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The Dictatorship of the Obscure? Values and the Secular Adjudication of Fundamental Rights

1. The Necessity of a Normative Theory of Fundamental Rights

Fundamental rights are decisively important for the normative architecture of modern legal systems and increasingly permeate all of their sub-domains. At the same time they are highly abstract and open-textured norms. The prior doctrinal unfolding of a catalogue of human rights and the case law create constraints of future interpretation. Doctrine and case law are, however, themselves the product of normative interpretation and therefore dependent on it. The interpretation of human rights norms that yields doctrine and case law is, like the interpretation of other legal rules, the product of the application of classical methods of legal hermeneutics, particularly of literal, historic, systematic and teleological interpretation, even though the explicit prominence of these methods varies in different legal systems, as do the terms under which they are discussed.

Concrete human rights norms can rule out certain interpretations through some clear regulation in their text.[1] Respect for the positive text of norms is a

[1] *Cf. e.g.*, Protocol No. 13 to the ECHR concerning the abolition of the death penalty in all circumstances which formulates: Art. 1, Abolition of the death penalty: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." Art. 2, Prohibition of derogations: "No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention." It will be hard to argue – even if one is conscious of the pitfalls of the modern theory of meaning and the claims of deconstructivism – that the death penalty is allowed under some circumstances. For some remarks on the current theory of language and the law *cf.* M. Mahlmann, *Mentalistische Perspektiven auf Sprache und Recht* [Mentalist

A. SAJÓ & R. UITZ (EDS.), Constitutional Topography: Values and Constitutions, 343-365.

self-evident characteristic of any serious concern for the rational application of human rights. Central elements of the rule of law depend on this respect: most importantly the certainty and thus the foreseeability of the law. The same is true for the principle of democracy. In modern societies positive legal norms are the means for implementing the political will of citizens. Fundamental rights are part of constitutions or supranational and international law, and thus often are not the product of direct democratic decisions but of the diverse processes of constitution making and of the creation of international law. Ideally, however, they do embody the (albeit procedurally mediated) expression of popular sovereignty, of the autonomous self-determination of citizens in the body politic, and of their fundamental conceptions of a well-ordered life, and are to be respected as such.

Given the abstract form of fundamental rights, however, many questions concerning their application necessarily remain open. Political decisions behind fundamental rights traditionally concern primarily the general normative framework, rather than everyday human-rights challenges, though there are some specialized norms directed at very particular problems. In addition, courts dealing with matters of human rights develop rights that have no explicit foundation in the text concerned.[2] In consequence the many questions arising must be answered by legal interpretation. Such solutions have to reach beyond folk conceptions of what legal work is about: the mechanical subsuming of facts under given rules with meaning established by their text alone. Legal reflection has many tools and the determination of the content of fundamental rights is an especially rich and complex matter. One thing, however, seems clear: Given the level of systematic sophistication of modern fundamental rights jurisprudence and scientific discourse, it is certainly not enough to find piecemeal, *ad hoc* solutions for singular problems without a wider conceptual horizon. On the contrary, any substantial problem of the adjudication of fundamental rights illustrates that it cannot be solved without a well-founded theoretical account of the deeper issues at stake.

This account has two dimensions: First, it has to answer questions about the precise normative *structure* of fundamental rights. Therefore, a structural analysis of fundamental rights as a constitutive legal category irrespective of their varying content must be undertaken. Second, and most importantly, one

perspectives on language and law] *in* K. Lerch (Ed.), Die Sprache des Rechts [The language of law] 209 *ff.* (2005).

[2] On the incorporation of human dignity in the ECHR *cf.* prominently in Pretty *v.* The United Kingdom, ECtHR Application no. 2346/02, judgment of 29 April 2002, Para. 52, 65: "The very essence of the Convention is respect for human dignity and human freedom." Another interesting example is the creation of fundamental rights in European Community law through the ECJ without any written bill of rights. For an overview *cf.* M. Mahlmann, *1789 Renewed? Prospects of the Protection of Human Rights in Europe*, 12 Cardozo J. Int'l Comp. L. 903 (2004).

has to understand the *normative substance* of fundamental rights. This leads legal work to questions which are difficult, of oscillating meaning, and of profound human interest.

It is a matter of much discussion, for example, whether clauses on the protection of human dignity prohibit certain forms of cloning, assisted suicide or preventive torture, whether they can limit modern biotechnology or whether they rule out forms of "collateral damage" in warfare. If one wants to ascertain the legal importance of human dignity in these matters, one has to develop an account of what is meant by human dignity, and thus of the sources and content of the worth and the normative status of human beings, and concrete consequences of the respect of its demands. One is forced to outline nothing less than a normative conception of being human, which is obviously a rather challenging task. To achieve this, there is no alternative but to delve into the many attempts in the history of ideas to determine the content of human dignity and to understand the enduring core of the protean normative images of humankind shown in the mirror of self-reflection. As historical naïveté is not the most promising starting point of further legal reflection, one has to assess the substance of these attempts and what lessons they provide for the contemporary conceptualization of what human dignity means – again not only in the lofty spheres of philosophical abstraction, but on the rough ground of hard judicial decision making.

Note that these kinds of issues are not limited to explicit dignity clauses. They can materially arise even in the framework of other legal provisions. To illustrate this, take the question whether lethal injections are forms of cruel and unusual punishment. To answer this question one must also engage in the task of considering what human dignity demands even if one does not use the term.[3]

To take other examples: if one wonders whether freedom of speech includes the freedom to blaspheme, one is forced to ask at some stage of legal reflection questions about the rationale of free speech and its place in a general theory of human liberty, not least in relation to freedom of religion. If one attempts to determine whether an equality clause allows for, or even legally demands, positive action to overcome existing inequalities based on certain characteristics, one will not find a convincing answer without a clear idea of what equality in a human rights catalogue actually means.

Current debates about bioethics and the law, the end of life, torture, rules of combat, religious speech or anti-discrimination law or any other contentious topic of the jurisprudence of fundamental rights leave little doubt about the importance of these wider conceptual questions. The differentiated practice and increased reflection about fundamental rights in recent decades has amply shown that ultimately a legal hermeneutics of human rights must rely on an

[3] As an example of normative limits of what can be done to human beings as the subtext of a decision *cf.* Baze et al. *v.* Rees, 553 U.S. 35 (2008).

encompassing understanding of the structure and content of fundamental rights as guidance for their interpretation. The necessary condition of their practical application is the development of a substantive theory of fundamental rights.[4]

2. Ethics and the Theory of Fundamental rights

2.1. Questions of Structure

A theory of fundamental rights must on the one hand provide for a structural account of fundamental rights as subjective rights. It must determine what kind of complex normative relations are established by a fundamental right.[5] The most differentiated current structural theory of human rights is the theory of fundamental rights as rules and principles.[6] This theory has provided many insights and is a benchmark for analytical clarity.[7] Its core element is the distinction between rules and principles.[8] Rules are applied in an all-or-nothing-fashion. Collisions of rules are solved by priority rules. Principles create *prima facie* normative positions, carry weight and are the object, in cases of conflict, of weighing and balancing exercises that yield definite legal rules. Conditions under which the one principle takes precedence over the other become the elements of the resulting rule.[9]

This distinction is, however, not without an alternative. There seems no clear reason why one should be convinced that there are no *prima facie* rules, but only *prima facie* principles, because the concept *rule* is confined to norms that are applied *sans phrase* or *all-things-considered*.[10] "You shall keep your promises" seems to fall squarely in the category of rules and is clearly only of a *prima facie* character, as illustrated by cases like the assassin asking for a promised gun, and the lack of an obligation to hand it over despite the promise given.

Another problem is that many principles are constructed in a form that is commonly called a rule, like Dworkin's early example that "no man may profit from his own wrong."[11] By formulating principles in the form of rules, the rules-and-principles-theory tends to blur the distinction between value-statements of the form "A is valuable" (what is meant by "valuable" will be

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4 *Cf.* M. Mahlmann, Elemente einer ethischen Grundrechtstheorie [Elements of an ethical theory of fundamental rights] 13 *ff.* (2008).

5 The classical example of such a theory is W. L. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning (2000).

6 *Cf.* R. Alexy, Theorie der Grundrechte [A theory of fundamental rights] (1985).

7 For an alternative account *cf. e.g.*, J. J. Thomson, The Realm of Rights 37 *ff.* (1990).

8 R. Dworkin, Taking Rights Seriously 24 (1977).

9 Alexy, *supra* note 6, at 84.

10 On this terminology *cf.* W. D. Ross, The Right and the Good 19 (1930).

11 Dworkin, *supra* note 8, at 26.

explained hereafter) and prescriptive rules of the form "X ought to do Y." This is an analytical disadvantage of the theory because the clear distinction of axiology and prescriptive rules is useful for a proper restatement of what fundamental rights are about and what their connection to values actually is.[12]

These are so far mostly terminological questions, though some analytical issues are implied. There are, however, substantial problems involved as well. The rules-and-principles theory introduced the idea of principles to overcome the limits of certain forms of positivism in order to point out that there is more to a legal system than a set of positive rules, identified as law by a master rule like the *Grundnorm*[13] or the *rule of recognition*.[14] This position is evidently not a particularly new perspective but a variation of the classical topic of meta-positive influences on positive law formulated in the natural-law tradition that has accompanied legal thought since antiquity and its secular heirs like the enlightened *Vernunftrecht,* the law of reason or their contemporary equivalents.[15] Its merits (or lack thereof) are by no means dependent on the terminological choice to call certain normative standards beyond positive legal rules "principles" or other tenets of the rules-and-principle theory.

Another issue is the idea that a theory of legal principles is the post-metaphysical heir to a theory of values.[16] This idea is, in contrast, problematic. There is no reason to believe that the concept of value is obsolete because it leads necessarily to the murky waters of ontological metaphysics. It is true that various theories of values were metaphysical in the past.[17] There is, however, no reason to assume that all theories of values have to be metaphysical in the sense rightly criticized in accounts of the nature of values that locate values in an ontologically independent realm of Goodness and Justice. To the contrary, a non-metaphysical theory of value is a rather obvious alternative to these attempts of the past. Such a theory relies on two basic elements: First, on what one might want to call *natural* values, i.e., values derived from given human needs involving material goods, like a drink that quenches the thirst, an automobile that satisfies the need for mobility and even immaterial, more elusive human goods like liberty. Second, it relies on *moral* values like justice. The first class of values is evidently not metaphysical. The same holds for the second class of values, if they are not conceptualized as independent objective moral entities but as the product of a generative human moral cognition, of

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[12] *Cf*. for more comments Mahlmann, *supra* note 4, at 84 *ff*. Alexy modifies the distinction because he thinks that one cannot state all possible exceptions to a rule.

[13] H. Kelsen, Reine Rechtslehre [Pure theory of law] (1960).

[14] H. L. A. Hart, The Concept of Law (1994).

[15] For an overview, Mahlmann, *supra* note 4, at 27 *ff*.

[16] *Cf.* Alexy, *supra* note 6, at 18, 125 *ff*.

[17] M. Scheler, Der Formalismus in der Ethik und die materiale Wertethik [Formalism in ethics and non-formal ethics of values] 37 (1966); N. Hartmann, Ethik [Ethics] (1949).

the capacity of moral judgment reconstructed in the framework of a mentalist theory of the human mind – a perspective we shall return to later.[18]

2.2. Questions of Normativity

Beyond structural analysis a theory of fundamental rights must have a *normative* component, since its main purpose is to inform the understanding of existing norms the text of which underdetermines their interpretation. To be sure, a theory of fundamental rights has to be consistent with the positive normative material it serves to interpret. A Fascist theory of fundamental rights (if conceivable at all) is for example certainly not reconcilable with the norms of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Within this framework, however, a normative theory of fundamental rights has to be based on other foundations than the concrete normative texts it serves to understand. It is important to emphasize that this is necessarily so. The content of a theory of fundamental rights cannot be derived from the very norms the meaning of which it serves to determine, as this meaning is opaque without such a theory. What is unclear and creates a need for clarification (the text of human rights) cannot itself clarify the content of the tool of clarification (the theory of fundamental rights).

In the practice of human rights adjudication – not always explicitly or necessarily consciously – various kinds of sources are mobilized for the concretization of human rights beyond positive law, for example, economic theories about the efficiency of certain understandings of norms and the like.[19] Given the pivotal role of human rights in modern societies, there is one particular important element of their understanding: No conceivable interpretation of human rights can gain acceptance without formulating at least a claim to moral legitimacy. An understanding of fundamental rights that violates basic principles of ethics – especially of justice – will not be a serious candidate in courts or in society. No court will state that its interpretation, say, of freedom of speech is contrary to basic principles of justice but will nevertheless be upheld because principles of justice do not matter for its understanding of this basic right. Accordingly, any theory of fundamental rights that at least hopes to direct convincingly the interpretation of human rights must be consistent with basic moral parameters and their theoretical reflection in ethics. There is

[18] On the ontology of normative entities, *cf*. M. Mahlmann, *New Trends of Cognitive Science in Ethical and Legal Reflection*, *in* S. Vöneky *et al*. (Eds.), Legitimation ethischer Entscheidungen im Recht [Legitimation of ethical decisions in law] 18 *ff*. (2009).

[19] The Federal German Constitutional Court decided for example that an independent European central bank is justified in a democracy because of considerations of economic efficiency, *cf*. BVerfGE 89, 155, at 208 *ff*.

no systematic unfolding of human rights in case law and doctrine without a foundational recourse to ethics in the hermeneutical space underdetermined by positive law.

3. The Content of an Ethical Theory of Fundamental Rights

3.1. Theory and Practice

In modern legal systems various kinds of theories of fundamental rights are applied by courts – often implicitly, sometimes explicitly – and formulated by legal doctrine. The content of these theories varies. A standard functional theory states, for example, that fundamental rights are primordially negative rights against the state. This understanding is sometimes buttressed by historical arguments and the traditions of the liberal state. It can serve an important role in discussions about the modern functions of fundamental rights which transcend the relation of citizen and public authorities, like the direct or indirect horizontal effect of fundamental rights or positive duties. If one adheres to this theory one will be skeptical about recent tendencies of national and international human rights law to give fundamental rights legal effect in private relations. If one regards the limitation of human rights to relations of citizens and state as historically contingent, or even doubtful in a more fundamental sense, other conclusions are plausible. There are many other examples of theories of fundamental rights that are formulated by doctrine or used by courts: liberal, institutional, social, democratic-functional or systemic-functional, discursive or procedural theories of fundamental rights, to name just some examples, many of them – *nolens volens* – with a particular, more or less convincing moral point. Theories of fundamental rights have thus become an increasingly explicit interpretational tool, even if some of these theories are not really theories but rather interpretational rules of thumb.[20]

Notwithstanding, there is still the practice of courts and doctrinal thought to nourish the illusion that the adjudication of human rights can do without a theory of fundamental rights, particularly without one with ethical content. There are various reasons for this tendency, some of them quite serious and important. Among them are the – indeed decisive – intentions not to moralize law, to limit the discretion of judges, to respect democratically created rules, and a deeply rooted skepticism as to the rational foundations of any moral theory and the possible scope of its reach. The practical effect of this perception is, however, not that ethical theories of human rights are not applied, but that they direct the understanding of fundamental rights implicitly and without

[20] For an overview, Mahlmann, *supra* note 4, at 13 *ff*.

proper transparent critical reflection. There is no alternative, because (as we have seen) the structure of fundamental rights is such that at some stage in the interpretational process it becomes necessary to undertake an encompassing account of what the fundamental right in question is about, moral parameters included.

The substantial reference to what is in fact a theory of fundamental rights may be couched in terms of other forms of interpretation, including seemingly conservative methods, such as reference to the original intent of the framers of a bill of rights. But this does not change its nature or content; it only renders the theoretical background of the respective understanding invisible and shields it from possibly very important critique. A preferable course of action is, therefore, to avoid these hermeneutical charades and openly engage in the task of formulating the theoretical underpinnings of human rights adjudication and doctrinal thought. For this task, for the sake of transparency and rational reflection, it is particularly important to be outspoken about the ethical foundations and implications of competing theories. What this means concretely will be outlined for some core examples in the following pages.

3.2. The Distinction of Law and Morals

If one resolves to engage in the unavoidable task of giving a transparent account of the ethical foundations of human rights one must, however, remain mindful of the pitfalls mentioned above. The distinction of law and morals is an important achievement of human reflection which is usually connected with enlightened thought, most notably of Christian Thomasius[21] and Immanuel Kant,[22] but can in fact be substantially traced back to roots in the natural law tradition.[23] The distinction is not just of theoretical but also of considerable practical importance because of its liberating effects. It unburdens the law of moral baggage, and frees the addressees of legal obligation from certain demands that a moralized law creates. Its main point is that the law only demands that the external *behavior* of the agents be in conformity with its commands; law does not prescribe that their *motives* for a behavior conform to any legal standards. The agents are, for example, free to feel contempt for the law and abide by it only because they want to avoid sanctions. The inner world of motives for conformity with the law ceases as a consequence of the distinction of law and morals to be the business of the legal order.

An ethical theory of fundamental rights does not call this distinction into question; on the contrary. The theory is ethical insofar as it reflects the moral

[21] C. Thomasius, Fundamenta Juris Naturae et Gentium [Foundations of the law of nature and nations], reprint of the 4th edition 1718 (1963).

[22] I. Kant, Grundlegung zur Metaphysik der Sitten [Groundworks for the metaphysics of morals] Akademie Ausgabe, Band IV 218 *ff.* (1911).

[23] Mahlmann, *supra* note 4, at 27 *ff.*

point of fundamental rights and uses these insights to provide convincing interpretations of these subjective rights. It does not, however, moralize the law because it does not turn the law into a subjective order of ought (that is, morality). It leaves the law what it is: an external institutionalized order of normative compulsion buttressed by sanctions and of enabling powers. It provides ethical *content* where it is needed in the law; it does not transform legal human rights into subjectively obligatory moral commands. Thus it leaves the distinction of law and morals intact.

To turn to the second concern about the role of judges: An ethical theory of fundamental rights is by no means an exercise that unduly empowers judges or endangers the separation of powers. To the contrary, it serves an important critical function by making explicit what judges actually inevitably do – whatever their own perception of their task may be. It therefore opens the door to transparency in judicial decision-making and provides the basis of assessments whether functional redresses are to be sought in concrete legal systems in order to balance powers appropriately, for example, by limiting judicial review in certain respects. In addition, given its critical function, a theory of fundamental rights does not erode democratically created rules but rather enhances the transparency of their application. Finally, an ethical theory of fundamental rights must take up the last concern, the challenge of skeptical ethical epistemology. It must explain why it is not just presenting in auratic vocabulary subjective, parochial whim as the lodestar of fundamental rights interpretation. How this may be possible will be sketched in at least a rough outline later.

Given this starting point, a convincing theory of fundamental rights must deal with the ethical foundations of status rights, like guarantees of dignity or the right to life, liberties and guarantees of equality that are the standard categories of modern human rights catalogues. Another possible object is the legal institutionalization of human solidarity, though not all human rights systems provide for a legal foundation of solidarity (for example social rights). To illustrate what the material content of an ethical theory of fundamental rights might be, the examples of guarantees of human dignity, liberty and equality will be discussed.

3.3. Human Dignity

3.3.1. The background of a concept

Today, human dignity has become a central concern in the system of human rights. Human dignity has assumed a pivotal role in the postwar period in much of national and international human rights law, even if it is not explicitly

contained in the text of a given human rights catalogue.[24] Notwithstanding, not everybody is convinced of its normative merits. Schopenhauer, for example, famously formulated that the concept of human dignity is nothing but the Shibboleth of all thoughtless moralists.[25] In his view, they hide their lack of moral reflection behind this seemingly impressive idea. This criticism is still very much alive today. For many, the concept offers a seductive opportunity to substitute argument with pompous jargon. In any case, in much of legal debates, no less than in ethical ones, the concept is regarded as particularly elusive and hard to grasp.[26]

To begin with, the term 'human dignity' is not a predicate denoting a natural property of an entity, but a predicate ascribing a certain normative status to a being. It has been used in different senses, including the indication of a certain position relative to a social context. Its core for human rights law, however, is different. Here the term human dignity refers to the fundamental normative worth of persons as human beings, which is based on nothing but their humanity alone. The idea that human beings enjoy this kind of unique value status accompanies human culture since antiquity.[27] To gain a full impression of the many approaches to the fundamental normative status of

[24] *Cf*. Art. 1 sentence 1 Universal Declaration of Human Rights. On the ECHR *cf*. *supra* note 2. Art. 1 Charter of Fundamental Rights of the European Union states: 'Human dignity is inviolable. It must be respected and protected,' following the formulation in Art. 1 of the German Basic Law. Many new constitutions include a dignity clause, *e.g*. Art. 7 of the Swiss Federal Constitution (1999). The ECJ derives the protection of human dignity – as other fundamental rights – from the general principles of Community Law, *cf. e.g*., Case 377/98, Netherlands *v*. European Parliament, 2001 ECR I-7079, at Para. 70.

[25] A. Schopenhauer, Preisschrift über das Fundament der Moral [Prize essay on the foundation of morality] 64 (1979).

[26] For some thoughts from the international discussion *cf*. J. Frowein, *Human Dignity in International Law*, *in* D. Kretzmer & E. Klein (Eds.), The Concept of Human Dignity in Human Rights Discourse 121 (2002); J. Meyer-Ladewig, *Menschenwürde und Europäische Menschenrechtskonvention* [Human dignity and the European Convention on Human Rights] 57 NJW 981 (2004); C. Walter, *Menschenwürde im nationalen Recht, Europarecht und Völkerrecht* [Human dignity in national law, European law and international law] *in* P. Bahr & H. M. Heinig (Eds.), Menschenwürde in der säkularen Verfassungsordnung [Human dignity in a secular constitutional system] 127 (2006); D. Feldman, *Human Dignity as a Legal Value, Part I*, 1999 Public Law 682 (1999); D. Feldman, *Human Dignity as a Legal Value, Part II*, 2000 Public Law 61 (2000); J. J. Paust, *Human Dignity as a Constitutional Right*, 27 How. L. J. 145 (1984); W. Parent, *Constitutional Values and Human Dignity*, *in* M. J. Meyer & W. A. Parent (Eds.), The Constitution of Rights 47 (1992); F. Schauer, *Speaking of Dignity*, *in* M. J. Meyer & W. A. Parent (Eds.), The Constitution of Rights 178 (1992); L. Henkin, *Human Dignity and Constitutional Rights*, *in* M. J. Meyer & W. A. Parent (Eds.), The Constitution of Rights 210 (1992); M. D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 Neb. L. Rev. 740 (2006). For a sceptical perspective C. McCrudden, Human Dignity and Judicial Interpretation of Human Rights, 19 EUR. J. Intern'l L. 655 (2008). For an overview of the debate and further references *cf*. Mahlmann, *supra* note 4, at 97 *ff.*

[27] *Cf*. Mahlmann, *supra* note 4, at 104 *ff.*

human beings, it is important not only to look at legal or philosophical texts, but to consider human expression in other forms as well, e.g., in art. Ancient culture – epic, tragedy or (beyond the realm of language) sculpture – contains important examples for a reflection of what is peculiar to human beings.

Considering these many manifestations and the explicit reflections of the value status of human beings one finds, interestingly, a real thread in the discussion. Fundamental human worth is based, in very different cultural or religious contexts and epochs, on a limited number of human properties, most importantly on reason and understanding, autonomy, consciousness and morality. These properties play a decisive role in the philosophical thought of the classical Greek period,[28] the Stoic tradition,[29] of metaphysical natural law,[30] or the *Vernunftrecht* tradition,[31] the law of reason. One finds this line of thought beyond what is often called (albeit without a very clear meaning, given the migratory nature of thought) the 'Western tradition' as well.[32]

Human beings have interpreted their existence predominantly, in historical perspective, within a religious framework. Accordingly, world religions have made interesting, rich and complex contributions to the theory of the value of human beings.[33] Distinctive of these approaches is that the particular status human beings enjoy is regarded to be the gift of and dependent on a supernatural, divine source. Within this framework, human nature as such was regarded as embodying some value or as being, on its own, thoroughly corrupted, for example through the Fall.[34] This perspective is transcended by philosophical humanism. The concept of human dignity emancipates itself from sacral origins. Humanity as such once again becomes sufficient reason for the ascription of dignity to human beings.

Despite the fascinating breadth of thought arguing for a shared normative status, there is a different tradition as well, one that denies in principle any

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[28] *Cf*. Plato, Nomoi [Laws] IV 716d (2005); Plato, Theaitetos [Theaetetus]176b(2005); Plato, Politeia [The Republic] 611e-612a (2005); 613 a/b; Plato, Alkibiades I [Alcebiades] 132e-133c (2005).

[29] *Cf*. the conclusions drawn from of the earlier stoic thought by Cicero, De officiis [On Duties] 1, 105 (1999).

[30] *E.g*. T. Aquinas, Summa Theologica I, q. 93(1953).

[31] Kant, *supra* note 22, at 434 *ff.*

[32] For some examples Mahlmann, *supra* note 4, at 112 *ff.*

[33] For a detailed discussion of Hinduism, Buddhism, Confucianism, Judaism, Christianity and Islam, *see* Mahlmann, *supra* note 4, at 108 *ff*.

[34] *E.g*. Luther's view that human beings have been turned into an *imago diaboli*, M. Luther, *Über das 1. Buch, Mose, Predigten 1527* [About the first book of Moses, Sermons 1527] *in* M. Luther, Werke, Kritische Gesamtausgabe [Works, Complete critical edition] 24. Band 51 (1900); M. Luther, *Predigten über das erste Buch Mose, gehalten 1523/24* [Preachings on the First Book of Moses, held 1523-24] *in* M. Luther, Werke, Kritische Gesammtausgabe [Works, Complete critical edition] 14. Band 111 (1895); M. Luther, *Vorlesungen über 1. Mose von 1535-45* [Lectures on the First Book of Moses of 1535-45] *in* M. Luther, Werke, Kritische Gesammtausgabe [Works, Complete critical edition] 42. Band 166 (1911).

special value that all human beings share. A good example is Nietzsche, who argued that only an exalted few are the ends of human culture, whereas others derive value only from their service to the achievement of the ends of those of real worth.[35] Another approach makes the value of human beings dependent on their inclusion in a social community. Hegel argued accordingly that human beings have worth only insofar and because they are part of the state, the embodiment of *Sittlichkeit*.[36]

The ascription of value to human beings as human beings, or its denial, are not the only (rather simple) alternatives in the history of thought. The most serious contributions to the theory of human dignity had a sense for the deep ambiguity of human existence, marked not only by admirable achievements but by cruelty, greed, the pursuit of domination, the many faces of destructive pettiness or the other elements of those varied tragedies that human beings inflict on themselves. These contributions avoided, in consequence, any kind of mawkish anthropocentric narcissism which celebrates human greatness without consciousness of the abysses human culture has led to. A taste for such a position that takes the value of human beings seriously and that simultaneously remains aware of their other sides is offered by Sophocles, who describes human beings with the term *τὸ δεινόν*, which refers to what is at the same time great and, in its greatness, uncanny.[37]

To be clear: The assumption of the fundamental value status of human beings is just the beginning of the elaboration of a complete civilized normative system. Human beings had to travel a long way not only to formulate the insight that they *as such* enjoy a certain status, but to draw some plausible consequences from this idea and – equally difficult – to buttress it with concrete, most importantly, *legal* means. The history of ideas teaches that impressive concepts of human dignity were formulated and, at the same time (at least in the eyes of their authors) were perfectly reconcilable with what appears today as the most obvious violation of this normative status. The idea of human dignity did not necessarily rule out slavery, the subjugation of women, torture, or the death penalty, to name just a few examples. Previous approaches to the issue are therefore not to be misunderstood as final answers to the problems human dignity poses, but rather as tentative approaches that are worth remembering for their achievements as well as their limits if one wants to avoid talking about human dignity without too much naïveté.

One important general conclusion can be drawn from the history of ideas: The idea of human dignity is not the fruit exclusively of one type of cultural or religious soil. This concept has arisen in many and diverse places. This is

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[35] F. Nietzsche, *Fünf Vorreden zu fünf ungeschriebenen Büchern 1872* [Five prefaces to five unwritten books 1872] *in* F. Nietzsche, Kritische Studienausgabe [Critical study edition] Band I, at 776 (1999).

[36] *Cf. e.g.* G. W. F. Hegel, Grundlinien der Philosophie des Rechts [The Philosophy of Right] § 258 (1986).

[37] Sophocles, Antigone, verse 332 (1995).

important to emphasize because in constitutional and human rights discourse today one finds the idea that human dignity is in some essentialist way connected to the so-called Judeo-Christian tradition, and most importantly to the idea of human beings as the *imago dei*.[38] A sober look at the history of ideas teaches, as we have seen, a very different lesson. A differentiated concept of human worth is not the prerogative of any cultural context.

3.3.2. Contemporary Debates

The debate about human dignity continues to excite minds even today. In contemporary discussions various attempts have been formulated, apart from those theories that continue the conceptual project of some past inspiration, such as modern Kantianism or the discussion of human dignity within the framework of a world religion. Habermas for example tries to understand human dignity as the product of communicative action. It is predicated upon exiting patterns of mutual recognition as equals; it is a social creation dependent on a particular *Lebenswelt* or life world, not on any existential properties of human nature.[39] Margalit developed an idea of human dignity explicitly criticizing the attempt to found dignity on some set of human properties, asking why these human properties are supposed to be of particular relevance, rather than the other singular properties of other organisms, say the ability of fleas for impressively high jumps. Instead, the ability of new beginnings is the core of the particular value status of men.[40] There are contractualist accounts of human dignity, founding it on the mutually accepted obligation to respect others[41] or investment theories of human worth that argue that we value in human life the investments made to develop a personality.[42]

Apart from these examples of accounts of human dignity, there are modern cases of skepticism about the idea that human dignity should be understood in the traditional normative sense. The functionalist analysis of systems theory ranks prominently among them.[43] It argues that the point of human dignity as a normative concept is not to protect a given normative status of human beings, but to satisfy a functional imperative of modern societies. For their autopoietic reproduction these societies depend on the creation of sufficient variety of communications. Human agents are therefore needed because they are able to produce this variety. In Luhmann's view this presupposes the protection of

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38 For some comments *cf*. Mahlmann, *supra* note 4, at 111 *ff.*

39 *Cf*. J. Habermas, The Future of Human Nature (2003).

40 A. Margalit, The Decent Society (1996).

41 H. Hofmann, *Die versprochene Menschenwürde* [Promised human dignity] 118 Arch. öffent. R. 353 (1993).

42 R. Dworkin, Life's Dominion 84 (1994).

43 N. Luhmann, Grundrechte als Institution [Fundamental rights as an institution] (1965).

their normative status as such agents. Human dignity is therefore dependent on this functional need of modern societies, it is a tool – like other human rights[44] – that serves this social purpose, nothing more elevated than that.

3.3.3. Dignity, Anthropology and Justice

The most plausible account of human dignity pursues a different path that partly incorporates ideas formulated over the history of this concept but tries to break some new ground.[45] The value status of human beings has the normative consequence of demanding respect. In more concrete terms this means the prohibition of the instrumentalization of human beings and other forms of degrading treatment which are of an intensity that denies their humanity as such. The prohibition of instrumentalization has many roots in the history of ideas and has been most clearly formulated by Kant.[46] He provided a complex account of the foundation of this idea which is presumably the most advanced (and in many ways moving) attempt in this respect in the history of ideas.[47] It is doubtful, however, whether his arguments lay a foundation for the normative consequence of human dignity and human dignity as such, because his main argument – the derivation of human dignity from a human moral-purpose setting – may not be able to carry this burden alone.[48]

A way forward here and a new beginning is a multilayered argumentation. The first step is based on the simple anthropological fact that for human beings life is an end in itself, and on the basic principle of justice to regard the pursuit of this end as a universal right not limited to just a few. Every human person is the justified last-order purpose of action, because human beings are, through their factual quest for happiness, a purpose for themselves. Universalization as a command of justice demands the ascription of this purpose-status to all.

As Pufendorf nicely formulated, human beings have a particularly fine sense of self-respect.[49] To protect this human need for respect is certainly justified purely because of a concern for the feelings of human beings. The fact of self-respect does, however, not answer the question whether this attitude is justified because the self is in fact worthy of respect, or whether the self-estimation of human beings is just a (pleasant) subjective illusion of what is in fact a worthless, conceited creature. This is an important and difficult question.

Still, if one looks at the existential properties of human life, *Selbstzweckhaftigkeit* or being-an-end-in-oneself seems to be based on some

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[44] N. Luhmann, Die Gesellschaft der Gesellschaft [The society of society] Vol. II,1075 *ff.* (1997); N. Luhmann, Das Recht der Gesellschaft [The law of society] 574 *ff.* (1993).

[45] Mahlmann, *supra* note 4, at 262 *ff.*

[46] Kant, *supra* note 22, at 429, 462.

[47] For some critical discussion *cf*. Mahlmann, *supra* note 4, at 144 *ff.*

[48] *Id.*, at 160 *ff.*

[49] S. Pufendorf, De Officio Hominis [On the duty of man] VII, § 1 (1997).

good reasons. The construction of a mental explanatory image of the world (and the acceptance of its sometimes challenging results), the aesthetical appropriation of human existence with its many, not always pleasant attributes in art, the emotionally textured, potentially blissful but possibly tragically lost self-creation of transient human subjects faced with their own rather quickly-approaching end carried out in the mode of consciousness and self-determination, all confer particular value on human life – at least, it seems, from the (only available) human point of view.

This argumentation yields various results: it answers first what human dignity as a normative concept means. It includes, as has been said, a prohibition of the instrumentalization of human beings and – its positive basis – the imperative to respect human beings as the decisive subject of their personal and social life. It demands that human beings not be treated in a way that implies the negation of their belonging to humankind. These contents can be spelled out in more concrete terms and there is ample case law on the matter.[50]

The protection of the subject-status of human beings has e.g., rightly led courts to assume that a convict sentenced to lifelong imprisonment must have in principle the procedurally guaranteed chance to be freed again, given a successful process of social rehabilitation, because only under these conditions is the individual respected as a subject of the course of her life.[51] Other courts have buttressed claims of sexual self-determination[52] or procedural rights in courts[53] with the idea of human dignity, convincingly so, as intimate relations and their choice have to be the domain of the subject concerned and procedural rights avoid the objectification of persons in legal proceedings. A last example is the flooding of the cell of a convict by feces – a case in which a constitutional court was required to clarify that this is not reconcilable with human dignity though it does not constitute an instrumentalization of the convict.[54] These and many other possible examples illustrate that the developed content of human dignity can yield concrete legal gains and is more than mere edifying rhetoric

[50] Problems abound. Among the most discussed are the indeterminacy of the scope of the right; its conceptualisation as a subjective right and not only objective law, hermeneutical yardstick and the like; its horizontal effect; the protection of the species character through dignity clauses; the beginning and end of the (prenatal or postmortem?) protection of human beings through dignity clauses; its relation to particularly contentious legal questions like abortion, biomedical research (especially on embryos), new techniques of reproduction, or torture; the question of possible limitations or – alternatively – the absolute character of dignity clauses; the conditions for engagement in an interference; the relative or universalistic character of concretisations of human dignity, and the relation of interpretations of human dignity to the idea of the neutrality of the state. For a detailed doctrinal unfolding of human dignity as a legal concept considering these and other questions *cf.* Mahlmann, *supra* note 4, at 282 *ff.*

[51] Federal German Constitutional Court, BVerfGE 45, 187.

[52] *Cf.* US Supreme Court, Lawrence *v.* Texas, 539 U.S. 558 (2003).

[53] Swiss Federal Court, BGE 124 V 180, 181.

[54] Federal German Constitutional Court, BVerfG NJW 1993, 3190.

for Sunday sermons. To be sure, human dignity clauses are, even with this kind of determination of their content, not easy to apply, but this is not a surprising phenomenon; these difficulties are the daily bread of human rights adjudication in other fields as well.

The example of human dignity may have clarified the concept of an ethical theory of human rights to a certain degree: the legal term *human dignity* is interpreted in the light of an ethical conception of dignity informed by the history of ideas but not limited to the approaches formulated in the past. In this manner, historically and theoretically informed interpretation operates with elements of philosophical anthropology and normative principles like certain rules of justice. Ethical reflection results in the view that human dignity aims to protect the subject-status of human beings, their *Selbstzweckhaftigkeit*, their being-a-purpose-in-themselves. The result of this interpretative process continues to be a legal term, as it is not turned into a subjectively mandatory moral imperative. For human dignity as a legal term concerns only the *external* treatment of human beings. The legal guarantee interpreted in an ethical light says nothing about the *inner motives* of, say, the police force bound by it. Police officers may remain Schopenhauerians and be doubtful about this concept of the law as long as the state action they execute abides by the demands set out in this legal guarantee. This is all the guarantee of human dignity as a fundamental right demands, as it is not morality, but law informed by an ethical theory of fundamental rights.

3.4. The Worth of Liberty

Human rights protect many freedoms. There are some classical examples like freedom of speech, freedom of religion or property rights and new products of human rights adjudication such as data protection and thus the liberty to determine oneself the use of data. Some constitutional systems contain a general liberty clause as a subsidiary right protecting any kind of human behavior against unjustified limits.[55]

Again, some questions as to the interpretation of a right to a certain freedom may be answered through the framing of the given right in the particular human rights catalogue concerned. But there will be other questions as well. Here the doctrine of a special liberty must resort to an account of the point of the liberty in question. As mentioned before in the case of freedom of speech, opinions about the rationale of this liberty will be divided – some argue for a democratic orientation, and others for a focus on personality rights, for example.[56] The understanding of fundamental rights cannot do without such

[55] *Cf.* Art. 2(1) of the German Basic Law.

[56] For some dicussion *cf.* E. Barendt, Freedom of Speech 6 *ff.* (2005); M. Mahlmann, *Free Speech and the Rights of Religon*, *in* A. Sajó (Ed.), Censorial Sensitivities 53 *ff.* (2007).

an account. Any theory of this sort will have ethical content: a democratic theory will, for example, be faced with the question why democracy is an end to be served by the interpretation of a right, and thus will be forced to spell out the reasons of inclusion of human beings in the body politic, issues that are squarely rooted in ethical territory.

The modern debates about concepts of liberty are as manifold as they are in the history of ideas where a considerable component of practical and moral philosophy is a philosophy of freedom. Considering these many attempts, the following seems a promising approach to the problem:[57] A theory of freedom relies, first, on the instrumental worth of liberty for the achievement of other ends beyond freedom. A classical example is the role freedom plays for the achievement of the goal of proportional self-perfection in Wilhelm von Humboldt's work.[58] Without freedom, the plurality of situations it produces and the possibility it creates to become the agent of one's own life, such self-perfection is, in von Humboldt's view, impossible. Another example is John Stuart Mill's idea that freedom of speech serves the function of truth-catalyzing.[59] There is much to remark about the concrete arguments in these examples but suffice it to say that without freedom much of what is valuable to human beings could not be achieved, from valid theories about the movement of planets to attractive forms of life.

Freedom has, in addition, an intrinsic value. This is explicitly stated or at least implied in much of the philosophy of freedom. The taste for this particular good is, however, not provided by theoretical treatises and abstract argument. The intrinsic value of freedom manifests itself negatively by the experience of repression and positively by the historically rarer events of substantial self-determination. The last-order proof of the worth of liberty is the human appeal of a practice of individual and social self-determination offering the self-consciousness of an existential identity.[60]

A theory of the axiological point of liberty has various consequences. It reinforces the notion that liberty is protected for the sake of individuals and not for the sake of communities or the realization of transpersonal aims like the fostering of cultures, religions, or the power of a chosen class. It gives a taste of what is precious about liberty and formulates a critical sting against attempts to reduce its relevance, for example, in favor of security. It has quite concrete doctrinal offshoots as well, among them yardsticks for the rationalization of weighing-and-balancing-exercises, by explaining why the potentially various freedoms at stake matter, and in what respects. To return to the example of freedom of speech for illustration: only if it is clear what the

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57 For further discussion *cf*. Mahlmann, *supra* note 4, at 365 *ff.*

58 W. von Humboldt, *Ideen zu einem Versuch die Gränzen der Wirksamkeit des Staates zu bestimmen* [Ideas toward an endeavour to define the limits of state action] *in* W. von Humboldt, Werke in fünf Bänden [Works, in five volumes] Band 1, at 56 *ff.* (2002).

59 J. S. Mill, *On Liberty*, *in* J. S. Mill, On Liberty and Other Essays 1 *ff.* (1991).

60 Mahlmann, *supra* note 4, at 404 *ff.*

deeper reasons for its protection are will it be assigned the proper weight when balanced against, say, the personality rights of persons whose comportment is the object of critical speech, not the least in political matters or (to take another classical example) the security interests of a state. Other consequences concern the merits of a general protection of freedom of action in a society, the interpretation of what is sometimes called "institutional guarantees" like marriage, for example, in respect to their impact on the admissibility of same sex partnerships, or the conceptualization of the religious neutrality of the state.[61]

3.5. The Concept of Equality

Guarantees of equality appear in various forms. Standard dimensions of their scope are general principles of equality before the law, the provision that law be not only applied equally but created without violation of the principle of equality, prohibition of discrimination on certain grounds such as ethnic origin, religion, belief, sex, etc., and positive duties of public authorities to redress existing factual inequalities, the latter spearheaded in the area of discrimination on grounds of sex or race and ethnic origin, and now extended to many other areas.[62]

To understand what these various normative dimensions mean and entail one needs a concept of equality and – as equality is intrinsically linked to this ethical principle – of justice.

Just as with dignity or liberty, a convincing concept of justice is a complex matter and stirs as much debate today as in the past. A plausible theory of justice will be based on the preservation of proportional equality in two dimensions:[63] First, between the criterion of treatment and the treatment itself, and secondly, between different patients of the treatment. Due to the first principle, for example, an exam is evaluated according to the merit of the work. According to the latter, the scope of rights has to be distributed equally among the bearer of the rights (which by the way is the ethical core of weighing and balancing). On this basis, the concept of justice must be differentiated according to spheres and criteria of distribution. It has to respect the principle of autonomy and responsibility while maintaining the basic equality of worth of all human beings.

For guarantees of equality, this concept of justice as proportional, differentiated equality can guide the solutions of concrete current problems of equality guarantees, such as the standard of control. Do equality clauses entail a prohibition of arbitrariness (irrationality) or a test of proportionality (strict

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61 *Id*., at 365 *ff.*
62 *Id*., at 412 *ff.*
63 *Id*., at 438 *ff.*

scrutiny)?[64] The outlined concept of equality gives good reason to justify a proportionality test (strict scrutiny) at least where personal characteristics of human beings are at stake. There are no criteria in sight that could justify differential treatment as to such characteristics, for example ethnic origin, sex, religion, belief, sexual orientation, disability and the like without such test. Proportional equality, therefore, provides good reasons to sharpen the tools for preventing differential treatment of persons on these grounds.[65] The concept of discrimination (direct and indirect), the framework for positive discrimination and positive action or the justification of unequal treatment under human rights law, to name a few, offer further illustrations of issues for which the concept of equality lies at the root of the interpretation of equality clauses.[66] This concept of equality with its foundations in a theory of justice is, therefore, another important element of a full ethical theory of fundamental rights.

3.6. Political Theology

These examples of human dignity, liberty and equality and their guarantees in human rights law indicate that a secular, humanistic, liberal, egalitarian theory of human rights that embodies a clear consciousness of the worth of each human individual and the values of social bonds seems a most plausible candidate for a convincing overall conception of human rights.

It should be noted in passing that such a theory is the opposite of political theology. This is important to emphasize, as material accounts of the content of fundamental rights are often based in one way or another – sometimes directly, sometimes through processes of cultural transmission – on supposedly deeper religious sources. The genealogy of law is increasingly written in religious terms. This is notably so for the central concept of human dignity (wrongly so, as has been illustrated) but holds for other concepts as well. The outlined thoughts do not follow this path. They do not secularize theological concepts, but derive the content of human rights from the secular springs of political and legal anthropology and human moral judgment. In light of this account,

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[64] For some examples *cf*. the jurisprudence of the US Supreme Court, elaborating the positions taken in Korematsu *v*. United States, 323 U.S. 214 (1944) and United States *v*. Carolene Products Co., 304 U.S. 144, at n.4 (1938) or the case law of the German Federal Constitutional Court, which developed a strict test of proportionality if the treatment is based on a personal characteristic not open to change or similar to those explicitly mentioned in Art. 3(3) of the Basic Law, or if it endangers civil liberties (thus being a suspicious categories test) in BVerfGE 97, 35.

[65] Mahlmann, *supra* note 4, at 416 *ff.*

[66] *Id*., at 412 *ff.*

human rights are not a secular gloss on intrinsically religious contents, but quite the contrary: the concepts of religious ethics appear as the sacralization of secular ideas.

4. Dictatorship of the Obscure?

4.1. The Persistence of Value Questions

To some commentators, any references to values in constitutional law have seemed highly dubious. A good example is Carl Schmitt, who deplored the tendency of post-war human rights adjudication in Germany (an interesting example, given its past) to be guided by values.[67] On a more general level, transcending the legal sphere, Heidegger interpreted values as part of the metaphysical decay of the West and its forgetfulness of the true essence of being.[68] Today, various schools deconstruct the reference to values in one way or another. There is an important point here. It is true that under the cover of sometimes lofty value-talk, social interests and political powers pursue their ends often quite bereft of ethical content. Values are a potentially sharp tool against powerless groups in societies. They have served, to this day, to dominate women or discriminate against minorities. There is therefore good reason to be skeptical about assertions concerning values, and to ask hard questions as to the origin and the content of such values. Harmful illusions are certainly not permissible in these areas any more.

But there is essentially no escape from value theories in the adjudication of human rights – and this is the predicament. One may prefer a different term – 'principles,' 'axiology,' or the like – but there is no argument in hard cases of adjudicating and doctrinally unfolding human rights law which does not refer in substance to such values; any normative statement will embody them. Even such emphatically negativistic theories like the projects of Negative Dialectics or Deconstruction imply such value statements (against the intentions of their

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[67] C. Schmitt, Die Tyrannei der Werte [The Tyranny of Values] in: Säkularisation und Utopie [Secularization and Utopia] 37 *ff.* (1967).

[68] M. Heidegger, Nietzsches Wort ‚Gott ist tot', in: Holzwege 209 at 263 (2003): "Das Wertdenken der Metaphysik des Willens zur Macht ist in einem äußersten Sinne tödlich, weil es überhaupt das Sein selbst nicht in den Aufgang und d. h. in die Lebendigkeit seines Wesens kommen läßt. Das Denken nach Werten lässt im vorhinein das Sein selbst nicht dahin gelangen, in seiner Wahrheit zu wesen." Translation in M. Heidegger, *The Word of Nietzsche: 'God is Dead,' in* M. Heidegger, The Question Concerning Technology and Other Essays 53, at 108 (1977): "The value-thinking of the methaphysics of the will to power is murderous in a most extreme sense, because it absolutely does not let Being itself take its rise, i.e., come into the vitality of its essence. Thinking in terms of values precludes in advance that Being itself will attain to a coming to presence in its truth."

authors in a sometimes quite curious way), from Adorno's critique of cruelty[69] to the ethics of the Other[70] – and this is even more so in any legal doctrinal conceptions of such a kind. It is therefore no accident that contemporary legal positivism has been driven over the narrow limits of its early forms either. Given this, it is certainly preferable to be outspoken about this state of affairs, as indicated before, in order to open the door to critical reflection and constructive work.

4.2. Ethical Universalism Beyond Metaphysics

There is a last source of doubt about an ethical interpretation of the law apart from the importance of the separation of law and morals, the necessary limits of the power of judges, and considerations of democracy discussed above. This last problem concerns the epistemological possibility of valid moral judgment. This is a serious question, as many authors of traditional and contemporary varieties of non-cognitivism firmly believe that there is no dominion of reason in practical judgment. If this is true, it seems, this is a fatal blow to the project of an ethical theory of fundamental rights – at least if it formulates a claim of being justified – as there is no rational ground on which it could be built.

But perhaps the epistemological case for an ethical theory of fundamental rights is not so hopeless after all. Interestingly, the modern theory of the mind and cognitive science indicate theoretical possibilities beyond contemporary mainstream ethical skepticism as one of their most challenging perspectives. From this mentalist point of view, terms like 'conscience' or 'practical reason' are traditional ways to refer to a higher mental faculty, a universal and uniform human moral faculty governed by operative, though not necessarily express principles that generate foundational moral judgments (*Grundurteile*) which are the building blocks of moral systems.[71] Principles of altruism and justice seem to be among the generative principles of the moral faculty.[72] To be sure, it is a long way from these foundational judgments (*Grundurteile*) to even simple rules like "You shall not kill." Legal rules – say, of the intricacies of

[69] T. W. Adorno, Negative Dialektik [Negative Dialectics] 299 (1997).

[70] *Cf.* M. Mahlmann, *Law and Force: 20th Century Radical Legal Philosophy, Post-Modernism and the Foundations of Law*, 9 Res Publica 29 (2003).

[71] For an outline of this idea *cf.* M. Mahlmann, Rationalismus in der praktischen Theorie [Rationalism in practical theory] (2009); M. Mahlmann & J. Mikhail, *Cognitive Science, Ethics and Law*, *in* Z. Bankowski (Ed.), Ontology and Epistemology 95 (2005); J. Mikhail, Rawls' Linguistic Analogy (2000); J. Mikhail, *Universal Moral Grammar: Theory, Evidence and the Future*, 11 Trends Cogn. Sci. 143 (2007); N. Chomsky, Language and Problems of Knowledge 152 (1988). For substantial discussion *cf.* R. Jackendoff, Language, Consciousness, Culture 277 *ff.* (2007); analytically heavily indebted to J. Mikhail's work M. D. Hauser, Moral Minds (2006); J. Rawls, A Theory of Justice 46 *ff.* (1972), considered the so-called 'linguistic analogy' but did not pursue it further, *cf.* J. Mikhail, Rawls' Linguistic Analogy, *id*.

[72] Mahlmann, *supra* note 18, at 18 *ff.*

contract law – are even further removed from such foundational judgments and evidently embedded in a rich set of cultural, social, historical, political, or religious influences. But as we have seen, at some stage in its reflection legal science itself has to turn towards ethical theory, at least as far as the currently pivotally important human rights are concerned. In turn, ethical theory, in its complex constructions of normative positions depends on foundational moral principles generated by the human moral faculty. The generative human moral faculty is therefore the condition of the cognitive possibility of morality and – though mediated by many other social, historical, and cultural factors – of law.

This approach of a mentalist theory of ethics and law raises many questions – of moral ontology, moral motivation, the relationship of explanatory theory and normative contents and the like – but is certainly a serious candidate to reframe the problem of the foundation of morality in a perhaps quite promising way. It may offer a conceptual means to clear the path to a post-metaphysical reconstruction of conscience and practical reason as a human generative moral faculty. Many forms of epistemological skepticism lose their plaguing sting as a result of this emerging point of view. The resurrection of the idea of absolute – Platonic, Hegelian, (Neo-)Thomistic or other – insight in *the* Good and Just is philosophically not a serious option anymore. But there are trends in current moral epistemology that nourish the impression that the old concept of human practical reason has greater merits than it seems to possess in classic 20th century and some contemporary ethical thought.

5. The Prospects of Legal Cosmopolitanism

The ethical theory of human rights outlined is clearly universalistic in outlook. None of its central elements are dependent on a particular cultural context. There is no reason, for example, to assume that life is less (or more) a purpose in Cameroon, China or Switzerland than anywhere else, or that human existence has value-conferring properties in North America that it has not in Vietnam – assumptions of relevance for the developed conception of human dignity, the opposite of which have served as important building blocks of racism and other forms of discrimination. In consequence, it keeps a safe distance from the many forms of relativism or even contextual particularism pursued today.

This roughly-sketched theory has another important implication as its final perspective: It is not only about the interpretation of a given human right catalogue; this is only its starting point. It further points the way to a rather grand and difficult topic: a general *theory of the legitimacy of human rights*, transcending cultural, political and social contexts and perhaps possessing the potential to buttress with the ephemeral means of thought the fragile culture of human rights that has arisen since 1945. The reason is this: the present account of the foundation of dignity, liberty and equality is not only useful for

the interpretation of human rights but can serve to provide reasons why human rights – guarantees of human dignity, particular rights to certain freedoms, equality clauses and other (procedural, positive etc.,) rights – are legitimately created in the first place.[73]

If this conception of human dignity, for example, is convincing, it can serve not only to direct the interpretation of existing guarantees, but provides reason for creating them in the first place: if human beings can justifiably be regarded as ends-in-themselves because of the considerations outlined in this chapter, then there are good reasons to protect this normative status by means of human rights law, and guarantees of human dignity are consequently legitimate. The same kind of argumentation is possible for liberties and equality clauses, not only in an abstract sense, but on the level of normative concretization sketched above.

This outlined ethical theory, based on a mentalist conception of the origin of morals, begins with an interpretational task that is important on its own, but also leads far beyond this starting point. It opens the door to meet a central concern of contemporary political, legal and ethical reflection and culture: the formulation of a universalistic theory of human rights.

One should not forget that human rights today are protected by many institutions, among them powerful courts. In the last instance, however, they have no other foundation than the persistent conviction of the citizens of this world that only a life enjoying such rights does justice to the better potentials of human kind. In this sense, an ethical theory of the content that has been outlined can perhaps render a modest service to a cosmopolitan practice of human rights by confirming the soundness and moral attraction of its grounds.

[73] Mahlmann, *supra* note 4, at 517 *ff.*