

THE FORMAL AND SUBSTANTIVE CORE OF HUMAN RIGHTS

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Abstract

Human dignity is the basis of human rights. From the four dimensions of dignity - the status subjectionis, the status negativus, the status positivus and the status activus - both form and content of human rights can be justified. The form as subjective rights is necessary so that man is treated as a subject and not as a mere object (status subjectionis). In terms of content, human rights protect not only freedom from the state (status negativus), freedom through the state (status positivus), but also the freedom of the individual to participate in the establishment of public authorities (status activus). In addition: human dignity itself is a human right.

Keywords

Human dignity. Human rights. Negative rights. Right to have rights. Person in law. Theories of human rights

Summary

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1. INTRODUCTION

A State violates Human rights, if it lets a murderer wait for thirteen years without the possibility for an appeal against his conviction for the death penalty.² It is also a violation of human rights when a group of Bulgarian nurses is arrested in Libya in 1999, beaten to confession, subjected to electric shocks and other violence, forced into solitary confinement, sentenced to death and finally released only through political intervention.³ But does it also violate human rights if a state does not concern itself with intersexual people, i.e. people who, because of their genetic or sexual endowment, cannot be classified either exclusively as male or exclusively as female, and in particular denies them legal recognition and the right to specific medical care?⁴ The violation of human rights is again clear if the computers of a civil rights organization in Belarus are repeatedly confiscated arbitrarily without concrete suspicion on the basis of various criminal offences, which are then only partially charged (e.g. the use of unbound foreign aid), and convictions are based on these confiscations.⁵

² Violation of art. 14 of the ICCPR, CCPR of April 26, 2012, CCPR/C/104/D/1859/2009, S. 4 f.

³ Violation of art. 7, 2 III, 9, 14 of the ICCPR, CCPR/C/104/D/1880/2009, S. 10 f.

⁴ Relevant here are art. 2 V of the ICESCR of 19 December 1966 and its preamble, “in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”, cf. Parallel Report to the 5th National Report of the Federal Republic of Germany on the United Nations Covenant on Social, Economical, and Cultural Human Rights (CESR) by „Intersexuelle Menschen e.V.“, http://www2.ohchr.org/english/bodies/cat/docs/ngos/IMF_Germany_CAT47.pdf (last Dec. 15th, 2019).

⁵ The Human Rights Committee takes human rights violations as given here (art. art. 19 II, 22 and 25 of the ICCPR, CCPR/C/105/D/1226/203) and defines “public affairs” in art. 25 as “citizens take part in the conduct of public affairs, inter alia, by exerting

Positivized international human rights today protect people from unjust state power, demand state aid in areas in which they cannot help themselves, promote the cultural and political self-determination of individuals and groups and their coexistence in autonomous communities, as shown by the cases just described in last year's reports by the Human Rights Committee of the International Covenant on Civil and Political Rights (ICCPR) of the United Nations and a non-governmental organization.

What is the foundation of these international human rights or – philosophically speaking – their principle or origin? This question can be answered in terms of content or form. A substantive foundation could analyze the content of human rights and look for a common denominator to which all of them can be brought. Usually this denominator signifies a certain value. Based on non cognitivist or relativist assumptions, some authors are skeptical about such a value recognition.⁶ These authors may argue based on formal arguments and hold that human rights are individual rights of all people and examine the formal structure of human rights. Following the discussion of both approaches, I will attempt here to explain the substantive and formal foundation of human rights from a single principle. I will begin, however, with a few remarks on the systematics of the protection of human rights under international law.

2. FIVE GROUPS OF HUMAN RIGHTS AND THEIR STATUS

The legal starting point of today's human rights protection is the originally non-binding Universal Declaration of Human Rights of 10 December 1948 that has gained binding force as customary international law and

influence through public debate and dialogue with their representatives or through their capacity to organize themselves”.

⁶ KELSEN 1929, 100

keeps its guiding function when its rights have been transformed into binding treaties. It recognizes four groups of human rights.⁷

First it mentions the right to life (art. 3), freedom of property (art. 17), freedom of thought, conscience and religion (art. 18) and freedom of communication (art. 19) to associate (art. 20, 23 IV) and prohibits slavery (art. 4), torture (art. 5), arbitrary arrest (art. 10) or such interference with private life (art. 12) as well as discrimination based on physical, historical or religious beliefs (art. 2). Individuals are protected from restrictions on their freedom by public authorities. In this respect, human rights are negative or defensive rights that leave the individual a free space for their private life. This *first group* of rights is affected when people are tortured, as in the case of the Bulgarian nurses in Libya.

If we look at the history of human rights, we can actually observe the "progress in the consciousness of freedom" that Hegel observed in political history as a whole.⁸ In view of the increased potential threats to freedom posed by technical but also criminal developments, meaningful protection of freedom today must not only encompass the factual conditions of the use of freedom in the sense of positive rights, but also the protection of the capacity for freedom in the sense of human dignity.⁹ Even at the time of the drafting of the Universal Declaration, however, the authors were aware that these negative rights were not sufficient for a realistic protection of human rights. In addition to these freedoms and prohibitions of discrimination, the UDHR also recognizes certain individual claims towards the state as human rights.¹⁰ They are meant to

⁷ VERDROSS 1954, 335. Correctly though, he considers the UDHR a legal form that puts "the philosophical basis of human rights again into light".

⁸ HEGEL 1982, 33.

⁹ KIRSTE 2013a, 63-83.

¹⁰ In the UNESCO questionnaire it says: "By a right they mean a condition of living, without which, in any given historical stage of a society, men cannot give the best of themselves as active members of the community, because they are deprived of the means to fulfill themselves as human beings". In contrast to this, freedom is understood as a

ensure adequate living conditions for all.¹¹ Here, for example, we can mention the right to social security and other economic, social and cultural rights (art. 22, 25). In this *second group*, human rights protect the individual against natural and social risks from which the individual cannot protect himself and grant him a right to public services where these are necessary as prerequisites for freedom. This dimension is affected in our example, when intersexual people are denied legal recognition, protection against discrimination and the right to medical aid under national law, as was claimed by the NGO for Germany.

A *third group* of human rights in the Universal Declaration concerns neither human freedom against public authority in the form of negative rights, nor human freedom through the protection and performance of public authority, but ensures human participation in the establishment, concretization, and enforcement of rights, obligations and the common good by public authority. Therefore, the UDHR recognizes the human right to democratic participation in elections in one's own state (art. 21 I).¹² However, every human being has not only the right to be involved in the establishment of public authority, but also to be able to participate in

negative right, but also as a requirement for the structure of the state: "By liberty they mean more than only the absence of restraint. They mean also the positive organization of the social and economic conditions within which men can participate to a maximum as active members of the community and contribute to the welfare of the community at the highest level permitted by the material development of the society. This liberty can have meaning only under democratic conditions, for only in democracy is liberty set in that context of equality which does not distinguish by age or sex, by race or language or creed, between the rights of one man and the rights of another", Appendix II, p. 6. UNESCO had sent a questionnaire on human rights to philosophers and other scholars from different cultures of the world and with different religious backgrounds, and then introduced the results into the process of drafting the UDHR. Appendix II condenses the results of the scholars' responses, <https://unesdoc.unesco.org/ark:/48223/pf00000155042>, last accessed on Dec. 16th, 2019.

¹¹ LOHMANN 2005, 9.

¹² For a human right to democracy also cf. KIRSTE 2015b, 11-31.

its exercise by the administration in the same way as everyone else (art. 21). If his rights should finally be infringed, persons should not have to acquiesce in this, but be entitled to actively fight for their rights in court. They must also be entitled to such procedural rights if their substantive rights are to be infringed by a penalty. Therefore, the UDHR recognizes a right to judicial legal protection (art. 8) and to a fair trial. Persons also may not be held criminally liable, if the punishability of the kind of actions was not previously established (*nulla poena sine lege*) and finally, the presumption of innocence applies in their favor (art. 11). The third group of human rights thus regulates the active participation of man in the three powers of the legislature, the executive and the judiciary. This group of human rights are not directed *against* public authority like negative rights, they are also not realized by public authority like the protection and claim rights, but they are realized in and with the public authority. Therefore the case of the civil rights organization, whose PCs were arbitrarily seized, belongs to this group, because thereby their free participation in the public affairs is impaired (art. 25 II ICCPR).

So far, the classification follows the status theory of the German-Austrian Georg Jellinek.¹³ Jellinek distinguishes four statuses of the human being in relation to the state: the status of freedom *against* the state (status negativus), the status of freedom *by* the state (status positivus) and the status of freedom *in* the state (status activus). Winfried Brugger has developed the system of this status doctrine for fundamental rights and expanded it to include other statuses: rights against the state to the status negativus, the rights of protection and participation in public aid to the status positivus, and the rights of political participation to the status activus.¹⁴

¹³ JELLINEK 1905, 85.

¹⁴ BRUGGER 2011, 33. I do not follow Brugger in the assumption of further European and international status. The reason lies in the "status subiectionis" to be dealt with immediately: while Jellinek and Brugger think in terms of the state, my starting point is

But what about Jellinek's fourth status, the status subiectionis? Jellinek understood this relationship as an equal subjection of all citizens to state power.¹⁵ Brugger decidedly ignores this status, because it would be out of time. This is true in so far as Jellinek assumed that all individual statuses are based on a general actual relationship of submission to state authority. However, if we distinguish with Hans Kelsen between the validity of standards and the existence or validity of facts,¹⁶ then we cannot conclude from the relationship of the actual subjection of the people to the state to a legally founded and formed status. Rather, both statuses must be legally founded. Therefore, here the general status is to be understood as one of the original subjection of both the public authority and the individual to the law. These relationships are also legal relationships and not factual.¹⁷ Now human rights give rise to the assumption of such a fundamental status. We have namely neglected one group of human rights in the presentation of the various human rights so far. This *fourth group* is elementary, however: the regulatory section of the Universal Declaration of Human Rights begins with the sentences: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (art. 1 UDHR). Here innate values of human beings are given: Freedom, equality. These are the basis of human rights and dignity. They find their basis in the capacity of reason. From these results the duty of fraternal interaction among human beings.¹⁸ Article 2 of the Universal Declaration draws the conclusion from this and equally entitles every human being to all the rights of the Declaration. This includes the right to be recognized

the legal relationship. Therefore, the distinction between the three statuses (or four statuses including the status subiectionis), becomes categorical, i.e. returns at the levels of European law and international law, and does not lead to new kinds of legal relationships.

¹⁵ JELLINEK 1905, 197.

¹⁶ KELSEN 1960, 17.

¹⁷ GRÖSCHNER 1992.

¹⁸ I completely exclude the duties in the UDHR here, see also art. 29 UDHR.

everywhere as having legal capacity (art. 6) and in any case as a citizen of a State (art. 15). From the ability to reason follows therefore a right to freedom and equality.¹⁹ Since these rights are granted as claims of the citizen against the public authority, a “right to have rights” therefore follows from the ability to reason. Since having rights also means having legal capacity, the “right to have rights” also implies the right of the individual to have his legal capacity recognized. And because finally these rights also include the right to political participation, which under the conditions of the 20th century can only be exercised within the state, the right to citizenship finally follows from the recognition of legal capacity. The possibility of the individual to enter into legal relationships with others and with the public authorities is granted to him as a human right itself. Thus, in addition to the three statuses mentioned above, there is the status *subjectionis* as the status of subjection of all persons to the law, or rather, the status of the recognition of the legal capacity of man. – Because the murderer, whose appeal has not been decided even after 13 years, is not “honored as a rational being”.²⁰ He is not treated as a person having committed a crime, but as someone who can be locked up, held up and then killed if necessary like a natural object. Due to the uncertainty about the punishment, elementary doubts are cast on his ability to control the future and thus on his reason as the basis of his rights.

These four groups of human rights – the rights of the human being *vis-à-vis* public authority, rights *through* public authority, rights of participation *in* public authority and the right to recognition *of* the legal capacity of the human being – have been concretized by further declarations and conventions under international law and recognized as binding for the states, so that they result in an “international Bill of Rights”.²¹ In the

¹⁹ ALTWICKER 2011, 439.

²⁰ HEGEL 1991, 126: “In so far as the punishment which this entails is seen as embodying the criminal's own right, the criminal is honoured as a rational being.”

²¹ BUERGENTHAL; THÜRER 2010, 29.

Covenant on Civil and Political Rights, the status negativus is further elaborated, protecting the rights of defense against arbitrary punishment (art. 6), torture (art. 7), slavery (art. 8), guaranteeing personal freedom and security (art. 9), and granting other rights. Individual property rights are also mentioned (art. 24). Above all, however, the status activus is then further elaborated by stating a “right to participate in the conduct of public affairs, directly or through freely elected representatives” and equal access to public office (art. 25), and by guaranteeing fair procedures and active participation in them in order to secure one's own rights (art. 14, 15). The right to the recognition of legal capacity is mentioned (art. 16), but is only linked to freedom, equality and dignity through the preamble. The Covenant itself, with its binding force and institutionalized enforcement (art. 28 f.), is intended to effectuate this right. The Economic and Social Pact then concretizes above all the status positivus with regard to its regulatory content and binding nature. Here, rights to social security (art. 9), fair working conditions (art. 8), to an adequate standard of living (art. 11), health (art. 12), education (art. 13), culture (art. 15) are guaranteed. Further declarations and conventions have established additional prohibitions of discrimination and protection against children, women, disabled persons, ethnic and religious groups, protection against trafficking in human beings and forced prostitution.

In addition, however, there is a new right – already presupposed by the Charter of the United Nations – the right of self-determination of peoples (art. 1 ICCPR, art. 1 ICESR). It has been disputed whether the right to collective self-determination, the right to development, the right to peace, to a clean environment, to communication or to an appropriate share of the treasures of nature and culture should be regarded as human rights at all, because they are assigned to collectives and not to individuals.²² At this point, however, it is sufficient to note that they all constitute the general right of individuals under Article 28 of the UDHR to a social and

²² ALEXY 1998, 247.

international order in which they can best realize their rights and freedoms. These collective rights have an instrumental character for the realization of the human rights of the individual. This is expressed in the Preamble and Article 2 I of the United Nations Declaration on the Right to Development, which states: "(1) Man is the central subject of development and should be the active bearer and beneficiary of the right to development".²³ Collective rights can be human rights then.²⁴

Thus, *five groups* of human rights can be distinguished: people's rights to defend themselves against public authority (negative human rights); people's claims to protection and benefits from public authority (positive human rights); people's rights to participate in the establishment and execution of public authority and in proceedings (active human rights); the right to be regarded as having legal capacity in all these relationships (right to be regarded as legal persons); and finally, the rights of the groups to which people belong as a result of these rights (collective rights).

However, describing these rights and even classifying them – as has been done – is not a justification for human rights. Even the criterion of classification must remain arbitrary if the reason for human rights is not exposed.

Human rights are founded in very different ways in philosophy. We will distinguish these different approaches into substantive and formal justifications of human rights. The substantive justifications for a foundation of human rights attempt to attribute the various rights to a uniform principle or a fundamental value. Formal approaches, however, analyze the structure of human rights as subjective rights of the individual. I start with substantive justifications. I shall begin with substantive approaches to justification.

²³ Resolution 41/128 der Generalversammlung der Vereinten Nationen vom 4. Dezember 1986.

²⁴ KIRSTE 2016, 27-45.

3. THE SUBSTANTIVE FOUNDATION OF HUMAN RIGHTS

In terms of content, approaches to justification of human rights attempt to explain the various rights from a uniform origin and to derive criteria for the classification of human rights as well as their limitation. I will discuss historical and anthropological approaches here.

3.1. The Historical Approach

The historical approach is represented in an evolutionary-continuous and a historical-eventful variant.²⁵

3.1.1. The Evolutionary Approach

The evolutionary approach assumes that human rights are those rights, which in the course of history have proven to be central to being human.²⁶ Their discovery was “not an act, but a process”.²⁷ That is why the history of human rights is sometimes traced back to constants in the convictions of good and just. Alfred Verdroß, for example, writes that positive law “can only be right law if it corresponds to the physical, spiritual and moral nature of man”.²⁸ For example one then finds that since the Stoa or also since the Cynics rights have been spoken of which people, by virtue of their ability to reason or also their image of God, would be accorded in the same way independently of all privileges of social status.²⁹ Others point to the struggle of Bartholomé de las Casas and Francesco Vitoria for the recognition of the Indians as human beings and the anti-slavery movement

²⁵ For the difference cf. KIRSTE 1998, 352. 403. 431.

²⁶ HOFMANN 1999, 5. ISHAY 2008, 12: “This book argues that those human rights themes that survive the tests and contradictions of history provide in the long run a corpus of shared perceptions of universal human rights that transcends class, ethnic, and gender distinctions”.

²⁷ HOFMANN 1999, 5.

²⁸ VERDROSS 1954, 695.

²⁹ TÖNNIES 2011, 12.

ever since.³⁰ Still others believe that human rights as the right to a fair trial etc. have been discovered in the British tradition since the Magna Carta (1215), expanded and developed by the Petition of Rights (1628), the Habeas Corpus Act (1679), the Bill of Rights (1689) and other declarations.³¹ Georg Jellinek, on the other hand, thought that human rights had originated from religious freedom and then developed with the constitutions of the states of the New World, especially the Declaration of Independence.³² With good reasons, still other scholars see in "France - the initial spark and the everlasting example" of human rights.³³ The Declaration of Human and Civil Rights of 1789 and the constitutions since then have sometimes emphasized more freedom and less equality and then more equality and less freedom,³⁴ but most of the time political autonomy.³⁵

Certainly, the idea of "eternal" and therefore universal human rights³⁶ is based on this historical development.³⁷ Even the Sophists, however, discussed whether justice consists in the equal treatment of all people or in

³⁰ GSCHWEND 2009, 217–218. BRANDÃO 2019, 13.

³¹ This was e.g. *Bergsträsser's* idea in the deliberations of the German Parliamentary Council, Fundamental committee, 4th session of Sept. 23rd 1948: Der Parlamentarische Rat 1948-1949. Akten und Protokolle, Bd. 5/I, Ausschuß für Grundsatzfragen Boppard am Rhein 1993, 29-32.

³² JELLINEK 1919, 57: "The idea of legally establishing inalienable, inherent, sacred rights of the individual is not political but religious in origin. What has been thought to be a work of the revolution is in fact a fruit of the Reformation and its struggles. Its first apostle was not Lafayette, but Roger Williams, who, driven by a powerful, deeply religious enthusiasm, went out into the wilderness to found a kingdom of religious freedom, and whose name Americans still call with deep reverence".

³³ WOLGAST 2009, 53.

³⁴ WOLGAST 2009, 85.

³⁵ MENKE 2011, 15.

³⁶ KÜHNHARDT 1987

³⁷ KIRSTE 2012a, 1-30.

the right of the strongest.³⁸ Others - such as John Locke - claimed that freedom, not equality, had proved to be the decisive value of human rights.³⁹ In Aristotelian tradition, philosophers assumed that there could be slaves by nature.⁴⁰ The Rousseau tradition refers to the neglect of political rights in relation to these rights.⁴¹ Some also stresses the substantive and permanent limitation of the judicial rights of the British tradition.⁴² Finally, it must be taken into account that in this way only very abstract principles are “explained” as human rights, that the justifications in detail were very heterogeneous and that they were by no means individual rights, which were positive rights as an expression of the constitutional power, but were to be valid by virtue of the claim to truth.⁴³ Finally, newer developments such as the protective and performance rights of the so-called second generation and the collective human rights of the so-called third generation, which are only gradually beginning to assert themselves, cannot be fully explained in this evolutionary way.

³⁸ KIRSTE 2014a, 21.

³⁹ KÜHNHARDT 1988, 69–80.

⁴⁰ ARISTOTELES, 1254a/b.

⁴¹ MENKE 2011, 20: “The two basic ideas of the revolution, the idea of 'natural' rights and that of 'sovereignty of the nation', aim at the same redefinition of the political in which the normative unconditionality of equality and the radical power of freedom correspond to each other”.

⁴² HOFMANN 1992, 168: “As a look at the Anglo-American tradition from the Magna Carta Libertatum (1215) to the Virginia Bill of Rights of 1776 teaches, the development of human rights declarations can be presented as a process of gradual generalization of particular privileges”.

⁴³ HOFMANN 1992, 166: “The starting point of our considerations is the simple statement that the classical human rights principles of dignity, freedom, equality and property actually lack all the characteristics of a subjective right. They do not answer the legal question of who can demand what from whom and when. The famous model, the Declaration des droits de l'homme et du citoyen of 1789, is not at all an act of legislation, but a declaration of rights. Its claim to binding force is not based on the legislative will of the French National Assembly, but on the claim to truth of an enlightened social philosophy”.

3.1.2 The Historical-Eventful Approach

Some philosophers assume that human rights - like law in general – originated from “exemplary experience of injustice”.⁴⁴ There are indeed good indications to support this: the legal procedural rights of the British tradition are the result of the agreements between the Estates and the Crown following violations of rights. The defensive dimension of freedom and equality as well as political autonomy were legally recognized in the Declaration of Independence of the colonies of the New World against the exploitative British Crown and in the French Revolution in its generality in detachment from absolutism. The Social Question of the end of the 19th century, with the hardly imaginable working conditions for children, for example in the English mining industry, aroused the demand for social human rights. Mass unemployment showed that there are social risks, which affect the individual without him being able to avoid them, as they are structurally rooted in the economic process.⁴⁵ Above all, however, World War II triggered the most intensive, lasting and – in terms of its recognition – most successful debate on universal human rights to date.⁴⁶ In particular, Hannah Arendt contributed to the concept of human rights that not only this or that right was needed, but that through statelessness and racism the individual had become a lawless object of state power. What was needed, therefore, was a right that recognized all people as having legal capacity. Arendt called it a "right to rights".⁴⁷ Niklas Luhmann also speaks of the fact that “the right of human rights can hardly be justified by the clarity of the bases of validity and the precision of the corresponding texts”, but “it can be justified by the

⁴⁴ BRUGGER 1999, 129.

⁴⁵ ISHAY 2008, 117. OESTREICH 1978, 105.

⁴⁶ TÖNNIES 2011, 169. WOLGAST 2009, 214. OESTREICH 1978, 118. HARATSCH 2010, 67.

⁴⁷ ARENDT 1951, 296.

evidence of legal violations”.⁴⁸ Also Richard Rorty feels that "sad and sentimental stories" would do more for the human rights culture than elaborate philosophies⁴⁹ -- a notion that could be right, if we dealt with human rights politics.

The problem of the justification of human rights from exemplary experiences of injustice, however, is that, at least since the French Revolution, abstract general human rights cannot be explained from concrete individual historical experiences.⁵⁰ One must at least have a feeling for a human right in order to experience its violation as an injustice. Therefore, a positive justification of human rights, however vague, is required. Even Luhmann – certainly not an apostle of highest values – needs a value for the establishment of the evidence of the violation of rights, and the highest of all: human dignity: “One will only be able to speak of blatant violations [of human rights, SK] with reference to human dignity”.⁵¹ The experience of injustice may then perhaps lead to a stronger and more differentiated awareness of human rights, but it presupposes their systematic justification.

Both historical approaches – the evolutionary as well as the historical-eventful – thus affect important aspects of the justification of human rights, but are also exposed to fundamental objections.

3.2. The Anthropological Arguments for the Justification of Human Rights

⁴⁸ LUHMANN 1993, 577.

⁴⁹ RORTY 1993, 111-3.

⁵⁰ HOFMANN 1992, 169.

⁵¹ LUHMANN 1993, 580 and: “Restrictions of the rights to freedom and equality, which are also listed as human rights, are so standard and so indispensable that one must concede state legal systems a high degree of discretion”.

It is often assumed that human rights have the function of protecting fundamental human interests. As Robert Alexy specifies: “Human rights are about the protection and satisfaction of fundamental interests and needs. An interest or need is fundamental if its violation or non-satisfaction concerns either death or serious suffering or the core area of autonomy”.⁵² James Griffin too holds it that a human right is, “what is needed to function as a normative agent”.⁵³ Joseph Raz too has a reciprocal thought in mind when he says that a human right exists when human interests are so strong that they are sufficient to create corresponding obligations in others.⁵⁴ Otfried Höffe understands human rights as interests that are mutually recognized as indispensable in a universal exchange of interests, i.e. interests that enable people as human beings.⁵⁵ However, what interests are so fundamental to being human that people would mutually recognize them and make man as man? A candidate is survival. But life is not fundamental for someone who does not want to go on living, because he suffers from a serious illness associated with unbearable pain. He will value the autonomous decision about life more than the interest in life. So autonomy is regarded the fundamental interest of man.⁵⁶ Human rights would serve the preservation and realization of autonomy in different

⁵² ALEXY 1998, 251.

⁵³ GRIFFIN 2011, 90.

⁵⁴ RAZ 1986, 166. 180-183. 208.

⁵⁵ “... the idea of human rights is content with what makes man as man possible; in conscious anthropological modesty it concentrates on the initial conditions, namely on elements that make man as man possible”. HÖFFE 1998, 34.

⁵⁶ SCHILD 1978, 46: “It is evident... that the concept of autonomy is not only the foundation of the classical human right to freedom, but also the very foundation of equality. It can therefore be said that human rights are deeply rooted in this concept of the human being: they are deductions which follow from the concept of the human being and which can also be called 'rights' because they are also linked to the concept of positive law, which likewise can only be communicated through autonomy”.

situations. But what happens to those who can never make use of their autonomy because they may be severely disabled or not yet born? An embryo or a child as a human being has the *ability* to be autonomous, but may never be able to realize it. If one refers to autonomy that can be updated, embryos do not enjoy human rights.⁵⁷ Even if it were still possible that the state has a special *duty* to protect such a being, this being would not have the individual *right* to have its legal capacity recognized. Therefore, the ability to make autonomous decisions is to be taken into account, even if it cannot be realized. All human beings have this ability, even if they cannot realized it due to biological or social handicaps. Areas which do not serve the activity of freedom, current communication, but in which freedom is only being formed or regenerated, are increasingly in need of protection in view of the technical, cultural and also state surveillance means.⁵⁸

Here, in particular, Martha Nußbaum's "Capability Approach" can be fruitful. It is based on an "intuition of human dignity".⁵⁹ According to this "intuition" dignity is not only an expression of the ability to reason, but in an Aristotelian understanding the characteristic of a rational animal, namely of a human life in dignity in the sense of Marx's concept of

⁵⁷ Not even in a downgraded version: "The human individual receives the right to life at the highest level (i.e. the actual right to life...) precisely when his development into an autonomous, independent human being is completed, that is, when he comes of age. In the various stages of its development up to the age of majority, however, the human individual merely receives a right to life that is adapted to its respective stage of development and that has several 'stages', whereby the weight of this right to life increases continuously from fertilization through birth to the age of majority" HOERSTER 2011, 242.

⁵⁸ LADEUR 2008, 89.

⁵⁹ NUSSBAUM 2007, 74: "The basic intuitive idea of my version of the capabilities approach is that we begin with a conception of the dignity of the human being, and of a life that is worthy of that dignity—a life that has available in it 'truly human functioning,' in the sense described by Marx in his 1844 *Economic and Philosophical Manuscripts*".

dignified life.⁶⁰ Such a life would not be possible if certain abilities, which are certainly time-dependent, could not be developed.⁶¹ These abilities are e.g.: life, health, freedom of movement, intellectual debate, political and substantive environmental control. The task of human rights is to promote these skills. The strength of Nussbaum's capabilities approach lies in the reconstruction of protective and performance rights. Rights of defense and political participation have the fulfilment of elementary abilities to be put into practice: People who are starving do not go to voting.⁶² By linking capabilities to the existence of man as such and not to further qualifying characteristics as for instance the ability to reason, Nussbaum also succeeds in a broad consideration of all human beings.⁶³ However, the explanatory value of the capability approach has limits with regard to negative rights and the rights of political participation: it places existence above autonomy and thus cannot prevent redistribution at the expense of freedom, paternalistically ensuring that political decisions are made and rights and duties are granted which serve the advantage of the individual but are not based on the autonomy of the citizens.⁶⁴ Common to all the abilities mentioned by Nussbaum is the ability to be free. In philosophy, this ability is traditionally called human dignity. In fact, James Griffin says that human rights have the task of protecting

⁶⁰ NUSSBAUM 2007, 159.

⁶¹ NUSSBAUM 2007, 78: "The basic idea is that with regard to each of these [capabilities, SK.], we can argue, by imagining a life without the capability in question, that such a life is not a life worthy of human dignity".

⁶² NUSSBAUM 2007, 289: "The capabilities approach insists throughout on the material aspects of all the human goods, by directing our attention to what people are actually able to do and to be".

⁶³ NUSSBAUM 2007, 280.

⁶⁴ Kao, for example, consciously accepts this. KAO 2011, 154.

"dignity and human agency".⁶⁵ Rights that serve dignity are human rights, those that do not are not.

However, human dignity is now connected with manifold religious and ideological assumptions that do not stand up to a pluralistic justification.⁶⁶ If, however, one looks at the process of development of the Universal Declaration and takes into account the claim to universality of human rights, a justification that would be based on a certain religion or a certain ideology cannot be considered.⁶⁷

In the end, also the here so-called "anthropological justification" of human rights names with the protection of fundamental interests important aspects of human rights justification, but is exposed to the objection to justify the importance of interests by the normative criterion of human dignity, without being able to distinguish it from strong religious and ideological preconceptions.

4. SUMMARIZING REMARKS ON THE SUBSTANTIVE APPROACHES

These approaches rightly seek a uniform principle from which all human rights should be developed. It is necessary to distinguish human rights from other individual rights and to justify them. But it is problematic that they refer to historical or anthropological facts for this purpose. In most cases, however, these facts can also be cited by others who draw contrary conclusions: Historical experiences can be interpreted in different ways; the statement that there are constants in legal history which make certain

⁶⁵ "To adopt the personhood account of human rights is to adopt normative agency as the interpretation of 'the dignity of the human person' when that phrase is used as the ground of human rights", GRIFFIN 2011, 152.

⁶⁶ KIRSTE 2014b, 274-296.

⁶⁷ Cf. the questionnaire answered by representatives of the major religions and world views UNESCO, <https://unesdoc.unesco.org/ark:/48223/pf0000155042>, last accessed Dec. 30th 2019.

rights appear to be human rights ignores the fact that the assertion of constants presupposes a selection from the competing ideas of what is good and just. This normative selection in turn requires justification by a criterion of evaluation.

Nevertheless, the substantive justification of human rights hits an important point. It has been shown that human rights safeguard the freedom and equality of human beings vis-à-vis the public authorities as negative rights of the status negativus (first group of human rights), and the freedom of human beings by the aid of public authorities where they are unable to provide for their own freedom requirements, as protective and performance rights of the status positivus (second group). The concretization of these safeguards, however, should only be achieved by such public authority, which is an expression of the political self-determination of individuals and of groups, and in such a way that this public authority is not only based on freedom, but can be exercised with due regard for the freedom of the citizens and, if the citizens' freedom is violated, can also be legally enforced by them. The rights and duties of public authority must therefore themselves be an expression of the participation rights of people in status activus (third and fifth group). These rights, however, only become human rights if every person is equally entitled to these rights and if they are not granted differently according to race or other criteria and if they are not forced into a factual relationship in a dispute with public authority, but remain recognized in their legal capacity even then. Thus the status subjectionis, understood as the subjection of all people to the law, is guaranteed (fourth group).

The common content of all human rights is thus the same capacity for freedom for all people. Group 1 refers to freedom from the state, group 2 to freedom through the state, group 3 to freedom to participate in the state, group 4 to freedom to be in legal relations with the state as a subject and group 5 to freedom of groups as groups or the individual qua being a member of a group. This capacity for freedom is not to be equated with autonomy that is actually exercised; rather, it denotes its possibility. The human rights declarations and conventions also refer to this possibility

when they express that all these rights serve the realization of human dignity.

If we assume that the ability to freedom constitutes human dignity, the views presented can be summarized in regarding human dignity as the basis of human rights. Those interests which serve the realization of his ability to freedom are so fundamental that they are to be protected as human rights. The annihilation of entire ethnic groups, the exclusion of ethnic and religious communities from the human community and the legal community that emerged from it has called into question the dignity of the members of these groups no less than the enslavement of people in all parts of the world. The fact that characteristics are being called into question here which belong to being human as such, and indeed also the humanity of the slave owner and the warden in Auschwitz, because mutual recognition as a human being is no longer possible, was the historical experience of injustice which shook the consciousness of justice so deeply that human rights took such a unique upswing in the second half of the 20th century.

Even if we accept this, the objection remains possible that human dignity as the foundation of human rights is a highly presuppositional and historically and currently controversial value. Does this not lead to an ideologization of human rights,⁶⁸ to a particularism and above all – from a philosophical perspective – does it not presuppose a recognition of values which cannot stand up to relativistic objections?

5. FORMAL APPROACHES TO THE JUSTIFICATION OF HUMAN RIGHTS

If the recognition of underlying values of human rights is problematic because there is no rational justification for it or because value perception

⁶⁸ TOPITSCH 1963, 1-7.

is subjective, then formal justifications for human rights could be more promising. Here again, two approaches will be discussed.

5.1. The Positivist Analysis of Human Rights

Starting from skepticism about the possibility of rational value recognition, positivist approaches in particular endeavor to specify formal and structural criteria as the unifying characteristic of all human rights and thus as their foundation.

Hans Kelsen, for example, understands as human rights individual rights of all persons.⁶⁹ According to him, individual rights they mean the subjective aspect of objective legal principles⁷⁰ and the legal power granted to an individual in relation to a legal person.⁷¹ As legal rights, they are addressed to holders of public authority as legal entities or addressees. Based on these rights, the individual can claim that the public authorities cease to act – e.g. to intervene – or to do something – e.g. to protect. Hans Kelsen assumes that “even under a legal system, however totalitarian

⁶⁹ KELSEN 1925, 62.

⁷⁰ KELSEN 2008, 720

⁷¹ KELSEN 1962, 149: “the individual right of a person is either a mere reflex right, that is, the reflex of a legal obligation towards that individual; or a subjective private right in the technical sense, that is, the legal power granted to an individual to claim, by judicial action, the non-performance of a legal obligation towards him, the legal power to participate in the creation of the individual norm ordering the sanction linked to the non-performance; or a political right, which is the legal power granted to an individual either to participate directly, as a member of the people's legislative assembly, in the creation of general legal norms known as laws; or, as the subject of a parliamentary or administrative right to vote, to participate indirectly in the creation of the legal norms which the elected body is empowered to create; or, as a constitutionally guaranteed fundamental right or right of freedom, to participate in the creation of the norm by which the validity of the unconstitutional law violating the guaranteed equality or freedom is annulled either generally, that is to say in all cases, or only individually, that is to say only in the specific case. Finally, a positive official permission can also be regarded as a subjective right”.

it may be, there is something like an inalienable freedom; not as a natural right inherent in human beings, but as a consequence of the technically limited possibilities of positive regulation of human behavior”.⁷² This core freedom, which is necessary in every law, is not a legal requirement but a necessity: without it, man could not fulfil his legal obligations. In this respect, legal freedom is only a reflex of legal duty. “However, this sphere of freedom can only be regarded as legally guaranteed insofar as the legal system prohibits interference with it”.⁷³ The negative rights become real human rights, if they are protected by the legal system. Hans Kelsen does not accept an unconditional connection between the legally necessary and freedom protected by a negative right.

In principle, these rights can be positive or non-positive.⁷⁴ However, formal theories often deny not only the assumption of non-positive human rights as ideological, but also that of a pre-legal freedom.⁷⁵ Non-positive human rights are natural and moral rights.⁷⁶ They serve the realization of moral obligations. However, their analysis falls mostly outside the scope of the philosophy of law. Human rights become positive through state regulation or through international covenants.⁷⁷ The human rights contained in the UDHR and in the two human rights covenants are positive human rights. They do not only protect any pre-legal freedoms, but constitute legal freedom. Kelsen rightly emphasizes “that all principles of natural law are denatured as soon as they take on the guise of positive law”.⁷⁸ In their positive form, human rights make sense for the positivist

⁷² KELSEN 1925, 45.

⁷³ KELSEN 1925, 45.

⁷⁴ Fort he following in more detail: KIRSTE 2013b, 203.

⁷⁵ KELSEN 1962, 154.

⁷⁶ KIRSTE 2012a, 13.

⁷⁷ KIRSTE 2012a, 41.

⁷⁸ KELSEN 1962, 155

not as natural instructions to the state, but as higher-ranking constitutional norms of the state compared with statutory laws.⁷⁹

However, can we really determine the form of human rights independent from their content? It is quite remarkable that Kelsen assumes that all people are bearers of human rights. But as long as there was a theory of slavery by nature, as long as women were not allowed to vote, as long as the protection of human rights is primarily mediated by the states, so that stateless persons do not enjoy their benefits, this assumption cannot be taken for granted. It is rather, as has been shown above, decided by human rights themselves: Article 6 of the European Convention on Human Rights and Article 16 of the Covenant on Civil and Political Rights stipulate that everyone has the right to be recognized as legally competent everywhere – and not only “Aryans” and those born free. Article 15 of the Covenant on Civil and Political Rights states that everyone has the right to a nationality, which may not be arbitrarily withdrawn.

The reason why human rights are rights of all human beings in the same way is by no means value-neutral, but is itself an expression of values. To have legal capacity means to be a subject of rights and duties.⁸⁰ A right, as correctly developed by formal theory, is a competence to act or a claim of the legal subject to be able to demand action from another. It recognizes the legal subject's capacity for freedom. A legal subject can acquire or be assigned rights and obligations; but he cannot be an object of rights, because law is always a legal relationship between legal subjects.⁸¹ The

⁷⁹ Hans Kelsen also acknowledges this despite his criticism of the more recent history of human rights. KELSEN 1925, 155.

⁸⁰ Strictly speaking: “The physical or legal person who 'has' legal obligations and subjective rights - as its bearer, is this legal obligation and subjective rights, is a complex of legal obligations and subjective rights, the unity of which is figuratively expressed in the concept of person... Legal person is the unity of the complex of legal obligations and subjective rights”, KELSEN 1925, 177.

⁸¹ KELSEN 1925, 33..

slave is merely the object of a contract – like any other object of sale.⁸² He does not conclude a contract about his sale himself. If a legal system grants every human being a right to recognition of his legal capacity, then it excludes the possibility of making him a mere object of law. From the aspects of human dignity sketched above it follows that to be recognized in social relations as a subject capable of acting freely and not to be made a mere object is an expression of the principle of human dignity. The statement that human rights belong to every human being as individual rights is therefore not value-neutral, but rather an expression of the value of human dignity, as the declarations and conventions express. The status subjectionis ensures the inclusion of the human being in the law as a social order of freedom.

The strict formal-structural justification of human rights thus overlooks the fact that the correctly stated structure of human rights is an expression of values, in particular the value of human dignity.

5.2. The Discourse-Theoretical and Procedural Foundation of Human Rights

The discourse-theoretical foundation of human rights does not dispute the formal analysis. It also shares with it the rejection of a substantive derivation of human rights from assumed highest values. Because of the subjectivity of the experience of values, an intersubjective justification of human rights in discourses is important, as Sheila Benhabib, for example,

⁸² Cf. the infamous Judgment of the US-Supreme Court *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405–7 (1857): Colored people “had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race”.

explains.⁸³ It would therefore be a congenital defect of liberal human rights that they were primarily understood as the citizens' negative rights against public authority. This ensured their private autonomy, but not their public autonomy. There would also be the problem of an imperialism of values if the Western idea of human rights is exported there without taking into account the political autonomy of the peoples of Asian and the emerging countries.⁸⁴

According to Jürgen Habermas, private and political autonomy are in a necessary connection and are of equal origin.⁸⁵ Accordingly, the granting of rights should be an expression of the political autonomy of citizens.⁸⁶

⁸³ “[I]n discourse ethics we ask: Which norms and normative institutional arrangements would be considered valid by all those who would be affected if they were participants in special moral argumentations called discourse?”. BENHABIB 2007, 14.

⁸⁴ “I will argue that any political justification of human rights, that is, the project of *juridical universalism*, presupposes recourse to *justificatory universalism*. The task of justification, in turn, cannot proceed without the acknowledgment of the communicative freedom of the other, that is, of the right of the other to accept as legitimate only those rules of action of whose validity she has been convinced with reasons. Justificatory universalism then rests on *moral universalism*, i.e., equal respect for the other as a being capable of communicative freedom”. BENHABIB 2007, 13.

⁸⁵ HABERMAS 1996, 104, the “internal relation between popular sovereignty and human rights consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized. The system of rights can be reduced neither to a moral reading of human rights nor to an ethical reading of popular sovereignty, because the private autonomy of citizens must neither be set above, nor made subordinate to, their political autonomy... The co-originality of private and public autonomy first reveals itself when we decipher, in discourse-theoretic terms, the motif of self-legislation according to which the addressees of law are simultaneously the authors of their rights”.

⁸⁶ HABERMAS 1998, 260: “However well-grounded human rights are, they may not be paternalistically foisted, as it were, on a sovereign. Indeed, the idea of citizens' legal autonomy demands that the addressees of law be able to understand themselves at the same time as its authors. It would contradict this idea if the democratic legislator were to discover human rights as though they were (preexisting) moral facts that one merely needs to enact as positive law.

Human rights must then be discursively justified. They ensure the participation of the individual in various discourses. Especially Sheila Benhabib has argued that Arendt's idea of "right to have rights" means an individual right to inclusion in discourses.⁸⁷ This can explain in particular the rights of status activus and status subjectionis, the right to recognition of legal capacity. If one assumes that a person develops as a person only through social communication, then this right to have rights in the sense of belonging to a political community is central to his humanity.⁸⁸ In short, the negative rights of the status negativus and the protective and participative rights of the status positivus should not be granted without but on the basis of the political participation rights of the status activus.⁸⁹

Although Habermas and Benhabib emphasize the participatory aspect of human rights, this cannot reject substantive justifications altogether. To avoid legal paternalism, legal systems cannot presuppose rights that are not based on the self-determination of those affected by them. Otherwise these systems would indeed prefer private autonomy at the expense of public autonomy. In the sense described above, persons would be merely the object of a granting of rights that they themselves had not authorized. If this is to be avoided, not every discourse is suitable for bringing about

⁸⁷ "I have argued that the right to have rights and the moral right of the human being to be considered as a being entitled to juridico-civil rights are enabling conditions of the exercise of communicative freedom", BENHABIB 2007, 18; Habermas mentions, for example, citizenship rights, freedom of emigration, etc. as a reflex of the juridification of law in certain communities, HABERMAS 1996, 127.

⁸⁸ "The right to have rights then is not only a right to conditions of membership but entails the right to action and to opinion in the public sphere of a polity the laws of which govern one's existence. Only through the public expression of opinion and action can the human person be viewed as a creature who is capable of self-interpreting rights claims" BENHABIB 2007, 21.

⁸⁹ "If the people are viewed not merely as subject to the law but also as authors of the law then the contextualization and interpretation of human rights can be said to result from public and free processes of democratic opinion and will-formation" BENHABIB 2007, 21.

the desired legitimizing effect. This presupposes conditions of discourse that cannot themselves be discursively identified, but conversely are the conditions of legitimizing discourses.

For a discourse on the justification of rights to be an expression of human rights, i.e. the political autonomy of people in the status activus, participants must have a free and equal opportunity to participate. In the so-called Millennium Declaration it is then also stated that “democratic and participatory governance based on the will of the people best assures” human rights, especially dignity, freedom and equality.⁹⁰ Art. 29 II of the UDHR also speaks of democratic society as the ideal condition for the realization of human rights. The preamble of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 18 December 1979 therefore consistently states that a worse position of women in elections or even their exclusion violates their human dignity.⁹¹ The material value presupposed by the ideal discourse conditions is thus human dignity.

6. HUMAN DIGNITY AS THE FOUNDATION OF HUMAN RIGHTS

We had analyzed two different candidates for a foundation of human rights: first, substantive theories that tried to explain human rights from a unified principle, and second, formal approaches that attempted to determine human rights from their form as subjective rights.

The form is not as value-neutral as it appears: the cited characteristic that human rights are individual rights of every human being is rather an expression of the value of human dignity. This dignity is also the value founding the discourse model. For discourse theory bases human rights

⁹⁰ United Nations Millennium Declaration, General Assembly resolution 55/2 of 8 September 2000, at “I. Values and principles”.

⁹¹ Cf. BUERGENTHAL 2010, 52.

on the political autonomy of human beings. Autonomy again is the realization of dignity as the ability of man to enjoy freedom.

This does not mean that substantive theories, which regard human dignity as the very basis of human rights, are justified in themselves without question.⁹² Rather, it must be taken into account here that the content of human dignity is by no means undisputed. Although the principle has a certain universality, since it can be proved in the most different philosophies and religions all over the world, its meaning and function is interpreted quite differently. Whether it is understood as “God-likeness”, as “Son of Heaven”, as “end in itself” (Kant) or as “ability to design oneself the one one wants to be” (Pico della Mirandola) results in different connotations.

The discussion of the formal theories had rather shown that the human rights declarations not only speak of human dignity in general terms, but that they presuppose a sense of dignity. Human dignity is referred to in the preamble of the UN Charter, as well as in the UDHR and the human rights pacts, as the basis of freedom and equality. On the one hand, dignity can be distinguished from both freedom and equality, on the other hand it is the foundation of them. Human dignity can be distinguished from freedom, if it means the equal *potentiality* of freedom, all men have qua being humans. Free actions and equal treatment then realize this potential. This is the connection of human dignity, freedom and equality. The meaning of the concept of dignity is the capacity for equal freedom, the potential for free action. Freedom exists in the two forms of negative freedom and autonomy. Negative freedom signifies not being subject to any external determination; autonomy is positive freedom.⁹³ According to

⁹² This is, however, what – on the basis of the history of ideas – Verdross (note 7) assumes, p. 698. He endeavours to prove that human rights presuppose a positive anthropology, as with Aristotle, Cicero and Thomas Aquinas, for example, and that a negative anthropology, as with Machiavelli or Hobbes, falls into oblivion.

⁹³ For this relation of freedom and autonomy, cf. KIRSTE 2015, 65-89.

Immanuel Kant, this form of freedom means that instead of being determined by natural law causality, persons are able to give themselves the laws of their actions.⁹⁴ Persons give themselves their laws in a theoretical sense, if they do not let themselves be determined by objects of knowledge, but reflect on this thinking itself. They give themselves their laws in a moral sense, if the motives of their actions arise from their own reasoning. They give themselves their laws in a legal sense, if the rights and duties which they enters into or to which they are subject to are legitimized by their reason-guided actions – be it in the conclusion of contracts or in the enactment of laws. Freedom as autonomy is made possible by human rights, even if, in addition, within the limits of the freedom of others and certain public interests, the freedom of arbitrariness is also protected. This must be so because human rights would be contradictory in themselves if they forced man to be autonomous, because they protect only this form of his freedom. In contrast to this autonomy, in which the limits of freedom arise from legal self-determination, i.e. are set by the individual, the limits of arbitrariness are drawn from outside. Both forms of freedom, however, rest in the capacity for freedom of human beings, which is the basis of their dignity.⁹⁵

Through the capacity for freedom, persons have the possibility of being the subject of their actions. Objects of freedom do not possess their own freedom. Persons possess *legal* freedom insofar as they are granted rights. Basically their freedom is legally recognized in the legal capacity and as a “right to have rights” or to legal subjectivity in the status subjectionis. Human beings as such, namely as beings of freedom, are entitled to dignity. It is therefore the basis of both freedom and equality. Human dignity is the genus proximum, the general concept from which only fundamental inequalities can be identified and sanctioned. Therefore,

⁹⁴ SCHILD 1978, 38.

⁹⁵ Not only for autonomy and not just for the realized freedom, in this sense however SCHILD 1978, 46.

human beings are entitled to further rights without distinction of race, color of skin, sex, language, religion etc. Which concrete rights of freedom and equality are protected as human rights can only partly be derived from human dignity. These rights include, for example, the prohibition of slavery and torture, which, significantly, are also mentioned by the UDHR at the beginning. However, no human right may contradict its foundation in human dignity: Therefore, there can be no equality that makes the free development of the human being impossible; furthermore, there must be rights to public aid which grant support to those people who cannot themselves ensure the conditions for the realization of freedom, such as sufficient education. For this reason, however, collective rights – as shown at the beginning – must not suppress the self-determination and equal recognition of the members of such communities.⁹⁶

The aforementioned four statuses are thus based on the dignity of the human being as a person capable of freedom. The legal value of dignity means protection of the ability to freedom: firstly, the legal recognition of every human being, secondly, the prevention of interventions that prevent the development of his or her ability to freedom, thirdly, the creation of and participation in the conditions for freedom and fourthly, the legal possibility of being able to participate in the decision on the basis, structure and safeguarding of his or her rights. Every human being has the right to belong to the free order of law as a subject and not to be subjected to the mere factual force of others. They therefore have the right to have their legal capacity recognized (status subjectionis).⁹⁷ No person may be degraded in relation to public authority to a position that

⁹⁶ KIRSTE 2016, 27

⁹⁷ BENHABIB 2007, 9: “The right to have rights then is not only a right to conditions of membership but entails the right to action and to opinion in the public sphere of a polity the laws of which govern one’s existence. Only through the public expression of opinion and action can the human person be viewed as a creature who is capable of self-interpreting rights claims”.

has no capacity for free self-determination, as happened in the case of the torture of Bulgarian nurses and similar cases. Thus the status of negative rights is founded in human dignity (status negativus). Anyone who, through no fault of their own, finds himself in a situation in which he cannot realize his potential for freedom is entitled to protection and services from public authorities in status positivus – including the intersexuals mentioned at the beginning. However, these rights must not be granted to persons as benefits. On the contrary, the guarantee of human rights and their concretization, as well as the implementation of the public order administering them and the control of public authority must be justified by the political autonomy of those concerned (status activus) – the prevented political activities in Belarus thus have their final reason in dignity. These status are no longer rooted in the subjugation of the individual to the state, as was the case with Jellinek, but are themselves an expression of human rights. The question of who possesses human rights is determined by human dignity: Every human being as a free being. Human rights thus present themselves as a dialectical development of the formal and material meanings contained in the concept of human dignity. Human dignity is thus the foundation of human rights in both content and form. As Niklas Luhmann said, the “human rights discussion” cannot be “limited to the problems of human dignity”.⁹⁸ However, individual human rights can be traced back to them, because they protect the active exercise of freedom and prevent discrimination, which is based on and measured by human dignity as a capacity for freedom. Human rights mark indeed a progress in the consciousness of freedom in an Hegelian sense:⁹⁹ In view of the increased potential threat to freedom from technical but also criminal developments, a meaningful protection of freedom today must not only include the factual conditions of the use of freedom in the sense of performance rights, but also the protection of the capacity for freedom

⁹⁸ LUHMANN 1993, 28.

⁹⁹ Note 8.

in the sense of human dignity. However, this concept of human dignity cannot simply import the ideological and religious connotations into human rights from which it has philosophically and theologically sprung. Rather, the content of human dignity finds its limit in the form it has received through human rights. The form of human rights as individual rights and as positive, discursively legitimized human rights is not value-neutral, but is itself an expression of human dignity, not of the flesh and blood human being, but of the human being as the (international) legal order itself reconstructs him by rights and duties.¹⁰⁰ Human rights thus present themselves as a dialectical development of the formal and material meaning contained in the concept of human dignity.¹⁰¹

7. CONCLUDING REMARKS

If perhaps a more general lesson about law can be drawn from this, it is that there is no value without form in law, but also that form is valuable in law. The form is an expression of values. Gustav Radbruch called justice the value of law.¹⁰² But justice is an expression of human rights, whose foundation is human dignity. The dialectic of human dignity is therefore the foundation not only of the values that the law protects, but also of its form.

The task of the philosophy of law is to reconstruct the principles of law in thought.¹⁰³ For this purpose it breaks up the unity of legal form and

¹⁰⁰ Kelsen 2008, 7; Kelsen 1929, 155.

¹⁰¹ This is not a paradox as Botha thinks, "... dignity is seen as a universal entitlement. However, it depends on a particular legal order for its concretization, and the precise content given to it is invariably filtered through contingent social, cultural and historical factors" BOTHA 2010, 209. Rather, the dialectical resolution of the contradiction lies in the fact that the form of dignity itself is an expression of human dignity in its form as status activus. SCHILD 1978, 42.

¹⁰² RADBRUCH 2003, 34.

¹⁰³ KIRSTE 2010, 17. KIRSTE 2018, 38

valuable content by analyzing the two in the abstract. These values are, however, principles of freedom, because modern law is the form and expression of freedom in the stated sense. It is the realization of freedom. The philosophy of law as a philosophy of the reality of law is therefore a “philosophy of freedom”.¹⁰⁴ Together with the neighboring academic disciplines, it analyses and criticizes the legal principles that are detached from legal concretization and makes the results of this interdisciplinary discussion fruitful for legal studies. The philosophy of law thus is as a bridge on which the findings of philosophy can be transformed into jurisprudence and the findings of jurisprudence can be exported to other sciences and social practices.¹⁰⁵ In this sense, human dignity as the foundation of human rights should be reconstructed here.

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¹⁰⁴ Just as jurisprudence has little to do with the biological-psychological reality of man, but with the person as the subject of the attribution of rights and duties KELSEN 1925, 7. So the philosophy of law has little to do with the empirical-sensual reality, but with the reality of law as an order of freedom.

¹⁰⁵ KIRSTE 2012b, 47-58. KIRSTE 2011, 135-146.

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