks of "achieving a dignified life for everyone." Here the concept of human dignity remains concealed behind the adjectival use of a colloquial expression; but as early as 1944 the International Labour Organization employs the rhetoric of human dignity without qualification in the same context. Moreover, just a few years later Article 22 of the Universal Declaration of Human Rights already calls for guarantees of economic, social, and cultural rights, so that every individual can live under conditions that are "indispensable for his dignity and the free development of his personality." Since then we speak of successive "generations" of human rights. The heuristic function of human dignity is the key to the logical interconnections between these four categories of rights.

The *liberal rights*, which crystallize around the inviolability and security of the person, around free commerce, and around the unhindered exercise of religion, are designed to prevent the intrusion of the state into the private sphere. They constitute, together with the *democratic rights of participation*, the package of so-called classical civil rights. In fact, however, the citizens have equal opportunities to make use of these rights only when they simultaneously enjoy guarantees of a sufficient level of independence in their private and economic lives and when they are able to form their personal identities in the cultural environment of their choice. Experiences of exclusion, suffering, and discrimination teach us that classical civil rights acquire "equal value" (Rawls) for all citizens only when they are *supplemented* by social and cultural rights. The claims to an appropriate share in the prosperity and culture of society as a whole place narrow limits on the scope for shifting *systemic* costs and risks onto the shoulders of *individuals*. These claims are directed against yawning social inequalities and against the exclusion of whole groups from the life of society and culture. Thus policies such as those that have predominated in recent decades not only in the United States and Great Britain but also in Continental Europe, and indeed throughout the world—that is, those that pretend to be able to secure an autonomous life for citizens *primarily* through guarantees of economic liberties—tend to destroy the balance between the different categories of basic rights. Human dignity, which is one and the same everywhere and for everyone, grounds the *indivisibility* of all categories of human rights. Only in collaboration with one another

can basic rights fulfill the moral promise to respect the human dignity of every person equally.[8]

This development also explains the conspicuous role recently played by this concept in the administration of justice. The more deeply civil rights suffuse the legal system as a whole, the more often their influence extends beyond the vertical relation between individual citizens and the state and permeates the horizontal relations among individuals and groups. The result is an increase in the frequency of collisions that call for a balancing of competing claims founded upon basic rights.[9] A justified decision in such hard cases often becomes possible only by appealing to a violation of human dignity whose *absolute* validity grounds a claim to priority. In judicial discourse, therefore, the role of this concept is far from that of a vague placeholder for a missing conceptualization of human rights. "Human dignity" performs the function of a seismograph that registers what is constitutive for a democratic legal order, namely, just those rights that the citizens of a political community must grant themselves if they are to be able to *respect* one another as members of a voluntary association of free and equal persons. *The guarantee of these human rights gives rise to the status of citizens who, as subjects of equal rights, have a claim to be respected in their human dignity*.

After two hundred years of modern constitutional history, we have a better grasp of what distinguished this development *from the beginning*: *human dignity forms the "portal" through which the egalitarian and universalistic substance of morality is imported into law*. The idea of human dignity is the conceptual hinge that connects the *morality* of equal respect for everyone with positive *law* and democratic lawmaking in such a way that their interplay could give rise to a political order founded upon human rights. To be sure, the classical human rights declarations when they speak of "inborn" or "inalienable" rights, of "inherent" or "natural" rights, or of "*droits inaliénables et sacrés*" betray their religious and metaphysical origins: "We hold these truths to be self-evident, that all men are endowed . . . with certain unalienable rights." In the secular state, however, such predicates function primarily as placeholders; they remind us of the mode of a *generally acceptable justification* whose epistemic dimension is *beyond state control*. The American Founding Fathers, too, recognized that human rights, notwithstanding their purely moral justification, need a democratic "declaration" and must be applied in constructive ways within an established political community.

[8] Georg Lohmann, "Die Menschenrechte: Unteilbar und gleichgewichtig?" in Menschenrechtszentrum der Universität Potsdam (ed.), *Studien zu Grund- und Menschenrechten* 11 (Potsdam: Universitätsverlag Potsdam, 2005), pp. 5–20.

[9] The discussion concerning the so-called horizontal effect (*Drittwirkung*) of basic rights, which has been conducted in Europe over the past half century, has recently also found an echo in the United States; see Stephen Gardbaum, "The Horizontal Effect of Constitutional Rights," *Michigan Law Review* 102 (2003): 399–495.

Because the *moral promise* of equal respect for everybody is supposed to be cashed out in *legal currency*, human rights exhibit a Janus face turned simultaneously to morality and to law (Lohmann 1998). Notwithstanding their exclusively moral *content*, they have the *form* of enforceable subjective rights that grant specific liberties and claims. They are designed to be *spelled out in concrete terms* through democratic legislation, to be *specified* from case to case in adjudication, and to be *enforced* in cases of violation. Thus, human rights circumscribe precisely that part (and only that part) of morality which *can* be translated into the medium of coercive law and become political reality in the robust shape of effective civil rights.[10]

2

In this entirely new category of rights, two elements are reunited that had first become separated in the course of the disintegration of Christian natural law, and had then developed in opposite directions. The result of this differentiation was on the one hand the internalized, rationally justified morality anchored in the individual conscience, which in Kant withdraws entirely into the transcendental domain; and on the other hand, the coercive, positive, enacted law that served absolutist rulers or the traditional assemblies of estates as an instrument for constructing the institutions of the modern state and a market society. The concept of human rights is a product of an improbable synthesis of these two elements. *"Human dignity" served as a conceptual hinge in establishing this connection.* This leads me to cast a brief look back on conceptual history, in the course of which the old Roman and Christian concepts of human dignity were themselves transformed in the process of this modern synthesis. Of primary interest is one further conceptual element, the notion of *social dignity* in the sense of an honor that had become

[10] This implies not a revision of but a complement to my original introduction of the system of rights (in Jürgen Habermas, *Between Facts and Norms* [Cambridge: Polity Press, 1996], pp. 118–31, and "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" *Political Theory* 29 [2001]: 766–81). Human rights differ from moral rights in that the former are oriented toward institutionalization and call for a shared act of inclusive will-formation, whereas morally acting persons regard one another without further mediation as subjects who are embedded from the start in a network of moral rights and duties (cf. Jeffrey Flynn, "Habermas on Human Rights: Law, Morality, and International Dialogue," *Social Theory and Practice* 29, no. 3 [2003]: 431–57, here pp. 437–44). But I did not originally take into account two things. First, the cumulative experiences of violated dignity constitute a source of moral motivations for entering into the historically unprecedented constitution-making practices that arose at the end of the eighteenth century. Second, the status-generating notion of social recognition of the dignity of others provides a conceptual bridge between the moral idea of the equal respect for all and the legal form of human rights. I leave aside at this point whether this shift in focus toward these issues has further consequences for my deflationary reading of the discourse principle "D" as part of the justification of basic rights (cf. Jürgen Habermas, "On the Architectonics of Discursive Differentiation," in *Between Naturalism and Religion* [Cambridge: Polity Press, 2008], 77–97).

associated with particular statuses in the stratified societies of medieval and early modern Europe.[11] Admittedly, the hypothesis which I am going to develop calls for more research, in terms both of conceptual history and of the history of European revolutions.

Here I would like to highlight just two aspects: (a) on the one hand, the mediating function of "human dignity" in the shift of perspective from moral duties to legal claims, and (b) on the other hand, the paradoxical generalization of a concept of dignity that was originally geared not to any equal distribution of dignity but to status differences.

(a)

The modern doctrines of morality and law that claim to rest on human reason alone share the concepts of individual autonomy and equal respect for everyone. This common foundation of morality and law often obscures the decisive difference that whereas morality imposes *duties* concerning others that pervade all spheres of action without exception, modern law creates well-defined *domains* of private choice for the pursuit of an individual life of one's own. Under the revolutionary premise that everything is permitted which is not explicitly prohibited, subjective rights rather than duties constitute the starting point for the construction of modern legal systems. The guiding principle for Hobbes, and for modern law generally, is that all persons are allowed to act or to refrain from acting as they wish within the confines of the law. Actors take a different perspective when, instead of following moral commands, they *make use of* their rights. A person in a *moral relation* asks herself what she owes to another person independently of her social relation to him—how well she knows him, how he behaves, and what she might expect from him. People who stand in a *legal relation* to one another are concerned about potential *claims* they expect others to make on them. In a legal community, the first person acquires obligations as a result of claims that a second person makes on her.[12]

Take the case of a police officer who wants to extort a confession from a suspect through the illegal threat of torture. In his role as a moral person, this threat alone, not to speak of the actual infliction of the pain, would be sufficient to give him a bad conscience, quite apart from the behavior of the offender. By contrast, a legal relation is actualized between the police officer who is acting illegally and the individual under interrogation only when *the latter* defends herself and takes legal action to obtain her rights (or a public prosecutor acts in her place). Naturally, in

[11] On the evolution of the legal concept of human dignity through the generalization of status-bound dignity, see Waldron 2007.

[12] Lohmann 1998, 66: "A moral right counts as justified when a corresponding moral duty exists that itself counts as justified, a legal right when it is part of a positive legal order that can claim legitimacy as a whole."

both cases the person threatened is a source of normative claims that are violated by torture. However, the fact that the actions in question violate moral norms is all that is required to give an offender a bad conscience, whereas the legal relation that is objectively violated remains latent until a claim is raised that actualizes it.

Thus Klaus Günther sees in the "transition from reciprocal moral obligations to reciprocally established and accorded rights"[13] an act of "self-empowerment to self-determination." The transition from morality to law calls for a shift from symmetrically intertwined perspectives of respect and esteem for the autonomy *of the other* to raising claims to recognition for *one's own autonomy* by the other. The morally enjoined *concern* for the vulnerable other is replaced by the self-confident *demand* for legal recognition as a self-determined subject who "lives, feels, and acts in accordance with his or her own judgment."[14] Thus the legal recognition *claimed* by citizens reaches beyond the reciprocal moral recognition of responsible subjects; it has the concrete meaning of the respect *demanded* for a status that is *deserved*, and as such it is infused with the connotations of the "dignity" that was associated in the past with membership in socially respected corporate bodies.

(b)

The concrete concept of dignity or of "social honor" belongs to the world of hierarchically ordered traditional societies. In those societies a person could derive his dignity and self-respect, for example, from the code of honor of the nobility, from the ethos of trade guilds or professions, or from the corporative spirit of universities. When these *status-dependent* dignities, which occur in the plural, coalesce into the *universal* dignity of human beings, this new, abstract dignity sheds the particular characteristics of a corporative ethos. At the same time, however, the universalized dignity that accrues to all persons equally preserves the connotation of a *self-respect* that depends on *social recognition*. As such a form of social dignity, human dignity also requires anchoring in a social status, that is, membership in an organized community in space and time. But in this case, the status must be an equal one for everybody. Thus the concept of human dignity transfers the content of a morality of equal respect for everyone to the status order of citizens who derive their self-respect from the fact that they are recognized by all other citizens as *subjects of equal actionable rights*.

[13] Which Lohmann (1998, 87) seems to misunderstand as a transition from traditional to enlightened morality.

[14] Klaus Günther, "Menschenrechte zwischen Staaten und Dritten: Vom vertikalen zum horizontalen Verständnis der Menschenrechte," in Nicole Deitelhoff and Jens Steffek (eds.), *Was bleibt vom Staat? Demokratie, Recht und Verfassung im globalen Zeitalter* (Frankfurt: Campus, 2009), pp. 275f.

It is not unimportant in this context that this status can be established only within the framework of a constitutional state, something that never emerges of its own accord. Rather, this framework must be *created* by the citizens themselves *using the means of positive law* and must be protected and developed under historically changing conditions. As a modern *legal* concept, human dignity is associated with the status that citizens assume in the *self-created* political order. As addressees, citizens can come to enjoy the rights that protect their human dignity only by first uniting as authors of the democratic undertaking of establishing and maintaining a political order based on human rights.[15] In view of such a community of self-legislating citizens the dignity conferred by the status of democratic citizenship is nourished by the republican appreciation of a corresponding orientation to the public good. This is reminiscent of the meaning that the ancient Romans associated with the word *dignitas*, namely, the prestige of statesmen and officeholders who have served the *res publica*. Of course, the distinction of the few outstanding "dignitaries" and notabilities contrasts with the dignity that the constitutional state guarantees *all* citizens *equally*.

Therefore, Jeremy Waldron draws attention to the paradoxical fact that the egalitarian concept of human dignity is the result of a generalization of particularistic dignities that must not lose the connotation of "fine distinctions" entirely: "Once associated with hierarchical differentiation of rank and status, 'dignity' now conveys the idea that all human persons belong to the same rank and that the rank is a very high one indeed" (2007, 201). Waldron understands this generalization process in such a way that all citizens now acquire the highest rank possible, for example that which was once reserved for the nobility. But does this capture the meaning of the equal dignity of every human being? Even the direct precursors of the concept of human dignity in the philosophy of the Stoics and in Roman humanism (for example, with Cicero), do not form a semantic bridge to the egalitarian meaning of the modern concept. That same period developed well a *collective* notion of *dignitas humana*, but it was explained in terms of a distinguished ontological status of human beings in the cosmos, of the particular rank enjoyed by human beings vis-à-vis "lower" forms of life in virtue of species-specific faculties, such as reason and reflection. The superior value of the species might have justified some kind of species protection but not the inviolability of the dignity of the individual person as a source of normative claims.

Two decisive stages in the genealogy of the concept are still missing. First, universalization must be followed by individualization. The issue is

[15] Thus human rights are not opposed to democracy but are co-original with it. The relation between the two is one of mutual presupposition: human rights make possible the democratic process, without which they could not in turn be enacted and concretized within the framework of the civil-rights-based constitutional state. Klaus Günther, "Liberale und diskurstheoretische Deutungen der Menschenrechte," in Winfried Brugger, Ulfrid Neumann, and Stephan Kirste (eds.), *Rechtsphilosophie im 21. Jahrhundert* (Frankfurt am Main: Suhrkamp, 2008), pp. 338–59.

the *worth of the individual* in the horizontal relations between different human beings, not the status of "human beings" in the vertical relation to God or to "lower" creatures on the evolutionary scale. Second, the relative superiority of humanity and its members must be replaced by the absolute worth of any person. The issue is the *unique worth* of each person. These two steps were taken in Europe when ideas from the Judeo-Christian tradition were appropriated by philosophy, a process I would like to address briefly.[16]

A close connection was already drawn between *dignitas* and *persona* in antiquity; but it was only in the medieval discussions of human beings' creation in likeness to God that the individual person became liberated from a set of social roles. Everyone must face the Last Judgment as an irreplaceable and unique person. Another stage in the conceptual history of individualization is represented by the approaches in Spanish scholasticism that sought to distinguish subjective rights from the objective system of natural law.[17] The key parameters were finally set by the moralization of the concept of individual liberty in Hugo Grotius and Samuel Pufendorf. Kant radicalized this understanding into a deontological concept of autonomy; however, the price paid for the radicalness of this concept was the disembodied status of free will in the transcendental "kingdom of ends." Freedom on this conception consists in the capacity to give oneself reasonable laws and to follow them, reflecting generalizable values and interests. The relationship of rational beings to each other is determined by the reciprocal recognition of the legislating will of each person, where each individual should "treat himself and all others *never merely as means* but always *at the same time as ends in themselves*" (Kant 1998, 41 [4:432]).

This categorical imperative defines the limits of a domain that must remain absolutely beyond the disposition of others. The "infinite dignity" of each person consists in his claim that all others should respect the inviolability of this domain of free will. Yet the concept of "human dignity" does not acquire any systematic importance in Kant; the complete burden of justification is borne by the moral-philosophical explanation of autonomy instead. In order to understand what we mean by "human dignity," the "kingdom of ends" must first be explained.[18]

In the *Doctrine of Right*, Kant introduces human rights—or rather the "sole" right to which everyone can lay claim in virtue of his humanity—by direct reference to the freedom of each "insofar as it can coexist with

[16] On the theological background of the concept of human rights, see the analysis of history of ideas in Tine Stein, *Himmlische Quellen und irdisches Recht* (Frankfurt am Main: Campus, 2007), in particular chap. 7. Also Wolfgang Huber, *Gerechtigkeit und Recht: Grundlagen einer christlichen Rechtsethik* (Gütersloh: Chr. Kaiser, 1996), pp. 222–86.

[17] Ernst Böckenförde, *Geschichte der Rechts- und Staatsphilosophie* (Tübingen: Mohr Siebeck, 2002), pp. 312–70.

[18] Again, Kant 1998, 42 [4:434]: "In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity."

the freedom of every other in accordance with a universal law" (Kant 1996, 30 [6:237]). In Kant, too, human rights derive their moral content, which they spell out in the language of positive laws, from a universalistic and individualistic conception of human dignity. However, the latter is assimilated to an intelligible freedom beyond space and time, and loses precisely those connotations of status that only qualify it as the conceptual link between morality and human rights. Thus the point of the *legal character* of human rights gets lost, namely, that they protect a human dignity that derives its connotations of self-respect and social recognition from a status in space and time—that of democratic citizenship.[19]

3

The moral charging of coercive rights explains why the foundation of constitutional states at the end of the eighteenth century gave rise to a provocative tension within modern societies. Of course, everywhere in the social realm there exists a difference between norms and actual behavior; however, the unprecedented event of a constitution-making practice gave rise to an entirely different, utopian gap in the temporal dimension. On the one hand, human rights could acquire the quality of enforceable rights only within a particular political community—that is, within a nation-state. On the other hand, human rights are connected with a universalistic claim to validity, which points beyond all national boundaries.[20] This contradiction would find a reasonable solution only in a constitutionalized world society (not necessarily with the characteristics of a world republic).[21] From the outset, a dialectical

[19] On the premises of Kant's own theory there is, of course, no need for any "mediation" between the transcendental realm of freedom and the phenomenal realm of necessity. As soon as the noumenal character of the free will is detranscendentalized, however, the conceptual gap between morality and law must be bridged. And it is the status-bound conception of human dignity that provides this connection.

[20] Albrecht Wellmer, "Menschenrechte und Demokratie," in Gosepath and Lohmann 1998, 265–91. For an astute analysis of the implications of the gap between human and civil rights for both citizens and alien residents within the nation state, see Denninger 2009b.

[21] On the constitutionalization of international law, see Jürgen Habermas, "Does the Constitutionalization of International Law Still Have a Chance?" in *The Divided West* (Cambridge: Polity Press, 2006), pp. 115–93, and "The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society," in *Europe: The Faltering Project* (Cambridge: Polity Press, 2009), pp. 109–30. The contradiction between civil rights and human rights cannot be resolved exclusively through the global spread of constitutional states combined with the "right to have rights" demanded by Hannah Arendt (with the flood of displaced persons at the end of the Second World War in mind), because classical international law leaves international relations in a "state of nature." The need for coordination in world society that has arisen in the meantime could be satisfied only by a "cosmopolitan juridical condition" (in the contemporary, revised Kantian sense). In this context I must correct a grave misunderstanding in the introduction to the special issue of *Metaphilosophy* 40, no. 1 (2009), p. 2 (and in the article by Andreas Føllesdal in the same issue, pp. 85ff.). I am, of course, defending the extension of collective political identities beyond the borders of nation-states and by no means share the

tension has existed between *human* rights and established *civil* rights that can trigger a mutually reinforcing dynamic under favorable historical conditions.

This is not to suggest a self-propelling dynamic that would supersede the dialectical tension between exclusion and inclusion. Increasing the protection of human rights within nation-states or pushing the global spread of human rights beyond national boundaries has never been possible without social movements and political struggles, without courageous resistance to oppression and degradation. The struggle to implement human rights continues today in our own countries as well as, for example, in Iran and in China, in parts of Africa or Russia or in Kosovo. Whenever an asylum seeker is deported behind closed doors at an airport, whenever a ship carrying refugees capsizes on the crossing from Libya to the Italian island of Lampedusa, whenever a shot is fired at the border fence between the United States and Mexico, we, the citizens of the West, confront one more troubling question. The first human rights declaration set a standard that inspires refugees, people who have been thrust into misery, and those who have been ostracized and humiliated, a standard that can give them the assurance that their suffering is not a natural destiny. The translation of the first human right into positive law gave rise to a *legal duty* to realize exacting moral requirements, and that has become engraved into the collective memory of humanity.

Human rights constitute a realistic utopia insofar as they no longer paint deceptive images of a social utopia that guarantees collective happiness but anchor the ideal of a just society in the institutions of constitutional states themselves.[22] Of course, this context-transcending idea of justice also introduces a problematic tension into social and political reality. Apart from the merely symbolic force of human rights in those "façade democracies" we find in South America and elsewhere,[23] the human rights policy of the United Nations reveals the contradiction between the spreading rhetoric of human rights, on the one hand, and their misuse to legitimize the usual power politics, on the other. To be sure, the U.N. General Assembly promotes *the codification of human rights in international law*, for example by enacting human rights covenants. The *institutionalization* of human rights has also made progress—with the procedure of the individual petition, with the periodic reports on the human rights situation in particular countries, and above all with the creation of international courts, such as the European Court of Human Rights, various war crimes tribunals, and the International Criminal Court. Most spectacular of all are the humanitarian interventions authorized by the U.N. Security Council

reservations of liberal nationalists in this respect. Advocating a multilevel global system of a constitutionalized world society, I propose other reasons for why a world government is neither necessary nor feasible.

[22] Ernst Bloch, *Natural Law and Human Dignity*, translated by Dennis J. Schmidt (Cambridge, Mass.: MIT Press, 1987).

[23] Marcelo Neves, "The Symbolic Force of Human Rights," *Philosophy and Social Criticism* 33, no. 4 (2007): 411–44.

in the name of the international community, sometimes even against the will of sovereign governments. However, precisely these cases reveal the problematic nature of the attempt to promote a world order that currently is institutionalized only in fragmentary ways. For what is worse than the failure of legitimate attempts is their ambiguous character, which brings the moral standards themselves into disrepute.[24]

One need only recall the highly selective and short-sighted decisions of a nonrepresentative, and far from impartial, Security Council, or the half-hearted and incompetent implementation of interventions that have been authorized—and their catastrophic failure (as in Somalia, Rwanda, Darfur). These supposed police operations continue to be conducted like wars in which the military writes off the death and suffering of innocent civilians as "collateral damage" (as in Kosovo). The intervening powers have yet to demonstrate in a single instance that they are capable of marshaling the necessary energy and stamina for state building—in other words, for reconstructing the destroyed or dilapidated infrastructure in the not yet pacified regions (such as Afghanistan). When human rights policy becomes a mere fig leaf and vehicle for imposing major-power interests, when the superpower flouts the U.N. Charter and arrogates a right of intervention, and when it conducts an invasion in violation of humanitarian international law and justifies this in the name of universal values, the suspicion is reinforced that the program of human rights *consists in* its imperialist misuse.[25]

[24] Moreover, the "gubernatorial human rights policy" prevalent today is increasingly destroying the connection between human rights and democracy; see footnote 15 above in connection with Ingeborg Maus, "Menschenrechte als Ermächtigungsnormen internationaler Politik," in Hauke Brunkhorst, Wolfgang R. Köhler, and Matthias Lutz-Bachmann (eds.), *Recht auf Menschenrechte* (Frankfurt am Main: Suhrkamp, 1999), pp. 276–91. On this trend, see also Klaus Günther, "Die Definition und Fortentwicklung der Menschenrechte als Akt kollektiver Selbstbestimmung" (unpublished manuscript, 2009).

[25] Cf. Carl Schmitt, *Die Wendung zum diskrimierenden Kriegsbegriff* (1938), 2nd edition (Berlin: Duncker und Humblot, 1988), and *Das international-rechtliche Verbrechen des Angriffsgrieges* (1945), edited by Helmuth Quaritsch (Berlin: Duncker und Humblot, 1994). Schmitt was the first to formulate this suspicion explicitly. He denounced human rights above all as the ideology that incriminates war as a legitimate means for resolving international conflicts. He already made the pacifist ideal of Wilsonian peace policy responsible for the fact that the distinction between just and unjust wars is giving rise to an ever deeper and sharper, ever more "total" distinction between friend and foe. In the brutish domain of international relations, he argued, the moralization of enemies constitutes a disastrous method for obscuring one's own interests; for the attacker barricades himself behind the apparently transparent façade of a purportedly rational, because humanitarian, abolition of war. The critique of a "moralization" of law in the name of human rights is otiose, however, because it misses the point, namely, the *transposition* of moral contents into the medium of coercive law. Insofar as the prohibition of war actually leads to the legal domestication of international relations, the distinction between "just" and "unjust" wars is abandoned in favor of that between "legal" and "illegal" wars. On this, see Klaus Günther, "Kampf gegen das Böse?" *Kritische Justiz* 27 (1994): 135–57.

The tension between idea and reality that was imported into reality itself as soon as human rights were translated into positive law confronts us today with the challenge to think and act realistically without betraying the utopian impulse. This ambivalence can lead us all too easily into the temptation either to take an idealistic, but noncommittal, stance in support of the exacting moral requirements, or to adopt the cynical pose of the so-called realists. Since it is no longer realistic to follow Carl Schmitt in entirely rejecting the program of human rights, whose subversive force has in the meantime permeated the pores of *all* regions across the world, today "realism" assumes a different form. The direct unmasking critique is being replaced by a mild, deflationary one. This new minimalism relaxes the claim of human rights by cutting them off from their essential moral thrust, namely, the protection of the equal dignity of every human being.

Following John Rawls, Kenneth Baynes characterizes this approach as a "political" conception (Baynes 2009a) of human rights in contrast to natural law notions of "inherent" rights that every person is supposed to possess by his very human nature: "Human rights are understood as conditions for inclusion in a political community" (Baynes 2009b, 6). This first step is in line with the foregoing argument. The problematic move is the next one, which effaces the moral meaning of this inclusion, namely, that everyone is respected in his human dignity as a subject of equal rights. For from this perspective the focus of the whole approach is narrowed down to questions of *international* human rights policies,[26] while the normative source of this dynamic is ignored, namely, the tension between universal human rights and particular civil rights that exists even *within* exemplary constitutional states.[27]

From that narrow point of view, the global dissemination of human rights requires a separate justification. This is provided by the argument that in international relations moral obligations between states (and citizens) arise out of the growing systemic interconnectedness of an ever more interdependent world society;[28] normative claims to inclusion first

[26] Baynes 2009b, 7: "Human rights are understood primarily as international norms that aim to protect fundamental human interests and/or secure for individuals the opportunity to participate as members in political society." Charles Beitz starts his recent book *The Idea of Human Rights* (Oxford: Oxford University Press, 2009,) p. 1, with the observation that "human rights has become an elaborate international practice."

[27] For a forceful critique of this minimalist approach, cf. Rainer Forst, "The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach," forthcoming in *Ethics*: "It is generally misleading to emphasize the political legal function of such rights of providing reasons for a politics of legitimate intervention. For this is to put the cart before the horse. We first need to construct (or find) a justifiable set of human rights that a legitimate political authority has to respect and guarantee, and then we ask what kinds of legal structures are required at the international level to oversee this and help to ensure that political authority is exercised in that way."

[28] Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" *Journal of Political Philosophy* 12 (2004): 190–213.

arise out of reciprocal dependencies in *factually* established interactions.[29] This argument has a certain explanatory force in view of the *empirical* question of how a responsiveness to the legitimate claims of marginalized and underprivileged populations to inclusion is awakened in our relatively affluent societies. However, these normative claims themselves are grounded in universalistic moral notions that have long since gained entry into the human and civil rights of democratic constitutions through the status-bound idea of human dignity. Only this internal connection between human dignity and human rights gives rise to the explosive fusion of moral contents with coercive law as the medium in which the construction of just political orders must be performed.

This investment of the law with a moral charge is a legacy of the constitutional revolutions of the eighteenth century. To neutralize this tension would be to abandon the dynamic understanding that makes the citizens of our own, halfway liberal societies open to an ever more exhaustive realization of existing rights and to the ever-present acute danger of their erosion.

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[29] Baynes 2009a, 382: "Rights and corresponding duties are created by the special relationship that individuals stand in to one another, rather than as claims individuals have simply in virtue of their humanity."

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