

## INTRODUCTION

In recent times, Kant's legal philosophy has been greatly developed and has become very influential. One of the reasons for this, and perhaps the most important, is that Kant's theory is still a very important and inspiring source of philosophical reflection in the field of law.

All issues of applied philosophy in Kant arouse debates about the relationship between a priori, universal principles, on the one hand, and the empirical data to which they are applied, on the other hand. In the realm of law, this tension exists between the requirements of an a priori universal law, or of justice, and the need for a positive law that finds its sources and its domain in the empirical world and its contingencies. Thus, one can consider that the relation between law and morality, a core topic of legal philosophy, appears in Kant's philosophy as a tension between positivity and correctness of law. But since human beings, *qua* rational beings, have a moral duty to definitively leave the state of nature, and since leaving the state of nature is, according to Kant, the precondition for any progress in legislation, the positivity of law is required on moral grounds.

This tension offers a broad perspective that the essays contained in the present volume address in order to analyze in Kant's works specific issues such as human dignity in the realm of law, his rejection of any right of necessity, the justification of property rights, republicanism, and the right of resistance.

These essays have been delivered in the workshop "Kant's Concept of Law" at the 26<sup>th</sup> World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR), held from 21<sup>st</sup> to 26<sup>th</sup> July 2013 in Belo Horizonte, Brazil. They demonstrate how relevant and fruitful Kant is for today's debate in legal philosophy. The editors wish to express their gratitude to these authors, for their most valuable contributions, as well as to Azucena Cruz for advice on matters of English style.

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## HUMAN DIGNITY AS JUSTICE IN THE FACE OF INJUSTICE: ON KANT'S SUPPLEMENTARY FUNCTION OF HUMAN DIGNITY IN LAW\*

### INTRODUCTION

Kant's body of thought has a major influence on the jurisdiction of the Federal Constitutional Court of Germany dealing with Art. 1.I of the German Basic Law, concerning human dignity. Similar to Kant's second formula of the categorical imperative, the so-called end-in-itself-formula<sup>1</sup>, the rights and duties that follow from Art. 1.I of the German Basic Law are described by the Federal Constitutional Court of Germany as follows:

Human dignity as such is affected when a concrete human being is reduced to an object, to a mere means, to a dispensable quantity.<sup>2</sup>

It is debatable, however, whether the reference to Kant really is consistent with his own concept of human dignity. Two opinions can be differentiated in this debate. According to one opinion, Kant's concept of human dignity has no legal meaning. The main argument for this notion is that Kant's concept of human dignity only refers to the intelligible world, i. e., a world that is not experienced on a sensual level. But since the law could only sanction actions that can be experienced on a sensual level, there are no legal breaches of human dignity. "A breach of the human dignity", as H. Dreier<sup>3</sup> put it accordingly, appears to be "impossible" from a legal perspective. This thesis could be called *thesis of intelligibility*. The opposite thesis is the so-called *thesis of inclusion*.<sup>4</sup> Thus, Kant's concept of human dignity does include a sensually experienced freedom of action. According to this thesis, if the general

\* A (slightly modified) German version of this paper was already published in: *Der Staat* vol. 52 (2013), 401–413. The author translated the paper "Menschenwürde als Recht im Unrecht. Zur Ergänzungsfunktion der Menschenwürde im Recht bei Kant" together with Felix Lüdicke. All quotes of Immanuel Kant are taken from *Kant's Gesammelte Schriften*, Deutsche Akademie der Wissenschaften (formerly: Königlich preußische Akademie der Wissenschaften). All translations are taken – unless otherwise stated – from *The Cambridge Edition of the Works of Immanuel Kant*.

1 The end-in-itself formula says: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means." (I. Kant, 'Groundwork Of The Metaphysics Of Morals', in *The Cambridge Edition Of The Works Of Immanuel Kant – Practical Philosophy*, trans. and ed. M.J. Gregor [Cambridge: Cambridge University Press, 1996], 37–108 at AA 429.

2 Decisions of the German Federal Constitutional Court – *Bundesverfassungsgericht* – BVerfGE 9, 89 (95); 27, 1 (6); 28, 386 (391); 45, 187 (228); 50, 125 (133); 50, 166 (175); 50 205 (215); 72, 105 (116); 87, 209 (228); 109, 133 (150); 109, 279 (312).

3 H. Dreier, *Grundgesetz Kommentar*, ed. H. Dreier, 2<sup>nd</sup> ed. (Tübingen: Mohr Siebeck, 2004), Art. 1 I n. 13; compare also D. von der Pfordten, 'Zur Würde des Menschen bei Kant', in *Menschenwürde, Recht und Staat bei Kant – Fünf Untersuchungen*, ed. D. von der Pfordten (Paderborn: Mentis, 2009), 9–26 at 26.

4 R. Alexy, *Ralf Dreiers Interpretation der Kantischen Rechtsdefinition*, in *Integratives Verstehen. Zur Rechtsphilosophie Ralf Dreiers*, ed. R. Alexy (ed.), (Tübingen: Mohr Siebeck, 2005), 95–109, at 102 n. 37; N. Teifke, *Das Prinzip Menschenwürde* (Tübingen: Mohr Siebeck, 2011), 59.

freedom of action is violated, it follows that human dignity is violated as well. But, since the general freedom of action is already violated if somebody is restrained without legal justification, for example from “riding in the woods”<sup>5</sup>, human dignity gains legal relevance even in supposedly unimportant actions.

The core of this debate between the *thesis of intelligibility* and the *thesis of inclusion* pertains to the question about the extent of human dignity. If Kant’s concept of human dignity includes sensually experienced actions, it follows – at least *prima facie* – that human dignity is also relevant from a legal perspective. But, if that is not the case and the concept of human dignity only alludes to the intelligible part of a human being, human dignity does not gain any legal relevance.

To resolve the argument whether Kant’s concept of human dignity has any legal relevance, it is useful to first determine the extent of Kant’s human dignity (Part One). The second section deals with the opening question of this article and asks if, and, if so, to what extent human dignity is relevant from a legal perspective (Part Two.). The subsequent third section then asks how Kant’s concept of human dignity can be developed further and made useful for current discussions in different areas of law (Part Three.). The last section will conclude and sum up this article (Concluding Remark).

## PART ONE: THE EXTENT OF HUMAN DIGNITY

When talking about the extent of Kant’s concept of human dignity, the first thing to consider is his own differentiation between price and dignity.<sup>6</sup> In his *Groundwork of the Metaphysics of Morals* Kant argues about the differentiation as follows:

What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.<sup>7</sup>

Following Kant’s reasoning, animals only have a “price”, human beings, however, are given an “exceptional position” compared to nature, namely dignity.<sup>8</sup> This exceptional position is a result of the autonomy of human beings:

Autonomy is therefore the ground of the dignity of human nature and every rational nature.<sup>9</sup>

It is questionable what Kant’s statement means exactly. It is clear, however, what Kant’s understanding of the concept of autonomy is in principle. He understands autonomy in the sense of self-legislation.<sup>10</sup> According to Kant, autonomy is “the

5 See BVerfGE 80 (n. 2), 137 ff.

6 For the differentiation between price and dignity in Kant, see J. Hruschka, ‘Die Würde des Menschen bei Kant’, in *ARSP* 88 (2002), 463–480 at 463 ff.; H.J. Paton, *The Categorical Imperative* (London: Hutchinson, 1947), 188 ff.

7 I. Kant, ‘Groundwork’ (n. 1), at 434 – marked by the author.

8 O. Sensen, ‘Kants Begriff der Menschenwürde’, in *Abwägende Vernunft. Praktische Rationalität in historischer, systematischer und religionsphilosophischer Perspektive*, ed. F.-J. Bormann / C. Schröder (Berlin/New York: De Gruyter, 2004), 220–236, at 226.

9 I. Kant, ‘Groundwork’ (n. 1), at 436.

10 To be precise, Kant’s understanding of the concept of autonomy is only partly in the sense of self-lawgiving. The human being only appears to be self-lawgiving as a regulative idea. See A. W. Wood, *Kantian Ethics*, (Cambridge/New York et al.: Cambridge University Press, 2008), 111.

will's property of being a law to itself".<sup>11</sup> The will of a human being has then, according to Kant, the ability to be a law for itself if it can be motivated by the categorical imperative alone to conduct a certain action. In other words: The fact that morality, based on rationality, demands a certain action has to be the lone reason for taking action. A motivation based solely on the categorical imperative does not exist if the will of a human being has been motivated by interests, needs, or other empirical ends. In this case, according to Kant's terminology, it is possibly a matter of an action in conformity with duty, but not "an action from duty".<sup>12</sup> Autonomous acting, according to Kant, is therefore an action from duty, i. e., a moral acting.

It is important to note that Kant uses two different meanings of autonomy. On the one hand, Kant understands the concept of autonomy as the ability, i. e., the *capacity*, of the will to be motivated by the categorical imperative, i. e., to act morally. It follows that autonomy is, indeed, a necessary condition for the possibility of a human being to follow the categorical imperative, to act morally. Autonomy in this case is also a necessary condition to be able to decide *against* the categorical imperative, or, in other words, to act immorally.<sup>13</sup> On the other hand, this concept of autonomy as the ability to act in morally relevant ways has to be differentiated from the principle of autonomy.<sup>14</sup> The principle of autonomy is only concerned if the human being actually uses her ability for autonomy to act morally, that is, to act from duty.

If one looks closer at Kant's statement that "[a]utonomy is [...] the ground of dignity of human nature and every other rational nature"<sup>15</sup>, keeping in mind the conceptual clarifications made in the paragraph before, three different interpretive possibilities arise: *First*, dignity could be assigned to those human beings, who are capable of autonomy, i. e., to act in a morally relevant way. *Secondly*, dignity could also be assigned to those who use their ability for autonomy to follow the principle of autonomy, i. e., the categorical imperative and thereby morality itself. Only the human being that acts in a morally good way would have dignity. The *third* possibility brings into consideration that also unborn life, infants, and mentally handicapped human beings possess dignity, even though they neither actually act on the basis of the principle of autonomy, nor are they capable to do so. Essential in this case would be the fact that they all belong to the species of human beings and that this species is generally capable of following the principle of autonomy.

At first glance, Kant's answers appear to be contradictory. This basic problem of interpretation will be accounted for with the help of passages from Kant's texts (1.). By using the thesis that Kant's concept of human dignity has a two-stage structure, some of the contradictions shall be solved (2.). A complete solution to the aforementioned contradictions can be found in the final discussion of the so-called problem of extension (3.).

11 I. Kant, 'Groundwork' (n. 1), at 446.

12 I. Kant, 'Groundwork' (n. 1), at 400.

13 See M. Willaschek, *Praktische Vernunft* (Stuttgart/Weimar: J. B. Metzler, 1992), 238.

14 See H. Allison, *Kant's Theory of Freedom* (Cambridge/New York et al.: Cambridge University Press, 1990), 105 f.; A. Reath, *Agency and Autonomy in Kant's Moral Theory* (Oxford/New York: Oxford University Press, 2006), 125; a variation of G. Prauss, *Kant über Freiheit als Autonomie* (Frankfurt a. M.: Vittorio Klostermann, 1983), 2, who argues that Kant would generally put autonomy on the same level as the principle of autonomy, i. e., morality.

15 I. Kant, 'Groundwork' (n. 1), at 436.

## 1. (OSTENSIBLE) CONTRADICTIONS IN KANT

In his *Groundwork*, it appears that Kant only assigns dignity to a human being, if she follows the principle of autonomy, i. e., acts from duty.<sup>16</sup> The ability for autonomy would therefore be a necessary, but not a sufficient, condition of human dignity.<sup>17</sup> In the *Groundwork*, it is namely “the lawgiving itself, which determines all worth” and “must for that very reason have a dignity.”<sup>18</sup> Only “a morally good disposition, or virtue” qualifies for “making such high claims” and for assigning dignity to the human being.<sup>19</sup> In another passage in the *Groundwork*, Kant formulates that “only [...] the mere law itself [...] can be an object of respect and so a command.”<sup>20</sup> Therefore, “any respect for a person” could only be “respect for the law (of integrity and so forth) of which he gives us an example.”<sup>21</sup>

One gains, however, a different perspective if one looks closer at Kant’s *Doctrine of Virtue*. Here, Kant combines the concept of dignity with the second formula of the categorical imperative, the end-in-itself formula, and also assigns the right of respect to “a vicious man”<sup>22</sup>. This gives the impression that human dignity does not depend on acting from duty, i. e., following the categorical imperative, but only on the ability to do so. In his *Doctrine of Right*, Kant assumes that a human being is from her “procreation”<sup>23</sup> already entitled to rights against her parents. From this passage one could follow that not even the ability for autonomy is necessary in order to award a human being with rights of respect and with dignity.

16 See G. Prauss, *Kant über Freiheit als Autonomy* (n. 14), at 139 f.; D. Schönecker / A. Wood, *Kants “Grundlegung der Metaphysik der Sitten”. Ein einführender Kommentar*, 3<sup>rd</sup> ed. (Paderborn/München et al.: Ferdinand Schöningh, 2007), 162 n. 9, and O. Sensen, ‘Kants Begriff der Menschenwürde’ (n. 8), at 228; see F. Ricken, ‘Homo noumenon und homo phaenomenon’, in *Grundlegung zur Metaphysik der Sitten. Ein kooperativer Kommentar*, ed. O. Höffe (Frankfurt a. M.: Vittorio Klostermann, 1989), 234–252 at 246.

17 From the following excerpt, it can be deduced that autonomy of human beings is a necessary condition for dignity: “Hence morality, and humanity insofar as it is capable of morality, is that which alone has dignity” (I. Kant, ‘Groundwork’ [n. 1], at 435).

18 I. Kant, ‘Groundwork’ (n. 1), at 435.

19 I. Kant, ‘Groundwork’ (n. 1), at 435; compare with Kant’s statement, according to which “it is just this fitness of his maxims for giving universal law that marks him out as an end itself” (I. Kant, ‘Groundwork’ [n. 1], at 438).

20 I. Kant, ‘Groundwork’ (n. 1), at 400.

21 I. Kant, ‘Groundwork’ (n. 1), at 402 n.; that a human being is only awarded dignity if she follows the categorical imperative can also be taken from an excerpt from the *Groundwork*, which states that “it is impossible to think of anything at all in the world [...] that could be considered good without limitations except a *good will*” (I. Kant, ‘Groundwork’ [n. 1], at 393).

22 I. Kant, ‘The Metaphysics of Morals’, in *The Cambridge Edition Of The Works Of Immanuel Kant – Practical Philosophy* (n. 1), 353–604 at 463. For a comparison of dignity and the end-in-itself formula, see D. von der Pfordten, ‘Zur Würde des Menschen bei Kant’ (n. 3), at 22 ff.

23 I. Kant, Kant, ‘The Metaphysics of Morals’ (n. 22), at 280 f.

## 2. TWO-STAGE STRUCTURE OF HUMAN DIGNITY

Before one becomes content with the argument that Kant contradicts himself in these text passages, or that his opinions might have changed (or at least evolved) over time,<sup>24</sup> one should attempt to reconcile Kant's (seemingly) contradicting text passages literally. A partial solution can be found in the thesis that Kant assumes a two-stage structure for human dignity, based on the traditional concept of human dignity as developed by Cicero.<sup>25</sup> According to Cicero, every human being has an initial dignity and from this initial dignity comes the duty to realize her dignity.<sup>26</sup> Such a two-stage structure of human dignity can be found in one of Kant's *Reflections*:

The dignity of human nature lies only in its freedom [...]. But the dignity of one human being (worthiness) rests on the use of his freedom.<sup>27</sup>

Although a systematic analysis of the two-stage structure of human dignity cannot be found in Kant,<sup>28</sup> the same concept of dignity can, nevertheless, be found in other places in Kant's works. Another example for this thesis of a continuous two-stage structure of human dignity can be found in an excerpt from Kant's *Religion Within the Boundaries of Mere Reason*,<sup>29</sup> in which human dignity "aspires to achieve" the dignity of humanity. In his work *On Education*,<sup>30</sup> Kant refers to the "duty [...] not to deny the dignity of humanity in his nature," and, in his *Doctrine of Virtue*,<sup>31</sup> he states that there is a "duty with reference to the dignity of humanity within us". Kant's concept of the two-stage structure of human dignity can finally be found in a passage from the *Doctrine of Virtue*, where he discusses the dignity of vicious human beings:

Nonetheless I cannot deny all respect to even a vicious man as a human being; I cannot withdraw at least the respect that belongs to him in his quality as a human being, even though by his deals he makes himself unworthy of it.<sup>32</sup>

Kant subsequently formulates that "the censure of vice" must "never break out into complete contempt and denial of any moral worth to a vicious human being."<sup>33</sup>

24 See D. von der Pfordten, 'Zur Würde des Menschen bei Kant' (n. 3), at 3.

25 For the traditional concept of human dignity, see O. Sensen, *Kant on Human Dignity* (Berlin/Boston: Walter De Gruyter, 2011) 152 ff.

26 O. Sensen, 'Kants Begriff der Menschenwürde' (n. 8), at 224.

27 I. Kant, *Reflection* (n. 1), at 181.

28 O. Sensen, 'Kants Begriff der Menschenwürde' (n. 8), at 224.

29 I. Kant, *Religion Within The Boundaries Of Mere Reason* (n. 1), at 183.

30 I. Kant, *Lectures on Pedagogy* (n. 1), at 488.

31 I. Kant, 'The Metaphysics of Morals' (n. 22), at 436; see also: I. Kant, 'The Metaphysics of Morals' (n. 22), 420: "But a human being's duty to himself as a moral being *only* [...] consists in what is *formal* in the consistency of the maxims of his will with the *dignity* of humanity in person. It consists, therefore, in a prohibition against depriving himself of the *prerogative* of a moral being, that of acting in accordance with principles, that is, inner freedom, and so making himself a plaything of the mere inclination and hence a thing."

32 I. Kant, 'The Metaphysics of Morals' (n. 22), at 463.

33 I. Kant, 'The Metaphysics of Morals' (n. 22), at 463.

Kant sees the reason for it in the “predisposition” of human beings “to the good,” which leads to hope for improvement.<sup>34</sup>

In summary, it can be said that, according to Kant, a human being has dignity in the first stage, because of her ability to act morally, and in the second stage she has dignity if she acts according to her initial dignity and actually acts morally, i. e., follows the categorical imperative. The two stages of human dignity correspond to Kant’s two aforementioned concepts of autonomy: autonomy as a capacity and autonomy as a principle, which only comes into play when the human being actually uses her ability for autonomy to follow the categorical imperative.

Parts of the contradiction in Kant are thereby solved: Kant simply refers in the previous excerpts to the different stages of dignity. But the two-stage structure does not yet solve if, and if so, why, according to Kant, infants, unborn life, and mentally handicapped human beings have dignity. This will be discussed in the following section.

### 3. PROBLEM OF EXTENSION

In connection to the aforementioned two-stage structure of human dignity, the thesis seems plausible, at first glance, that the human capacity for autonomy of a human being is a condition of the assignment of dignity. After all, dignity is assigned to human beings only due to their autonomy. It does not depend on any other human characteristics or attributes. If there were any other reasonable creatures on the earth, they too would be assigned dignity. As Kant formulates:

Autonomy is therefore the ground of all dignity of human nature *and of every* rational nature.<sup>35</sup>

Following this thesis, T. Gutmann writes that “this incident” is “not a contingent offshoot of Kant’s ethic,” but “rather stems from the basic architectonic assumptions of his thesis on morality.”<sup>36</sup> The counter thesis is that humanity as a species, according to Kant, is the object of respect.<sup>37</sup> But since, for Kant, the affiliation to the species human being does not depend on their ability for autonomy and accountability,<sup>38</sup> even infants, mentally handicapped human beings, and unborn life would be assigned dignity. At second glance, there are a couple of arguments that can be made in favour of this species-thesis. As previously mentioned, in the

34 I. Kant, ‘The Metaphysics of Morals’ (n. 22), at 464.

35 I. Kant, ‘Groundwork’ (n. 1), at 436 – marked by the author.

36 T. Gutmann, ‘Würde und Autonomie. Überlegungen zur Kantischen Tradition’, in *Jahrbuch für Wissenschaft und Ethik* (JWE) 15 (2010), 5–34 at 13 – trans. F. Lüdicke,

37 O. Höffe, ‘Menschenwürde als ethisches Prinzip’, in *Gentechnik und Menschenwürde*, ed. O. Höffe / L. Honnefelder et al. (Köln: DuMont, 2002), 111–141 at 132; L. Honnefelder, ‘Die Frage nach dem moralischen Status des menschlichen Embryos’ in *Gentechnik und Menschenwürde*, 79–110 at 87; J. Hruschka, ‘Die Würde des Menschen bei Kant’ (n. 6), at 478; D. Jaber, *Über den mehrfachen Sinn von Menschenwürde Garantien*, (Frankfurt a.M.: Ontos, 2003), 123; R.A. Lorz, *Modernes Grund- und Menschenrechtsverständnis und die Philosophie der Freiheit Kants* (Stuttgart/München et al.: R. Boorberg, 1993), 290 f.; F. Ricken, ‘Homo noumenon und homo phaenomenon’ (n. 16), at 239 f.; O. Sensen, *Kant on Human Dignity* (n. 25), at 133 n. 103.

38 See, for example, I. Kant, ‘The Metaphysics of Morals’ (n. 22), at 461.



*Doctrine of Right*, Kant explicitly states that human beings are given rights towards their parents since their “procreation”:

For the offspring is a *person*, and it is impossible to form a concept of the production of a being endowed with freedom through a physical operation. So from a *practical point of view* it is a quite correct and even necessary idea to regard the act of procreation as one by which we have brought a person into the world without his consent and on our own initiative, for which deed the parents incur an obligation to make the child content with his condition so far as they can.<sup>39</sup>

It is especially important to note Kant’s reference that “from a *practical point of view* it is a quite correct and necessary idea” to use the act of procreation as the starting point. This reference points to the crucial argument that can be made for the species-thesis: the argument of *epistemic self-restraint*.<sup>40</sup> Not even in relation to herself, can the human being be sure, according to Kant, if she really is able to follow (from duty) the categorical imperative, i. e., if she is capable of autonomy. For Kant, there is only a limited ability for self-awareness. In the *Groundwork*, Kant writes:

Even as to himself, the human being cannot claim to cognize what he is in himself through the cognizance he has by his inner sensation.<sup>41</sup>

Towards other human beings, she can be even less certain, because “the human judge cannot see into the inside of other human beings.”<sup>42</sup> Thus, it stands to reason that one must look at every human being *as though* she really is capable of autonomy, and with that assign dignity and respect to every human being. Kant writes in the *Doctrine of Virtue* that “every human being has a legitimate claim to respect from his fellow human beings.”<sup>43</sup> The human being is “under obligation to acknowledge, in a practical way, the dignity of humanity in every other human being,” and “there rests on him a duty regarding the respect that must be shown to *every* other human being.”<sup>44</sup> That the human being who is capable of autonomy is not only assigned respect, but also the human being as a species, follows as well from Kant’s statement regarding “disgraceful punishments”:

So there can be disgraceful punishments that dishonor humanity itself (such as quartering a man, having him torn by dogs, cutting off his nose or ears). Not only are such punishments more painful than loss of possessions and life to one who loves honor [...]; they also make a spectator blush with shame at belonging to a species that can be treated that way.<sup>45</sup>

All things considered, it is plausible to assume that Kant represents the species-thesis, which assigns the right of respect, and therefore dignity as well, to infants, mentally handicapped human beings, and even unborn life. This thesis presents the advantage that all aforementioned excerpts can be assembled into an overall system without contradiction.

39 I. Kant, ‘The Metaphysics of Morals’ (n. 22), at 280f.; compare J. Hruschka, ‘Die Würde des Menschen bei Kant’ (n. 6), at 478.

40 See F. Ricken, ‘Homo noumenon und homo phaenomenon’ (n. 16), at 247f.

41 I. Kant, ‘Groundwork’ (n. 1), at 451.

42 I. Kant, *Religion* (n. 29), at 95.

43 I. Kant, ‘The Metaphysics of Morals’ (n. 22), at 462.

44 I. Kant, ‘The Metaphysics of Morals’ (n. 22), at 462.

45 I. Kant, ‘The Metaphysics of Morals’ (n. 22), at 463.

## PART TWO: LEGAL RELEVANCE OF HUMAN DIGNITY

The question about the legal relevance of human dignity appears to be solved. The concept of human dignity covers, in the first stage, for epistemic reasons, even human beings who are not at all capable of autonomy. It, therefore, does not refer only to the intelligible, non-justiciable world. The *thesis of intelligibility* is therefore to be rejected.

However, in regards to the legal relevance of human dignity, doubts nevertheless arise considering the fact that Kant does not even once mention the term “human dignity” in his *Doctrine of Right*.<sup>46</sup> Only in his essay *What is Enlightenment?* can an excerpt be found in which Kant uses the concept of dignity in a legal context:

Thus when nature has unwrapped [...] the seed for which she cares most tenderly, namely the propensity and calling to think freely, the latter gradually works back upon the mentality of the people (which thereby gradually becomes capable of freedom in acting) and eventually even upon the principles of *government*, which finds it profitable to itself to treat the human being, who is now more than a machine, in *keeping with his dignity*.<sup>47</sup>

Despite this excerpt, Kant’s use of the concept of human dignity is overall too sporadic and unsystematic to give it legal relevance or the characteristics of a “fundamental rule of law.”<sup>48</sup> As O. Sensen argues, the concept of human dignity in Kant is merely a “secondary concept.”<sup>49</sup> Kant’s concept of human dignity is not able to justify common rights and duties. The human being, for Kant, is not to be respected because she has dignity, but she has dignity because she is to be respected.<sup>50</sup> This becomes especially clear in the following excerpt from the *Doctrine of Virtue*:

Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the time as an ends. It is just *in this* that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so over all things.<sup>51</sup>

More precisely, human dignity is derived from the categorical imperative and not the other way around.<sup>52</sup> The *thesis of inclusion* that assigns a larger legal relevance to Kant’s concept of human dignity cannot be accepted without further questioning. In fact, this thesis can only be accepted, if one looks at the concept of human dignity as a transcription of the rights and duties that follow from the categorical imperative. In the aforementioned excerpt from Kant’s *What is Enlightenment?*, Kant appears to use the concept of dignity in this way. However, the necessary conclusion is then, that it is more important to deal with Kant’s really decisive concept, i. e.,

46 See H. Dreier, *Grundgesetz Kommentar* (n. 3), at Art. 1 I n. 13; see also G. Mobr, ‘Ein “Wert, der keinen Preis hat” – Philosophiegeschichtliche Grundlagen der Menschenwürde bei Kant und Fichte’ in *Menschenwürde. Philosophische, theologische und juristische Analysen*, ed. H.J. Sandkühler (Frankfurt a. M./Berlin et al.: Lang 2007), 13–39 at 25 ff.

47 I. Kant, *An Answer to the Question: What is Enlightenment?*, 41 f. – marked by the author.

48 R.A. Lorz, *Modernes Grund- und Menschenrechtsverständnis und die Philosophie der Freiheit Kants* (n. 37), at 136; see also N. Teifke, *Das Prinzip Menschenwürde* (n. 4), at 149.

49 O. Sensen, *Kant on Human Dignity* (n. 25), at 202.

50 See O. Sensen, *Kant on Human Dignity* (n. 25), at 200 ff.

51 I. Kant, ‘The Metaphysics of Morals’ (n. 22), at 462 – marked by the author

52 It follows that, according to Kant’s understanding, “what is right comes before what is good” (see O. Sensen, ‘Kants Begriff der Menschenwürde’ [n. 8], at 231).