

1 How To Think About Human Rights

Our thinking about normative concepts is always bound by paradigmatic notions of their primary task in social practice. Human rights are a case in point. Some focus on their moral core as protecting urgent and essential human interests and try to define these; some focus on their being a cross-cultural ‘lingua franca’ and thus look for definitions and justifications that could be approved from within an ‘overlapping consensus’ of all cultures and societies – or at least the ‘reasonable’ ones. Some locate the idea of human rights in international political or legal practice as standards of legitimacy, the violation of which justifies international action or intervention.

Each of these approaches has its advantages as well as its shortcomings, which I will not discuss in detail here (for more in-depth discussion of these approaches, see Forst, 2014: ch. 2). Rather, what I want to argue is that none of them identifies the *political* and *emancipatory* point of human rights properly, the point being that these rights have been (and continue to be) fought for in historical social struggles to establish a legal, political and social status of non-dominated persons within a political normative order – that is, as free and equal persons who are both addressees and authors of the legal, political and social basic structure of their political community. I emphasize that this is the original and primary social context of human rights: the emancipatory struggles and conflicts within particular societies marked by various forms of domination. We only understand the point and ground of human rights if we understand the normative logic of such struggles.

Thus we ought to free ourselves from some all too powerful imaginaries dominating human rights discourse that lead us away from this context. One such misleading imaginary is that of human rights as instruments of the protection of vulnerable persons against threats to their well-being by powerful agents, especially the state (Ignatieff, 2001).¹ Such ways of thinking about human rights focus on persons as primarily *passive* recipients of certain protections and overlook that the full meaning of these rights from the modern political revolutions onward was to achieve an *active* status of non-domination, such that one is not subject to a legal, political and social normative order that denies you standing as an equal; that is, an order that has not been and cannot be properly justified to you as a free and equal member of society. Domination in my understanding (which differs substantially from neo-republican versions)² does not mean being denied equal status in the sense of no longer enjoying freedom of choice from arbitrary interference; rather, and more fundamentally, it

means being disrespected in one's basic claim to be a free and equal normative authority within the order one is subject to, and that implies the basic right to co-determine the structure of that society. This is the *status activus*, to use Jellinek's term (2011; see also Alexy, 2010: ch. 5), which is a necessary component of human rights: they are not just rights to be protected in one's status as a legally, politically and socially non-dominated person; they are, in a reflexive sense, also basic rights to determine the rights and duties that define that status. Many interpretations of human rights today, even those called 'political', pay insufficient attention to this active, political competence.³

The other imaginary to be avoided is the internationalist-interventionist one already alluded to. This defines human rights as international legal rights and implies that, in the words of Charles Beitz, 'the central idea of international human rights is that states are responsible for satisfying certain conditions in their treatment of their own people and that failures or prospective failures to do so may justify some form of remedial or preventive action by the world community' (2009: 13). This way of thinking leads to a number of problems. To begin with, the quote shows that the primary context of human rights is not the international order but, rather, the different states, which ought to realize these rights, and that the international context builds on these state contexts and has the task of establishing procedures to legitimately discover, judge and possibly sanction human rights violations. Thus, human rights are a task for states in the first instance and then for the international community; therefore, the human rights that a state has to realize cannot be reduced to those rights the violation of which the international community finds a sufficient reason to intervene over, given the enormous costs and difficulties of an intervention. Such an argument turns the normative order of human rights on its head: first, we need to know which human rights claims are universally justifiable as claims within states, and then we need to think about legitimate cases and, most importantly, procedures and institutions of intervention – which today are still mostly lacking. Otherwise, we would reduce the core of human rights to those rights the violation of which calls for an intervention, and standard – and in my view essential – human rights like those of gender equality or democratic government would no longer be seen as core human rights because – to cite Beitz – 'the proper inference from the fact that there are circumstances in which the absence of democratic institutions would not generate ... reasons for outside agents to act is that the doctrine of human rights should not embrace such a right' (2009: 185).⁴ This view is remarkably at odds with international human rights documents and human rights practice – such as the social practice of demanding human rights to democracy and gender equality and of actively trying to change regimes that deny these. The 'practice-based' internationalist-

interventionist paradigm of thinking about human rights, as it is often called, thus focuses on the wrong practice – namely, that of an international regime of human rights rather than that of the critique of states which violate these rights as put forth by members of such societies and by outside agents even though the latter might not have the power or the legitimacy to intervene. Human rights are one thing, the question of an international politics of intervention is another, conditional on many contingent factors. In other words, if the existing system of international legal human rights were considered the ‘heart’ of human rights, as Allen Buchanan argues (2013: 274), we would have to look for the ‘heart of hearts’ to get to the core of human rights and to their justification.⁵

To briefly indicate the further argument I make in this chapter: if I am right about the moral and political *point* of human rights to establish the status of persons within their normative order as legal, political and social equals protected from severe forms of domination, it follows that there is a particular moral *ground* for these rights. Negatively speaking, this is the right not to be subjected to a normative order that denies basic standing as an equal to you and that, reflexively speaking, cannot be justified to you as free and equal; and, positively speaking, it is the right to be an equal normative authority and active agent of justification when it comes to the basic legal, political and social arrangements in your society. This reflexive formulation is necessary, for freedom from domination not just means to be respected as a legally, politically and socially non-dominated equal secured by certain rights; it also means that it is not others who decide without and over you about whether that status is fulfilled or not. Thus, the authority to define non-domination can only lie within a discursive procedure of reciprocal and general justification where all are justificatory equals.

Essentially, the negative and positive formulations used above coincide in the discourse-theoretical, Kantian idea that those subject to a normative order ought to be equal and free *normative authorities* determining that order through procedures and discourses of justification in which all can participate as equals. The main normative concept thus is that of a person as an equal normative authority, having a basic moral claim to be respected in his or her *dignity* to be such an authority – and thus having the basic moral *right to justification* (see Forst 2012), which in this context means the basic right to be an equal co-author of the (legal, political and social) norms one is subject to, and which define one’s basic standing in society. This implies not just political rights of participation, but all those rights that give you the *normative power* to ward off and overcome various forms of domination – that is, of unjustifiable subjection. Thus, it is a particular view of the point of human rights that leads me to reconstruct its moral core and ground in a certain way and locate it in the basic right

to justification. In what follows, I will unpack his argument.

2 The Point of Human Rights

An important aspect of the different imaginaries guiding our thinking about human rights is what one considers to be the genealogy of the concept. Those who, like myself, regard them as emancipatory weapons against oppressive regimes and social orders (including feudalism and other forms of economic exploitation – thus the emphasis on *social* non-domination, as I will explain later) locate their origins in the early modern social conflicts in the seventeenth century especially, playing a major role in the revolutions of the eighteenth century and finding their strongest historical expression in the *Déclaration de l'homme et du citoyen* of 1789 (see the historical accounts in Bloch, 1986; Gauchet, 1995; Hunt, 2008). Those who emphasize the international legal character of human rights, however, believe that with the Universal Declaration of 1948 a new conception of human rights as internationally secured protections came into being (Beitz, 2009; Moyn, 2012; Ratner, 2015). Whereas the first conception is guided by powerful images of modern revolutions, the second has no less of a powerful image to relate to: namely, the horrors of fascist tyranny and genocide as social evils to be avoided. The first see human rights as not just constraining, but constituting legitimate political power (Habermas, 1974; Besson, 2015); the second regard them as bulwarks against extreme forms of oppression and suffering.

Still, as I said above, if one looks at the Universal Declaration of 1948 and other covenants and, last not least, international practice, one must recognize that in the idea, as well as the practice, of human rights, states are the main context of their realization (which does not exclude the idea of realizing them in a world state), and the international institutions are only secondary (but of increasing importance) in that regard. Furthermore, it is not just in Article 21 that the Universal Declaration stresses the right to democracy; in its Preamble, it also makes reference to the revolutionary, democratic tradition of human rights by saying that human rights ought to be secured, 'if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression' (see also Gearty 2014).

To fix ideas about an active (or activist⁶) political imaginary of human rights as an alternative to the internationalist-interventionist as well as the passive notion of the avoidance of suffering, let me use an image. There is an excellent collection of photographs taken during the 'Arab Spring' in 2011 on Tahrir Square, compiled by Karima Khalil (2011).⁷ The pictures all show people holding signs asking President Mubarak to leave and to hand over power to a democratic government; some simply say 'freedom' or 'justice'. There is one

picture (taken by Hossam el Hamalawy) that shows a man holding a sign that says ‘Enough Humiliation’ (Khalil, 2011: 87).⁸ According to my interpretation, the picture does not just tell us a lot about the notion of dignity grounding human rights (which I will come back to in the next section). It also tells us something important about the point of human rights. For how shall we understand – and now of course I embark on a rational reconstruction and hermeneutic interpretation of my own, though I hope to be true to what the demonstrator meant – the kind of humiliation the activist has had ‘enough’ of?



The picture helps us place the demand and the politics of human rights in the primary political context in which we have to see them: the struggle for basic forms of respect as legal, political and social agents who do not ‘deserve’ to be ruled autocratically by a corrupt and oppressive regime. The humiliation that is decried and for which there is a demand that it end is not just a particular form of being denied access to the labour market or to certain social institutions; rather, it is being denied a proper recognition as a legal, political and social authority with certain powers, as someone who ‘counts’ at least to the extent that it is not others who tell him or her what his or her proper place in society is. (There are also many photographs in the book of women holding similar signs, and needless to say – as not just

the post-revolutionary developments in Egypt showed – the dialectic of liberation and of oppression has many facets and is still ongoing, from the rule of the Muslim Brotherhood to the military rule that followed it.) What is more, the protest sign does not just express the claim to be respected as a person with such powers, usually formulated as rights; it also expresses the claim to be a normative authority when it comes to deciding which rights or duties citizens have. This is the full meaning of an emancipatory claim – it is not just a claim to this or that right or social opportunity, but a right to have a say in the institutional regime one is subject to. The humiliation to be overcome is, if you will, a comprehensive experience, and the claim to overcome it has a comprehensive character of becoming a rights agent with the full right to determine the structure of rights to which you are subject.

This implies that we must not understand human rights vertically as rights or privileges granted to subjects by a monarch or a government; this is the older tradition of gaining status recognition from a ruler as the feudal lords did when they wrested the Magna Charta from King John in 1215. Rather, the emancipation from political humiliation implies that the rights one has are rights that members of a society mutually recognize and accord *each other*, based on their mutual respect as equal normative authorities within their social order. So the non-domination aimed at does not just mean having certain important rights, but being the authority to co-determine and secure these rights: a horizontal understanding of human rights (Habermas 1996, ch. 3; Günther 2009). The domination and humiliation to be overcome are twofold: the domination of being denied certain rights that human beings ought to have as legal, political and social equals, and the domination of having no say, no right to justification, within the normative order to which you belong. If you look at the French Declaration, and also at what protesters in human rights struggles demand, this is the full message of those who claim human rights. And that is why the right to democracy is essential to any conception of human rights. For this right expresses the basic right to be a constructive normative agent; and it is only in the discourse among political equals that a justifiable and concrete human rights regime can be determined and realized (see also Tully 2014).

It is not merely Kantian-style political philosophers who describe human rights movements in the thick normative language of dignity or justice; rather, it is the social agents themselves who use such language to express their demands for full respect and human rights – as a fundamental claim of justice among normative equals who are not just takers but also makers of the rights they have, on the assumption that they are free and equal in claiming as well as ‘constructing’ these rights in political discourse. The claims to be respected as rights-bearers and normative authorities are addressed to the regime one is

subject to, to be sure; but what they imply is that it is not up to the regime to deny these claims or to determine their meaning. In a certain sense, they are already part of a process of horizontal justification among those equals who gather in the square (and beyond it, as the community of all subjected). This is why human rights can be formulated (generally and abstractly) in declarations – because among those who respect each other as justificatory equals, there can be no good reason to deny them. This is the normative power the protesters are backed by when they write such signs. They already ‘have’ these rights, though they are denied their collective political-legal realization.

3 The Ground of Human Rights

The consideration of the emancipatory point of human rights shows how a historical and sociological reflection on human rights as emancipatory claims and tools links up with a moral and even a transcendental reflection. For we have to recognize not just the comprehensive character of human rights as realizing a fundamental status as legally, politically and socially non-dominated (and in this sense equal) persons, but also that their normative force implies that, among persons who respect each other morally and who aim to materialize this kind of respect in law, these rights are to be seen as justified horizontally between moral equals. They spell out what it means to be such an equal in the social world – and which rights this implies. So these are rights the possession of which equal justificatory authorities can always claim and can never deny each other – as addressees and authors of such claims and of such rights. The moral ground of these rights is the basic right to justification, or the right to be respected as an equal moral authority, and the substance of these rights comes in when it is determined (in discursive practice) what it means to be recognized as an equal and free normative authority in the legal, political and social realm. I will explain in section 4 how such discursive construction is to be conceptualized. But here it is important to understand that these rights, even though they aim at a legal, political and social status and can only be justifiably realized in a democratic regime, have a ‘ground’ that is both moral and, if you will, transcendental: the autonomy of persons with a right to justification as a normative authority equal to all others. Human or basic rights are constructed on that basis, where the agents of construction are autonomous persons, and the principles of construction are principles of justification among equals (see O'Neill, 1989; Rawls, 1993, ch. 3). Here we arrive at the transcendental, reflexive truth about the ground of human rights: they are rights of and between autonomous equal authorities in the realm of normative reasons, expressing the respect for such autonomy and authority, materialized and justified with respect to the legal, political and social world (and the many dangers of domination). But

their ground is the respect for each other as moral equals and as justifying beings (using practical reason), who are bound to nothing but what they as justificatory equals can claim from each other. They are bound and, at the same time, free as autonomous agents of justification – bound to each other as justificatory equals and to the principle of reason as the principle of general and reciprocal justification for reciprocally and generally valid norms (Forst, 2012: chs 1 and 2). So the ‘ultimate’ justification of these rights is the principle of justification itself.

It is only in Kant’s philosophy that we find the appropriate connection between the prior and ‘inviolable’ moral status of persons that grounds human rights and the activist, constructive aspects of this status as being a law-maker and not a mere law-taker with a claim to protection. Kant’s notion of the *dignity* of autonomous persons, with its twofold character of calling for unconditional moral respect as equals and for its operationalization in the mode of discursive justification⁹ between legislators in the space of reasons, combines morality, law and politics in the right way to ground human rights (Habermas, 2010: 469; Forst, 2014: ch. 4). It can explain why the Preamble of the Universal Declaration of 1948 starts with the principle that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’, and what the terms ‘inherent’ and ‘inalienable’ are supposed to indicate without making reference to a quasi-religious ground for this status.¹⁰ What it means is that the basis for human rights is the respect for each other person as a moral equal who need not qualify for this status or respect in any other way than by being human. To be respected in that way is, as Kant (2009: 6:237) says, an ‘innate right’ of humans.

The notion of the innate right to independence is Kant’s way of bridging the gap between morality and law. In the realm of morality, Kant explains the status of persons as an ‘end in themselves’, that is, as beings whose purposes have to be respected equally (within the bounds of reciprocity) and must not be ignored or instrumentalized by others, with the ‘idea of the *dignity* of a rational being, who obeys no law other than that which he himself at the same time gives’ (1997: 4:434). The beings with such dignity are all equally law-givers in the ‘kingdom of ends’ and thus have to rule over themselves and each other with reciprocally and generally justifiable norms, as the categorical imperative says:

Our own will insofar as it would act only under the condition of a possible giving of universal law [*allgemeine Gesetzgebung*] through its maxims – this will possible for us in idea – is the proper object of respect, and the dignity of humanity consists just in this capacity to give universal law, though with the condition of also being itself subject to this very lawgiving. (1997: 4:440)¹¹

To understand why Kant uses the notion of dignity here, it is essential to focus on the ‘worthiness [*Würdigkeit*] of every rational subject to be a law-giving member in the kingdom of ends’ (1997: 4:439). By this term, Kant emphasizes the status or rank¹² of persons as moral equals and as active law-givers – that is, as normative authorities subject to no one or no other values than those that can be justified according to the categorical imperative of their own rational will. The imperative asks persons to respect each other as justificatory equals, because being respected as an end in itself means not to be subjected to actions or norms that cannot be justified each person as an equal. As Kant explains in the *Groundwork*, treating another as a means by making, for example, a false promise, means that the other ‘cannot possibly agree to my way of behaving toward him, and so himself contain the end of this action’ (1997: 4:429f.). Hence, the moral duty of justification and the right to justification (here duty and right are co-original) express what it means to respect others as ends in themselves and as equal normative authorities in the realm of justifications or norms. So it is not that dignity is the first ‘ground’ of human rights (see also Waldron, 2015); rather, it is the term to express the status of every moral person as an equal and autonomous normative authority; as Kant affirms, autonomy ‘is the ground of the dignity of human nature’ (1997: 4:436). Dignity, equal status and normative authority are all concepts that form a unity based on the idea of the moral autonomy of persons with a basic right to justification (within a reconstruction of the principles and ideas of practical reason as justificatory reason) (Forst 2012: ch. 1). This basic claim, to be respected in one’s dignity as a normative justificatory equal and not be ignored or oppressed in that standing, explains the notion of freedom from ‘humiliation’ that the man in the picture demands. He asserts that no government has a normative authority over him that he cannot share in as free and equal.

For the grounding of human rights, this means that every person has a non-deniable claim to all the rights protections and powers that free and equal persons have to grant and guarantee each other who recognize the need to materialize their standing as equal normative authorities in the world of law and politics. Thus Beitz’s worry that the right to justification as the ground of human rights is too abstract and dissolves into ‘a generic idea of moral standing’ (2013: 279) is misplaced, as this ground is necessary but not sufficient for any specification of that standing with respect to the status of being a legally, politically and socially non-dominated person. Human rights secure such status in the legal, political and social world, and thus there is a clear relation between a general moral ground and a more specific context of justifying and theorizing human rights.

In my Kantian view, the right to justification operates between the moral and the legal-political level. Thus it performs the same function as Kant’s ‘innate’ or ‘original’ right of

persons. Kant introduces this right as the only 'natural' right of persons and as the ground of every justifiable form of law imposed over free and equal members of a kingdom of ends; thus, before explaining the innate right, he stresses the natural legal duty to regard oneself and others as ends in themselves (2009: 6:236). In this connection, he introduces the innate right thus: 'Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity' (2009: 6:237). This right to independence under general law has rightly been interpreted as a right to non-domination by Arthur Ripstein (2009: ch. 2), and in this connection one needs to stress *both* aspects discussed by Kant under the headings of private and public right: the right to legally protected independence and the corresponding right to partake in the making of the general law that will bind all. These are the two aspects of the moral right to justification in the realm of law and politics: to be only bound by strictly reciprocally and generally valid laws and to be the co-author of these laws, as Kant stresses in his republican theory.

I cannot go into the details of how Kant constructs a system of legal and political justice – and the rights entailed by that – on this basis. What is most important in this respect is not whether we find an explicit account of human rights in Kant's theory; what is essential is, rather, that in his view the form and justification of all rights or rightful claims has to be strictly reciprocal and general, in accord with the general concept of right which means 'the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom' (2009: 6:230). The natural right to freedom thus is not a ground for a 'derivation' of a list of rights or duties or principles of justice, but entails the moral criteria of justification of any rights or justice claim as well as the principle of the free and equal status of all those who are subjects of the law. This is why the right to freedom – or, in my interpretation, the right to justification – is a foundation for a procedural – and in that sense 'non-foundationalist' – construction of basic human rights.¹³ Any constructivist view that entails basic moral criteria of the justification of the constructions as well as of the standing of the constructing agents must be based on a reflexive notion of the moral right to justification among equal normative authorities; and the innate right expresses that standing and such criteria. It is thus formal and substantive at the same time, a ground of autonomous constructions of right(s) and yet not a basis of their non-discursive derivation.¹⁴ A constructivist view always entails two different kinds of normative argument – or two kinds of normativity. First, the normativity of the principles and ideas of practical reason, to use Rawls's language (1980; 1993: ch. 3) – that is, in my account, the principle of reciprocal and general justification and the moral notion of free and

equal persons as equal normative authorities with a right to justification. And second, the normativity of the norms (or 'laws') generated by the constructivist or discursive procedure, be it the categorical imperative or a notion of free and equal discourse. In a Kantian view, it is essential that practical reason, in my understanding justificatory reason, is the basis for the principles and ideas used – but practical reason understood as a rational and, at the same time, moral capacity, that is, of not just knowing how to justify norms, but also knowing that one is under a duty to do so. That is why the duty of and the right to justification are co-original. In other words, the theory I suggest uses the principle of justification itself as the justifying ground for a theory of human rights. That is why I call it a reflexive theory: no other ground is used than the normative principle of justificatory reason.

It is important to see that the normativity of constructed norms depends on the normativity of the principles and the normative standing of the agents of construction. One can only get so much normativity out of a procedure as one invests in it from the start; that is why categorical imperatives presuppose one basic categorical imperative, and that is why the duty and right to justification are basic for any justified norm. For the context of justifying rights, this means that any construction of human rights must rest on a basic right itself, as the moral right to justification or the innate right in Kant's theory. We can call this the principle of the *conservation and production of normativity*: human rights can only be grounded on a fundamental notion of a right to have all those rights that free and equal normative authorities cannot reciprocally and generally deny each other if they want to secure and operationalize that status (as the status of discursive authority and non-domination) in the legal, political and social world. If human rights are rights such that free and equal persons cannot with good reasons deny them to each other, then their status as free and equal – and the right to it – is basic; and only such a basis can generate the normativity of such rights. The ground of human rights must not be weaker than their own validity claim; rather, it must contain and transmit its normativity to such rights as rights no one can reasonably reject between moral-political equals.

This is why, to make a long argument short, an interest theory of rights cannot sufficiently ground human rights without adding the normativity-generating factor of justification by and through moral equals. An interest theory of rights says, to use Raz's formulation, that a person has a right if an aspect of his 'well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty' (1986: 166). This leaves open the criterion for which aspects of well-being, or for which interests, are a sufficient reason to ground a right, and thus attempts are made to narrow down 'essential' interests or aspects of well-being to ground rights.¹⁵ Raz himself gives a value-based account

of such interests, arguing that ‘the value of the right to its possessor is its ground’ (2015: 221). Thus, his approach would better be called a value theory of rights. In order to justify human rights, then, which affirm ‘the moral worth of all human beings’ and distribute ‘power away from the powerful to everyone’ (2015: 226), universalizable essential values of the good life have to be identified. But again, in order for these values to have such normative force, they have to not just reflect the equal moral status of every person, but also express it by being non-rejectable between such persons who seek to establish their status as legally, politically and socially non-dominated (as Raz’s characterization of these rights entails) by way of securing human rights. And if this is right, then the normativity of these rights does not rest on some prior account of values, but resides in their justifiability between equals who confer their justificatory power to these rights by finding them to be non-rejectable given these persons’ moral status as equals and what it requires to secure this status legally, politically and socially. It is the commonly arrived at justification by equal normative authorities that grounds the normativity of human rights. Justificatory equals combine their normative force in and by justifying these rights.

That is why we should see human rights as *congealed and solidified justifications* that can withstand normative doubt (which they need to be able to prove if challenged) and that express the status of moral equals in the legal, political and social world. A number of normative historical experiences and justifications are sedimented when it comes to basic rights to, say, freedom of religion, political participation or access to education. To claim such rights means to use these congealed justifications as normative powers in a contested space of justification and to be able to use them as a package, so to speak, without having to justify these claims anew every time. They provide a safe and secure status or standing in the social world. The basic right to justification gives persons the possibility to own these justifications and use them to ward off illegitimate power claims – but also to contest these justifications if one-sidedness, or narrowness, is feared. So the right to justification, as a ‘veto right’ against false justifications, is always in place, whereas the content of basic human rights is fixed to some extent, but still the possible object of questioning. Yet every such questioning is bound to the criteria of reciprocity and generality as criteria of practical reason. In a moral-political sense, especially within a constitutional regime, human rights thus serve as veto rights against legal or social arrangements that are unjustifiable and violate these rights; but they can only have such normative force by expressing the basic right of justification. This is why declarations and formulations of human or constitutional rights have a higher-order status, yet one that is not immune to questioning or revision. Whether there is a right to personal property and whether it entails a right to own means of production are

part of that discourse, as well as what the right to the free exercise of religion entails with respect to the education of one's children, for example. None of their formulations or interpretations are 'absolute'; yet the justificatory threshold of criticizing them is high.

To summarize my main grounding argument: respecting persons as equal normative authorities in the realms of morality as well as law and politics is basic, and that respect implies that every person (whether capable of exercising the faculty of justification or not)¹⁶ has a right to justification in the relevant contexts of moral action or political normative orders. This is what it means to respect the dignity of human beings as ends in themselves, to use Kantian language. Since moral and basic legal norms claim to be generally and reciprocally binding for all persons equally, the principle of practical reason says that all those subjected to the norms have to be equal justificatory agents when it comes to their justification heeding the criteria of reciprocity and generality. Reciprocity means that no one may make demands he or she denies to others and no one may impose his or her non-generalizable views, interests or values on others. Generality means that all those over whom norms claim to be valid have to be equally involved.

Human rights are not simply general moral rights, but a subset of reciprocally and generally justifiable rights that establish the status of persons as equal normative authorities within a normative order and protect persons from being subject to legal, political or social domination. These rights are based on the basic right to justification, which in this context means to be the co-author of all the justifiable rights and duties that apply to you. This is the equivalent of Kant's innate right to freedom (and rights) under generally justifiable law. But the formulation of the right to justification captures the ideas of equal personhood under law and of being a political co-author of laws, as well as the status of being free from social domination in a more complex way than in Kant's version.

4 Constructing Human Rights

Given what I said so far, I shall define the *concept* of human rights such that they are morally grounded, legally and politically guaranteed rights of free and equal persons who have a basic claim not to be socially or politically dominated or mistreated by states or other agents, and – what is of particular importance – to be the normative authorities of the regime of rights and duties they are subject to.¹⁷ Human rights reflect the insight that the status of being free and equal and not being subjected to the arbitrary power of others needs to be secured by law in a twofold sense: the persons in question must be both the authors and the addressees of the law. Thus, these rights are justified horizontally as those rights that free and equal normative authorities could not deny each other; based on that, they have a

vertical justification as rights that no political or social agent or institution may violate and which the state must secure. Their moral core consists in the fact that they confer the status of being a justificatory equal who must not be subjected to others' domination; and their justification lies in identifying those rights that are necessary to secure that egalitarian status in the social world. This implies rights to life, liberty, security, to social and material resources and to the political co-determination of the rights and duties you have.

This approach stresses the moral core of mutual respect essential for human rights, as well as their particular subset function, namely to include only those rights that are required for being secure as a non-dominated, free and equal person in the social and political realm. Classical 'liberal' rights protect this status as much as political rights or social rights that provide protection against political or social domination. This view implies non-arbitrary guidelines for the way in which a specific *conception* of human rights has to be constructed, namely by way of a discursive construction in which all those subjected are involved as justificatory agents – in practice as well as in a critical counterfactual dimension. This means that any conception of human rights for a particular context needs to be justified in a discursive manner guided by the criteria of reciprocity and generality, where no one – to repeat these criteria – may make a claim he or she denies to others (reciprocity of content) and where no one may impose his or her interests, needs, perspective or convictions on others who could reasonably reject these (reciprocity of reasons). Finally, no subjected person may be excluded from the relevant justification community (generality).

Several contexts of such constructions of human rights need to be distinguished. The first context in which a conception of human rights is to be justified is the moral-political context of a basic list of general human rights which contains all the rights that, given human experience of various forms of domination thus far, would be non-deniable between free and equal persons who share a political and legal order. The reference to historical experience is important, as every concrete conception of human rights is the result of an open-ended learning process; again, there is no deduction or derivation of human rights based on the foundation of the right to justification. The list of human rights is the product of a discursive construction and is necessary as a major reference point for any dispute over whether a certain right is actually a human right. As much as these rights are required in particular, concrete contexts, they must have a moral basis, and if they do, there is a list of such basic rights that substantiate the normative core concept named above. This list is general and vague and needs to be discursively concretized through political-legal constructions; yet, at a universal level, a general moral-political conception of these rights is indispensable. A severe dispute over human rights always goes back to this level.¹⁸ The construction of that basic

conception of human rights is and remains a moral-political, reflexive matter; in this form of constructivism, we gather and test the best moral arguments for certain rights to secure the standing of persons who are free from domination and are equal normative political-legal authorities within their normative order.

The second context of constructing a conception of human rights is the political context of a state that has the task of securing basic human rights and also of ensuring that the concrete determination and interpretation of these rights is justifiable to all those subject to it. This does not mean to merely 'apply' or 'mirror'¹⁹ a fixed set of morally preconstructed human rights; rather, the political constructions of basic rights on this level determine and interpret what it means in a given political community to have freedom of speech, the right to political participation, to a decent social status and so on. Human rights are determined by way of discursive political constructivism here, and it is important to note that this is a democratic, moral-political form of justification by the participants themselves. When it comes to basic rights, all must be involved in the determination of these rights as political equals and as critical participants who think reflexively about their own status and that of others, and who may transcend given legal and political forms in order to improve them. So human rights are at the same time the ground for such constructions as they are their result: in abstract form, they are the ground for such constructions because the general moral-political conception provides the justificatory background for any legal-political determination, both in procedure and substance, such that a political community has to determine what it means to realize and secure rights no person can justifiably be denied (which includes the rights of non-members). The result is a concrete conception of human rights for a political community. However, this conception must be in tune with the general moral conception and must be criticizable from that standpoint. Non-deniable core human rights provide something like a discursive veto against unjustifiable constructions of basic rights: persons or groups thus have the normative power to reject a determination of a basic right – say, of gender equality – when a majority in a political community believes that, for example, forced marriage is in line with this general right, or when a political community thinks that it can ban minarets and still respect the human right to religious liberty. In every such political context, non-arbitrary forms of legal interpretation and adjudication of basic rights disputes have to be devised; this is implied by the human right to be protected as a person with equal legal standing.

While there are many such political contexts of discursive construction where participatory equals determine their normative order in a non-arbitrary and constructivist way, being open to reflexive improvement and critique, another moral-political construction is

taking place on the international and supranational levels. This is the third context to be analysed. Here the construction of a conception of human rights is required that is laid down in international declarations, treaties and covenants, where these norms – and possible sanctions for violating them – are understood to be legally binding. In these contexts, the agents of construction are states with particular conceptions of basic rights as well as persons who make particular claims, possibly dissenting from their states' conceptions. The conceptions to be found on this international level therefore may reflect a thinner notion of human rights as compared to the political conceptions within states. Thus, for example, no particular model of democratic organization can be formulated here apart from the general right to democratic participation. Yet, that there is such a right must be stressed within the general moral conception as well as all particular political conceptions and the international conception. Otherwise, the point of human rights – namely, not to be forced to live in a normative order where you are not part of the relevant justification authority as a justificatory equal – would be lost. At this level, a reflection on which rights violations ought to lead to which sanctions, and by which prior procedure and through which agent, needs to be included. Yet it is a mistake to combine this reflection with the basic arguments for human rights on any of the other levels.

I cannot go into further details at this point about such an institutional scheme of international sanctions or into a more detailed discussion of the general list of human rights and how, from that angle, the meaning of such rights changes, given that the persons who claim these rights are seen as active political agents and not just as subjects to be protected or nourished. Just to give one example: the right to social goods such as food, housing and medicine is then no longer primarily a right to certain means of subsistence, but is a right to a social standing as an equal at least to the extent of being a full member of society and not an easy victim of social exploitation.

Above all, the reflexive point of human rights needs to be kept in mind: if human rights are essentially founded on the basic right to be secure in the status of being a normative authority free from political and social domination and co-determining the normative order one is subject to, then they must be rights constructed by their bearers themselves. This has implications both for the concept and for the various conceptions (and how they are interpreted). It means that human rights protect and express the autonomy of free and equal law-givers and law-addressees. This account is equally true to the historical meaning and function of human rights, to past and contemporary political struggles for human rights and to a moral and transcendental grounding indicated by such terms as 'human dignity'. That grounding is of a reflexive nature: if we look for a firm basis for

reciprocally and generally justified human rights, the very principle of reciprocal and general justification and the right to justification is the right place to look for such a ground.²⁰

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The Point and Ground of Human Rights: A Kantian Constructivist View

- 1 A more positive variant of this is the idea that human rights are claims to resources required to realize fundamental forms of well-being; this is forcefully argued by Talbott, 2005, 2010.
- 2 I discuss the difference between my approach and that of Philip Pettit in Forst, 2013, 2015.
- 3 Even Allen Buchanan, who stresses the status egalitarian function of human rights, partakes in this, as he mainly refers to the quality of being protected by law in this regard, less so to the right to be a political authority; see his discussion of the 'status egalitarian function', where democratic rights are missing (2013: 28–30).
- 4 Beitz argues similarly with respect to rights of gender equality (2009: 195).
- 5 I think that Buchanan's constructive justificatory arguments for human rights are to be interpreted in that way; they aim to provide the best philosophical justification for a system of human rights at the centre of national and international legal practice, which is different from Beitz's approach.
- 6 In her book on global justice, Lea Ypi (2012) rightly stresses the importance of political agency in theorizing emancipatory forms of politics, yet leaves the criteria for such progress (as dialectical learning processes facilitated by avant-garde political agents) undetermined (though in the discussion of first-order normative principles, Kantian moral equality is usually the reference

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- point – 2012: 54f., 60).
- 7 Thanks to Mahmoud Bassiouni for drawing my attention to this collection and for instructive conversations about it.
- 8 Permission to reproduce the picture was kindly granted by the photographer.
- 9 This aspect of Kant’s approach is stressed by O’Neill (1989) and Habermas’s discourse ethics in their respective interpretations.
- 10 For the opposite argument that a Kantian notion of dignity rests on metaphysical foundations comparable to a Catholic one, see Rosen, 2012. For a general discussion of the notion of dignity in the context of human rights, see McCrudden, 2013.
- 11 I cannot go into this here, but based on such statements it is often argued that for Kant only rationally autonomous beings have to be treated with dignity, and thus human beings who are not yet, or no longer, possessing their rational capacities have no such claim to respect. This is a mistake, however. First, this interpretation does not sufficiently distinguish between the dignity of rational agents as acting subjects and the dignity of human beings as objects of actions; and, with regard to the latter, Kant always speaks of human beings as representatives of humanity without any further qualification. Second, and more importantly, this view reads an empirical capacity into a noumenal, non-empirical characteristic of persons, which is contrary to Kant’s approach. He affirms that his notion of persons as autonomous ends in themselves is ‘not borrowed from experience’ (1990: 4:431), thus is a general moral ascription to human beings who do not have to take a rationality test to qualify as ends in themselves.
- 12 The notion of rank is stressed by Waldron (2012); see also the discussion in Kateb (2011).
- 13 Flikschuh (2015) rightly stresses the relational and strictly reciprocal character of any rights claims within Kant’s scheme, but finds the innate right incompatible with the ‘non-foundationalist’ and constructivist character of Kant’s general approach. That view, however, cannot explain the moral character of Kant’s concept of right asking for strict justificatory reciprocity that Flikschuh discusses (2015: 662).
- 14 Andrea Sangiovanni argues that there cannot be a Kantian theory of human rights despite the innate right as an appropriate ground, because ‘it is constitutive of a human right (in my sense) that its violation licenses unilateral action by third parties’ which is ‘straightforwardly denied by Kant’s account of the moral obligation to exit the state of nature’ (2015: 675). This argument is a good example of the hold of the internationalist-interventionist imagination over current human rights thinking. For having a justifiable claim to human rights is one thing, whereas the question of the legitimate institutions or agents to intervene in a state is another. And here a lot is to be said for Kant’s scepticism about unilateral interference; yet that is a point that is irrelevant to the question of which rights persons have within a state.
- 15 This unites the very different approaches by Talbott (2010), Griffin (2008), Buchanan (2013).
- 16 In the case of persons who are not yet or no longer capable of exercising the full capacity of justification, justifications of representatives or by justified authorities in light of what could be justified to such persons are required.
- 17 The following overlaps with a section of my ‘Human Rights in Context: A Comment on Sangiovanni’ (Forst, forthcoming).
- 18 Pace Andrea Sangiovanni and also Seyla Benhabib, I do not see how we can move directly from the general concept to more particular political conceptions in either the interpretivist way Sangiovanni (forthcoming) thinks correct or the discourse-theoretical view that Benhabib proposes with her notion of ‘democratic iterations’ (2011: 126–31).
- 19 This is the worry of Buchanan (2013: 14–23).
- 20 Many thanks to Nate Adams and Tobias Albrecht for their help in preparing this text and to Pietro Maffettone, David Held and Sarah Dancy for important suggestions to improve it.