Should We Take the "Human" Out of Human Rights? Human Dignity in a Corporate World

*Cristina Lafont**

In recent years philosophical discussions of human rights have focused on the question of whether "humanist" and "political" conceptions of human rights are genuinely incompatible or whether some kind of synthesis between them may be possible.[1] Defenders of the humanist conception take human rights to be those rights that we have simply by virtue of being human, and try to ground them on some authoritative conception of human nature or human good. By contrast, defenders of the political conception take contemporary human rights practice as providing an authoritative understanding of human rights; by understanding the purposes of the contemporary practice, one can grasp the concept of human rights that is operative within it.

Many participants in this ongoing debate argue that the supposed incompatibility between these approaches is, in fact, not as dramatic as it may seem, and they identify different ways of combining the most fruitful aspects of both.[2] However, defenses of this compatibility have been largely one-sided, showing that human rights theories that incorporate the central tenets of humanist approaches can also accommodate the core claims of political approaches. But this does not yet answer the question of whether theories using the political approach can incorporate the core claims of humanist approaches without sacrificing their distinctive methodological perspective. Prominent defenders of the political approach answer this question negatively.[3] I think they are wrong. In my view, an account of human rights that disregards the humanist core of human rights practice cannot properly identify

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its ultimate goal and, as a consequence, lacks the critical distance necessary to provide normative guidance in light of conflicts that can arise within that practice.

If this is indeed the case, then there is a tension between two claims associated with the political approach: on the one hand, the *methodological* claim that a plausible account of human rights must take contemporary human rights practice as authoritative and, on the other, the *substantive* claim that human rights are not rights that we have simply by virtue of being human, but rights that we have by virtue of being subject to political authority. Precisely to the extent that the political approach aims to take contemporary human rights practice seriously, it must provide a plausible account of the practice's humanist core instead of simply rejecting it, as defenders of the political approach do.

In what follows, I defend this claim in four steps. First, I offer a brief overview of the debate between humanist and political approaches in order to show that some of the key functions of the humanist core of human rights practice, most notably those of the concept of human dignity, have not been properly identified. In the next step I briefly indicate what these key functions are, and illustrate some of the problematic implications of leaving the concept of human dignity out of our account of human rights practice. In particular, I focus on the recent extension of legal human rights to corporations. I analyze the negative effects that the distinctive functions of human rights norms—such as limiting state sovereignty, prompting transnational remedial action, and so on—can have upon the human rights of natural persons once corporations are recognized as legal persons bearing human rights. If this legal development continues, human rights practice may be facing two incommensurable paths. To the extent that the political approach endows actual practice with the authority to determine what human rights are, its defenders may find themselves at a crossroads. On the one hand, defenders of the political approach can treat those aspects of the practice that seem to be taking the human out of human rights as authoritative and redefine the practice's ultimate aim as the protection of the urgent interests of all legal subjects, corporations included, no matter the consequences for the fundamental interests of human beings. On the other, they can insist that the protection of human dignity is the ultimate goal of human rights practice, and provide critical guidance concerning legal and institutional mechanisms that may allow the protection of the fundamental interests of human beings to be properly prioritized over those of corporations. I conclude by defending this second alternative, briefly exploring the normative resources that the jurisprudence of dignity may have to offer.

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The Debate between Humanist and Political Conceptions of Human Rights

A central question within the debate between humanist and political conceptions of human rights is whether the humanist perspective has anything essential to contribute to illuminating or guiding human rights practice. Many defenders of the political conception are skeptical. In their view, the humanist perspective only adds metaphysical baggage that is at best useless and at worst a threat to a practice that aspires to avoid both unnecessary disagreements among different cultures and charges of parochialism that would undermine its key political purposes. The latter concerns underlie John Rawls's project in *The Law of Peoples* of offering an account of human rights without any recourse to the idea that these rights are grounded in some intrinsic moral worth that all human beings possess simply by virtue of being human.[4] This leads him to exclude any reference to human dignity; he argues that references to human dignity as they appear, for instance, in Article 1 of the Universal Declaration of Human Rights—that "all human beings are born free and equal in dignity and rights"—express "liberal aspirations" that are too parochial and contentious to form a properly political basis for a Law of Peoples.

Similarly, in *The Idea of Human Rights*, Charles Beitz rejects attempts to conceive of human rights as rights possessed by all human beings "as such" or "solely by virtue of their humanity" as both useless and unnecessarily contentious. According to him, "human rights are institutional protections against standard threats to urgent interests."[5] The *identity* of these rights, however, does not derive from any grounding value such as "humanity" or "human dignity" but from "their special role as norms of global political life."[6] In contrast to humanist approaches that interpret human rights as an attempt to embody an independently intelligible moral idea (such as human dignity, equal moral worth, and so on) in international law and practice, the political approach infers the nature of human rights from the purposes and modes of action manifested in the ongoing human rights practice itself. In so doing, this approach gives actual practice authority over the answer to the question of what human rights are. From this practical perspective, Beitz concludes that human rights are rights that regulate the behavior of states toward their members and whose infringement is a cause for international concern, which may trigger transnational protective and remedial action.[7]

In addition, Beitz questions whether the *foundationalist* strategy of deriving human rights from a single notion or value (such as human dignity, personhood,

and so on) can be fruitful for generating content, that is, for providing a list of human rights proper. Such accounts are "likely either to be too abstract to settle disagreement about the contents of human rights doctrine or arbitrarily to constrain the doctrine's substantive scope."[8] Defenders of humanist approaches contend that without a robust philosophical conception of their grounds, political approaches lack the resources necessary to determine the substantive content of human rights.[9] Beitz rejects this contention by questioning the ability of humanist approaches to actually generate anything resembling the content of human rights found in current human rights doctrine.[10]

Thus framed, the debate assumes that the concept of human dignity can make a contribution to human rights practice only by *providing a substantive ground sufficient to generate the content of human rights norms*, that is, to generate the list of human rights proper. However, it is not at all clear why human dignity should play such a function. In fact, if foundationalism is as foreign to human rights doctrine as defenders of the political approach contend it is, then it seems all the more unlikely that human dignity's prominent presence within the practice of human rights could be explained by the foundationalist assumptions of humanist approaches. A different explanation of its presence and function seems to be required. However, two separate questions need to be distinguished here. One is whether the *concept* of human dignity is necessary for a plausible account of human rights practice and, if so, for what purposes. A different question is whether a single substantive *conception* of the concept (for example, a theory of human nature or personhood) is also necessary for such an account and, if so, for what purposes.

With respect to the latter question, defenders of the political approach may be correct to doubt that a philosophical conception of human dignity could be articulated that would be able to generate a list of rights sufficiently resembling actual practice. They may also be right in fearing that, even if such a conception could be articulated, it would be too contentious and constraining to serve as a public basis for a global political practice. However, even if these criticisms were true, this says nothing about the prior question, namely, whether the concept of human dignity itself (and not a specific conception of it) is needed in a proper account of human rights practice and, if so, for what purposes.

Christopher McCrudden offers an interesting answer to this question.[11] He argues that the inclusion of human dignity in human rights documents functions as a placeholder that helps to overcome disagreements among members of societies

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and cultures with different conceptions of the concept. He illustrates this function from a political and a judicial perspective. Commenting on the historical period that gave rise to the Universal Declaration of Human Rights, he indicates that

> the concept of human dignity played a pivotal political role in enabling different cultures with different conceptions of the state, differing views on the basis of human rights, and differing ethical and moral viewpoints, to put aside these deep ideological differences and agree instead to focus on the specific practices of human rights abuses that should be prohibited. . . . Dignity helped achieve this by enabling all to agree, at a political level, that human rights are founded on dignity and then to move on.[12]

From a judicial perspective, McCrudden claims that the concept of human dignity currently plays a similar role: "Its role, in practice, is to enable local context to be incorporated in the interpretation of human rights norms . . . . Dignity, in the judicial context, not only permits the incorporation of local contingencies, it requires it. Dignity remains as a placeholder, but in the judicial context it is a placeholder that allows each jurisdiction to develop its own practice of human rights."[13]

Based on this analysis there is no reason to assume that the role that the concept of human dignity plays in human rights practice is the same that a substantive conception of the concept might be expected to play, namely, offering a philosophical foundation robust enough to generate the content of human rights. In fact, Beitz's observation that the inclusion of the concept of human dignity in the core human rights documents is not based or justified on any further considerations about human nature or the human good, but rather that "it is simply asserted as a fundamental value in its own right,"[14] suggests that its inclusion serves purposes that may not require the additional endorsement of a shared substantive conception of human nature, personhood, and so on.

The analysis so far suggests that rejecting the foundationalism of "humanist" approaches while acknowledging that a theory of human rights must take contemporary human rights practice seriously is perfectly compatible with accepting the view of human rights as those rights that we have by virtue of being human, not by virtue of being subject to political authority, as defenders of the "political" approach propose. Indeed, precisely because the practical approach takes contemporary human rights practice seriously, it should provide some plausible explanation of the sense and justification of the practice's deeply embedded idea that human rights derive from the inherent dignity of the human person, and not from membership in some state or group.

What Functions Does the Concept of Human Dignity Play in Human Rights Practice?

Strangely enough, the debate between political and humanist approaches hardly ever mentions the most obvious purpose served by the claim that human rights "derive from the inherent dignity of the human person"—a claim repeatedly stated in most human rights documents.[15] Whatever else it does, this claim serves to identify the ultimate bearers of human rights, namely, *all* and *only* human persons. Since this is so obvious, the tacit assumption might be that defenders of the political approach can justify the demarcation of human rights bearers (that is, the ascription of human rights to all and only human beings) without referencing any concepts such as human dignity, intrinsic moral worth of the human person, and so on. However, as I will show in what follows, it is not clear how this can be done.

References to the inherent dignity of all human beings are prominently included in most human rights documents, and they seem to fulfill at least three important functions. First, as just mentioned, these references help *identify* the bearers of the rights in question. Indeed, without such an indication (typically in the preambles), it would be impossible to convey whether (1) they apply to all human beings or only to some, (2) they apply only to human beings or to other subjects as well, or (3) they apply to all human beings equally (or only to different degrees depending on differences in social or political positions, achievements, and so on). Second, the appeal to human dignity serves to *justify* the demarcation of rights bearers. It makes it clear why this demarcation is not simply an arbitrary stipulation, but instead grounded in something that all and only those bearers have in common, which also has high moral significance.[16] Third, in virtue of this last characteristic, the appeal to human dignity serves to identify *the ultimate aim* of human rights practice, namely, protecting the inherent dignity of all human beings and, in so doing, to convey *why* having such a practice matters. As a consequence of fulfilling all these important functions, the concept of human dignity imposes *significant constraints* upon generating the proper list of rights,[17] and it can offer some guidance for establishing *priorities* in cases of conflicts between rights. The question remains whether a theory of human rights can account for these key features without recourse to notions such as human dignity, the intrinsic moral worth of human persons, and so on.[18]

Following Rawls, and in contrast to humanist approaches, Beitz claims that human rights "protect some urgent interests against certain threats,"[19] but that

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"the distinctive identity and the authority of those rights is not to be found in an underlying value or interest such as human dignity or personhood."[20] To the contrary,

> We understand international human rights better by considering them *sui generis* rather than as instantiations of one or another received idea. Human rights are the constitutive norms of a global practice whose aim is to protect individuals against threats to their most important interests arising from the acts and omissions of their governments (including failures to regulate the conduct of other agents). The practice seeks to achieve this aim by bringing these aspects of the domestic conduct of governments within the scope of legitimate international concern.[21]

Once the identity of human rights is unmoored from any underlying value such as human dignity or personhood, the basis for drawing a distinction between natural and legal persons seems to dissolve. If human rights are not those rights that one has by virtue of being human, but rather those sui generis rights that one has by virtue of being subject to state authority, then it seems that human rights should include *everyone* within a state's jurisdiction who enjoys legal personality rights (that is, has the ability to have rights and obligations) and whose urgent or most important interests can be threatened by the actions and omissions of their government, thereby triggering international concern. Any restriction to the contrary seems rather arbitrary and hard to justify.[22] This difficulty is particularly acute in light of the fact that the political conception rejects any appeal to underlying values such as human dignity or personhood that could otherwise be used to draw a distinction between the sorts of interests of different members.

If, as Beitz contends, the only criteria of evaluation admitted by the political conception are the "urgency" and "importance" of the members' interests threatened by the actions and omissions of their governments, then it should be clear that the existence of corporations and similar entities can be directly threatened by governments. Since no interest can be more "urgent" or "important" than a member's interest in survival, it seems that the political conception can offer no plausible justification for disregarding threats to the existence of corporations.[23]

A perfect example of the latter is the high-profile *Yukos* case that was brought to the European Court of Human Rights (ECtHR). The previously state-owned Yukos Oil Company accumulated tremendous wealth under the leadership of CEO Mikhail Khodorkovsky, who became the wealthiest man in Russia and a politically influential figure. In 2003, Khodorkovsky was arrested and the Russian

government expropriated the assets of Yukos on the allegation of unpaid taxes. The company was forcibly broken up and its shares were sold to other companies; it was declared bankrupt in 2006 and liquidated a year later. Yukos ceased to exist and its most lucrative assets ended up with the state-run oil company Rosneft. The case attracted widespread international concern because it was perceived as politically motivated and exhibiting a blatant disregard for due process. In 2004, Yukos lodged an application with the European Court of Human Rights under Article 34 of the Convention. In 2011 the Court ruled that the Russian Federation had violated several human rights of the by then defunct company.

Several aspects of this case are relevant in the present context. First, the Court identified the company itself as possessing human rights. McCrudden explains this point in detail:

> The European Court of Human Rights held recently that the Russia [*sic*] state violated the human rights of the Yukos Oil Company, specifically its right to a fair trial and its right to protection of property. Notice, first, that the Court did not decide only that the rights of the owners of the company had been violated, nor did the Court decide that the rights of the company should be seen as the aggregation of the individual rights of (human) shareholders, nor did the Court decide that Russia was under a legal duty for reasons other than because Yukos had a right. The Court held, rather, that Russia was under a duty because the *company* itself was the possessor of *human* rights. Nor is this example exceptional. A significant proportion of claims under the ECHR is now made up of challenges by corporations to alleged violations of their human rights.[24]

The *Yukos* case is also particularly interesting for this discussion because it perfectly matches the political approach's description of the *distinctive functions* fulfilled by international human rights norms in the global political order. The role of international human rights as norms that regulate state behavior toward those within their jurisdiction, that limit their sovereignty, and that potentially trigger transnational protective and remedial action seems to perfectly describe what transpired in this case, wherein state institutions not only failed to protect a legal person's most fundamental rights but were also the perpetrators of the violations in question.[25]

Two legal scholars who favor the extension of human rights to corporations, Winfried van den Muijsenbergh and Sam Rezai, sum up the significance of the *Yukos* case as follows:

> The interesting feature of this high profile case entails its potent and compelling demonstration of the importance of the mere availability of the [European Court of Human

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> Rights], as an international independent judicial venue, for a brutalized corporation, which simply had nowhere else to go. . . . Since Yukos was a Russian corporation (and thus a Russian national), it did not have a (home) State to take up its cause in proceedings against the Russian Federation before the International Court of Justice. . . . Yukos furthermore could not bring a claim before an international arbitral tribunal under a bilateral investment treaty. . . . Since Yukos was a Russian corporation (and not a national of any other State), its investment in the Russian Federation could not be governed by any bilateral investment treaty concluded by the Russian Federation with another State. Yukos was thus essentially cut off from all international channels of judicial review because its case simply concerned an internal Russian matter. This is when the European Convention on Human Rights revealed its great significance, namely its establishment of *an international court which (also) adjudicates thoroughly national cases when the values in dispute are of such a fundamental nature that their protection transcends the national legal orders and concerns the international community as a whole.*[26]

As with the *Yukos* case, recent developments in international human rights practice demonstrate institutional support for an inclusionary view.[27] As McCrudden indicates, "human rights in the legal context, at both the national and the international level, protect 'legal' persons as well as 'human' persons."[28] The clearest example of this trend is the European Convention on Human Rights (ECHR).[29] Its first article states that all member states of the Council of Europe shall secure the Convention's rights and freedoms to *everyone* within their jurisdiction. In contrast to other human rights documents, the ECHR does not limit the enumerated rights to natural persons. Article 34, which contains the procedural provision on standing, names "any person, nongovernmental organization or group of individuals" as a potential victim capable of bringing a claim.[30] Moreover, legal persons are explicitly included in the text concerning one of the enumerated rights, the right to property.[31]

In fact, the number of human rights that the European Court has deemed applicable to corporations has steadily grown in recent years due to the high volume of cases they file. The gradual case-by-case extension of human rights to corporations includes rights to privacy,[32] property,[33] due process guarantees,[34] protection against discrimination,[35] freedom of assembly and association,[36] freedom of movement,[37] freedom of religion,[38] freedom of speech,[39] and even the right to compensation for nonpecuniary damages.[40] This expansion has provoked a robust debate among legal scholars, in which opinions are sharply divided between those who reject the inclusion of corporations among human rights bearers on normative grounds[41] and those who offer normative reasons in favor of their inclusion. The latter often bolster their arguments with the observation that the internal

dynamics of the legal system are likely to work in favor of expansion.[42] As van den Muijsenbergh and Rezai argue with respect to the ECtHR,

> The Court's case law already concludes that corporations (quite like human beings) can organize themselves, that they are able to express themselves, that they can enjoy their privacy and that they can even suffer non-pecuniary loss. It may not be too far-fetched to assume that the Court's dynamic (snowballing) humanization of corporations, combined with possible future corporate demands, will in due time allow corporations to also enjoy a right to life. . . . Though the Court currently does not seem willing to expand the right to life to corporations . . . it will be interesting to see whether the arguments not to offer this expansion can withstand scrutiny in the face of the inherent dynamics of the Court's own case law.[43]

The European human rights system is by far the most juridically mature of human rights regimes, with an established institutional system in place for the enforcement of its norms, and an authoritative and growing body of human rights jurisprudence generated by the European Court that serves as an inspiration and model for other human rights regimes.[44] Thus, it is not difficult to imagine that this dynamic may soon extend beyond the confines of the European system and decisively shape the future of international human rights law.[45]

If human rights practice itself is beginning to take the human out of human rights in some areas, this would seem to vindicate the political approach to human rights. After all, the political approach contends that theory answers to practice, and that a theory of human rights should therefore treat the practice it aims to explain as authoritative. Moreover, since no one denies that all legal subjects have rights and obligations, what difference does it make whether the rights in question are called "human rights" or just, say, "transnational legal claim rights"?[46] Is there a real distinction behind the difference in terminology? And, in particular, is it a distinction that followers of the political approach must take into account, given their own assumptions? In order to address this question, we need to take a closer look at the distinctive functions of international human rights norms so that we can assess the potential effects of extending *human* rights to corporations.

The Functions of Human Rights Norms in Light of the "Human Rights" of Corporations

Recall that the political approach aims to derive the *identity* of human rights from their distinctive *functions* within human rights practice, and that these functions

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are in turn inferred from the overall *aims* of that practice. As a result, defenders of the political approach would have no reason to reject the inclusion of corporations among the entities that bear the sui generis rights referred to as "international human rights" unless it can be shown that, when attributed to corporate bearers, the distinctive functions of human rights norms may undermine the practice's own aims. However, in this context it would beg the question to assume that the ultimate aim of human rights practice is to protect the equal dignity of all human beings. So let us simply assume that at least one of the aims of human rights practice is to protect the human rights of natural persons and, from that perspective, look at the potential effects that the distinctive functions of human rights norms might have upon that aim once they are also used to protect the urgent interests of corporations.

As defenders of the political approach are keen to highlight, international human rights norms serve distinctive functions, such as limiting state sovereignty, triggering international concern, or prompting protective and remedial transnational action. Focusing on the first of these functions, there are different senses and ways in which international human rights norms can be said to limit state sovereignty.[47] For present purposes, however, two features of international human rights norms seem especially significant. A key structural difference between human rights treaties and other interstate agreements is that their binding force does not rest on contractual reciprocity. Interstate agreements typically establish rights and obligations among member states that are based on mutual benefit and that rely on reciprocal compliance. By contrast, the primary function of human rights treaties is not to establish rights and obligations between states. Rather, states assume obligations toward all individuals within their jurisdiction, regardless of whether they are the state's own nationals, nationals of other states, or stateless persons. Human rights norms have *erga omnes* application and give rise to universal entitlements, not reciprocal ones. As Turkuler Isiksel puts it,

> The normative force of human rights law does not rest exclusively or even primarily on the reciprocal performance of duties; rather, it rests on alternative considerations such as the status of those norms as derived from universally affirmed moral principles, or each state's act of declaratory self-binding as witnessed by the international community.[48]

A consequence of the self-binding recognition of internationally valid principles is that, in contrast to other types of interstate treaties, states cannot rescind their

human rights obligations simply by withdrawing their consent from the treaty that established them. Human rights obligations limit the state's discretion to terminate or renegotiate the terms of the treaties and are understood to have an *irreversible character*.[49] Another important way in which international human rights obligations limit state sovereignty is through state party acceptance of transnational jurisdiction in cases of violations. This can lead to transnational protective or remedial actions that range from the imposition of international economic sanctions (or even military intervention), to juridically imposed remedies (as in the case of regional human rights regimes like the ECtHR), to diplomatic actions, or to "naming and shaming" by members of the international community when no effective enforcement mechanisms exist.

Now, these different mechanisms for limiting state sovereignty have the explicit purpose of *reinforcing* the ability of states to discharge their primary responsibility for human rights protections. However, if the fundamental interests of corporations are rendered equivalent to those of natural persons, there is no longer any reason to assume that a corporation's ability to use legal human rights instruments that limit state sovereignty would reinforce rather than undermine a state's ability to protect the human rights of natural persons within their jurisdiction. To begin with, the playing field is far from even: corporations have vastly superior resources compared with individual natural persons; they have greater access to the international rule of law; and greater access to effective international remedies.[50] However, none of the above advantages would be such a threat were it not for the crucial differences between the fundamental interests of human beings and those of corporations (whose survival only depends upon their ability to yield profits for their shareholders).

Critics of the extension of human rights to corporations focus their arguments on examples taken from current international economic law and, in particular, from the international investment regime that includes bilateral investment treaties (BITs) and regional free trade agreements. Whereas bilateral investment treaties between states are based on reciprocity, and whereas state parties are free to amend, restrict, or terminate their previous treaty commitments, this ability would be severely restricted if the interests of corporations as third-party beneficiaries were protected under international human rights law. The policy commitments that states have made to one another would become human rights owed to the corporations themselves.[51] This would undermine the ability of states to modify these commitments, even if this were necessary to implement domestic policies

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that protect the human rights of natural persons within a state's jurisdiction. Since it is in the interests of corporations to constrain state regulatory capacity (which can threaten their profits), the way in which human rights norms function to limit state sovereignty gives corporations the perfect tool to protect their interests, regardless of the effects that this may have on the human rights of natural persons. The ability of foreign investors to challenge states' regulations in international tribunals can seriously undermine the capacity of governments to modify or improve their current levels of human rights protections over time as information changes (for example, about health risks, environmental threats, and so on) or as their willingness to do so increases as a result of citizens' legitimate exercise of their political rights (for example, changing the political party in power).

A well-publicized example of this chilling effect is the recent multibillion dollar Philip Morris lawsuit against Uruguay. The company alleged that Uruguay's antismoking legislation devalues its cigarette trademarks and investments in the country. It is therefore suing Uruguay for compensation under the BIT between Switzerland and Uruguay at the International Centre for Settlement of Investment Disputes.[52] This is by no means an isolated case. Similar arbitration cases that have threatened states' abilities to protect human rights within their jurisdictions include legal challenges to South Africa's attempt to enact domestic affirmative action policies redressing the effects of past racial discrimination[53] and to Germany's recent parliamentary decision to phase out nuclear power in the wake of the Fukushima disaster.[54] Even more worrisome cases concern BITs that allow foreign investors to take over the function of supplying basic commodities, such as water or gas, to large sections of the population. Such takeovers can create conflicts between investors' treaty-rights and the basic human rights of vulnerable populations.[55]

Still, since these conflicts are currently framed as being between the treaty-based rights of corporations and the human rights of natural persons, state parties to BIT agreements can in principle avoid them by modifying or restricting specific provisions. This is something that, for example, South Africa has done in order to ensure that future BITs expressly permit affirmative action policies needed to redress the legacy of racial discrimination.[56] However, if the treaty-based economic rights of corporations were elevated to the status of human rights, then they would be equated with universal entitlements currently guaranteed to natural persons. As a consequence, their scope and level of protection would no longer be seen as derived from and dependent upon state parties' revocable consent and

thus subject to their discretion. In this context, the distinctive function that human rights play in limiting state sovereignty would undermine rather than reinforce the ability of states to exercise their primary responsibility to protect the human rights of natural persons within their jurisdiction. If this legal development were to progress along such a path in the future, human rights practice could face a conflict between two very different and potentially incompatible aims: either the protection of the human rights of all human beings or the protection of the urgent interests of all legal subjects, corporations included.

I do not mean to suggest that international human rights practice has already reached such a clash of incompatible aims, nor that it is clear which of these two aims best describes the future of international human rights practice. The purpose of presenting this hypothetical scenario is to help us assess the resources that a theory of human rights that incorporates the concept of human dignity has at its disposal for offering practical guidance, and which a theory that excludes the practice's humanist core lacks. If we focus on the "jurisprudence of dignity" as a distinctive category within human rights jurisprudence in general, we can see how it contains normative resources that can offer support to the practice's aim of protecting the human rights of all natural persons, even in the face of a pervasive extension of legal human rights to corporations.

Jurisprudence of Dignity: The Last Resort?

There is a certain tension between the political approach's aim of explaining contemporary human rights practice and its decision to discard the humanist core that so ubiquitously and prominently figures in that practice. A possible explanation for this mismatch is offered by McCrudden, who argues that it is part of a broader and even more puzzling oversight, namely, the failure of defenders of the political approach to engage with human rights jurisprudence despite its key role in human rights practice.[57] Had they taken the juridical component of legal human rights practice seriously, McCrudden argues, it would have been much harder for them to ignore how human dignity plays a central organizing role. It is certainly plausible to claim that the inclusion of human dignity in the preambles of human rights documents primarily served a rhetorical role insofar as it papered over deep disagreements in order to enable a global political consensus. However, once judges began to engage in judicial interpretation of the rights in question, they had to account for the claim that human rights derive from the

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inherent dignity of the human person within the reasoned justifications backing their decisions.[58] In other words, the concept of dignity has been put to use precisely in a context wherein conflicts and disagreements are *resolved* on the basis of reasoned arguments. From this perspective, the development of human rights adjudication offers the perfect context for an analysis of the functions of human dignity within human rights practice.

According to McCrudden, the concept of human dignity contains at least three elements, which constitute what he calls its "minimum core": that each human being possesses an intrinsic worth, simply by virtue of being human; that some forms of conduct are inconsistent with respect for this intrinsic worth; and that the state exists for the sake of the individual human being, and not vice versa.[59] Beyond this minimum core there is disagreement on what such intrinsic worth consists of, the sorts of treatment that are inconsistent with it, and their implications for the proper understanding of the role of the state vis-à-vis individuals. Different conceptions of human dignity give different and even mutually incompatible answers to these questions. However, recognizing the indeterminacy of the concept should not lead us to underestimate its importance. McCrudden distinguishes three distinctive *institutional* functions that human dignity fulfills to help address certain difficulties that arise during human rights adjudication. We can call them the *prioritizing, contextualizing*, and *extending* functions. For present purposes, the first function is the most significant.[60]

The aim of protecting human dignity justifies the *prioritization* of particular rights in cases involving conflict between different rights or between rights and other values or societal goals—"collision cases." Interpreting human rights through the lens of human dignity has an impact upon how the analysis of such conflicts is structured. First, it justifies the application of *strict scrutiny* when assessing acceptable restrictions upon any right that is understood to engage human dignity. Second, it justifies the attribution of *considerable* (even, in some cases, *overwhelming*) *weight* to the right in question. By contrast, if dignity is not a factor, then less weight can be attributed to the interest protected by the right in question and stronger restrictions might be considered justified.

It is important to notice that in collision cases the prioritizing effect of human dignity does not mean that a fixed priority is established once and for all, such that one right always trumps an inherently less weighty right. This could hardly be the case. If what singles rights out as human rights is that they are necessary for protecting human dignity, then that means that all of them can, in principle, affect

human dignity or, to use Dieter Grimm's expression, all of them have a *dignity core*.[61] Grimm explains this idea in the context of interpreting the role of human dignity in proportionality analysis of constitutional rights: "Every right has a dignity core and this can become relevant when the principle of proportionality is applied. The closer the restriction of a right comes to its dignity core the higher the weight of the right in the balancing process."[62] In other words, when there is a collision between rights in a specific situation, the question to be determined is which of them more directly touches upon human dignity and thereby justifies stricter protection. This remains the case even if human dignity is understood to be at stake on both sides of the conflict. Even in such cases, human dignity plays a key role in justifying the application of strict scrutiny to the conflict, and in tipping the scales in favor of the right understood to bear more strongly on its protection in that particular case. Needless to say, in cases in which only one of the rights in the conflict is considered to engage human dignity, its prioritizing function is all the more obvious.

In our context, this last type of case is the most relevant. The extension of human rights to corporations by no means requires that we ascribe human dignity to them. Even from a purely legal perspective, these are two separate steps subject to separate dynamics. Yet even if legal dynamics were to lead to the extension of the concept of dignity to corporations in specific cases, the jurisprudence of dignity still seems to contain the conceptual resources for properly prioritizing the protection of the human rights of natural persons over those of corporations.[63] If we can establish the correct priorities in collision cases involving only natural persons—by distinguishing the kinds of interests at stake and their differential impacts on human dignity—then nothing prevents us from doing the same for collision cases involving both natural and legal persons. As long as corporations lack the intrinsic worth of human persons, the prioritizing function of the "thin" concept of human dignity should still enable human rights practice to defend its moral aims against a hostile takeover by corporate interests.[64] By contrast, an approach to human rights that rejects the humanist core expressed by the concept of human dignity would seem to lack any conceptual resources that could fulfill the *prioritizing* function needed to protect the human rights of all natural persons.

NOTES

[1] Different authors refer to these methodological approaches with different names. What I am calling "humanist" approaches are also referred to as "traditional," "orthodox," or "natural-law" approaches and are usually identified with the work of authors such as Alan Gewirth, James Griffin, John

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Tasioulas, etc. Political approaches are also called "practical" and are defended by authors such as John Rawls, Charles Beitz, Joseph Raz, etc.

[2] E.g., Pablo Gilabert, "Humanist and Political Perspectives on Human Rights," *Political Theory* 39, no. 4 (2011), pp. 439–67; S. Matthew Liao and Adam Etinson, "Political and Naturalistic Conceptions of Human Rights: A False Polemic?" *Journal of Moral Philosophy* 9, no. 3 (2012), pp. 327–52; Erasmus Mayr, "The Political and Moral Conceptions of Human Rights—A Mixed Account," in Gerhard Ernst and Jan-Christoph Heilinger, eds., *The Philosophy of Human Rights* (Berlin, Germany: De Gruyter, 2011), pp. 73–106. There are considerable differences between the accounts given by each of these authors, and the distinction between these two approaches is by no means exhaustive. For examples of approaches that do not fit well under either description, see Jürgen Habermas, *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1999); Seyla Benhabib in *Dignity in Adversity: Human Rights in Troubled Times* (Cambridge, U.K.: Polity Press, 2011); and Allen Buchanan in *The Heart of Human Rights* (New York: Oxford University Press, 2013).

[3] E.g., John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), and Charles Beitz, *The Idea of Human Rights* (New York: Oxford University Press, 2009).

[4] This aim is crisply expressed in Allen Buchanan's characterization of the Rawlsian approach as one that is "taking the human out of human rights" (in *Human Rights, Legitimacy, and the Use of Force*, New York: Oxford University Press, 2010, pp. 31–49). It is also what motivates the title of my essay. For a critique of the way in which the political approach severs the internal connection between human rights and human dignity, see Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights," Metaphilosophy 41, no. 4 (2010), pp. 464–80, esp. p. 478ff.

[5] Beitz, *The Idea of Human Rights*, p. 111.

[6] Ibid., p. 128.

[7] Ibid., p. 65.

[8] Ibid., p. 138.

[9] See, e.g., Liao and Etinson, "Political and Naturalistic Conceptions of Human Rights."

[10] See Charles Beitz, "Human Dignity in the Theory of Human Rights: Nothing But a Phrase?" *Philosophy & Public Affairs* 41, no. 3 (2013), pp. 276–77.

[11] See Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *EJIL* 19, no. 4 (2008), pp. 655–724; and Christopher McCrudden, "Jurisprudence of Dignity," available at politicaltheory.yale.edu/conference-justification-beyond-state.

[12] McCrudden, "Jurisprudence of Dignity," p. 4.

[13] Ibid., p. 13. Notice that this interpretation of the function of human dignity in human rights practice is more congenial with a dynamic view of human rights than with a foundationalist view that assumes that the content of human rights can be derived once and for all from a philosophical theory of human nature or personhood.

[14] Beitz, *The Idea of Human Rights*, p. 20.

[15] The explicit link between human rights and human dignity can be found in a majority of human rights documents, most notably in the preambles of the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Multiple references to human dignity are also present in the American Convention on Human Rights (1969), the Helsinki Final Act (1975), the African Charter of Human and People's Rights (1986), the Vienna Declaration (1993), the Arab Charter on Human Rights (1994), etc. In addition, in 1986 the UN General Assembly passed a resolution indicating that new human rights instruments should "derive from the inherent dignity and worth of the human person" (Resolution 41/120, December 1986).

[16] As David Luban puts it, human dignity implies that "every human being has high status and rank." ("Human Rights Pragmatism and Human Dignity," in Rowan Cruft, S. Matthew Liao, and Massimo Renzo, eds., *Philosophical Foundations of Human Rights*, New York: Oxford University Press, 2015, p. 277.) Consequently, the inclusion of the concept of "equal human dignity in human rights instruments is a commitment to equalizing up" (ibid.). On the internal connection between the concept of dignity and the idea of high rank, see Jeremy Waldron, *Dignity, Rank, & Rights* (New York: Oxford University Press, 2012), pp. 34, 47ff.

[17] To claim that the concept imposes *significant* constraints does not mean that it imposes *sufficient* constraints upon generating the proper list of rights. It is indeed plausible that the latter function could only be fulfilled by a substantive *conception* of the concept of human dignity. However, this does not mean that the *concept itself* is empty. There are at least three types of constraints internally related to the "thin" core meaning of the concept: (1) constraints related to the *moral significance* of the rights in question, namely, that they protect those conditions that are essential for a life with human dignity. However sketchy this claim may be, it is certainly not empty. This becomes clear if we contrast it

with alternatives offered by theories of human rights that appeal instead to concepts such as "urgent" interests or conditions necessary for a "minimally decent" life—concepts that cannot be found in any of the actual human rights documents. In contrast to notions such as "urgency" or "minimal decency," the notion of human dignity is patently more demanding (as are the human rights actually enumerated in international human rights documents). This is due to two other types of constraints internally related to its core meaning, namely, (2) *equal status* (e.g., all bearers have the same set of rights, with the same scope and weight, no possibility of discrimination in its application, and requiring equally effective remedies, etc.), and (3) *high status* (e.g., in cases of conflict human dignity may *trump* other considerations and its protection requires quite *demanding* conditions). On the last two aspects of the notion of dignity see the prior note. I am thankful to an anonymous reviewer for pressing the need to clarify the limited functions of the concept of human dignity in contrast to those of a full-blown conception.

[18] In general, I refer to human dignity because it is the concept that is used in human rights documents to express the humanist core of human rights *practice*. However, similar notions such as "common humanity," "equal moral status," etc. could serve the same function in a *theory* of human rights. My critique targets human rights theories that purport to eliminate *all* such humanist notions and not just the notion of human dignity in particular. For a defense of the claim that the notion of "equal moral status" is better suited than the notion of "dignity" for a theory of human rights, see, e.g., Samantha Besson, "The Egalitarian Dimension of Human Rights," *Archiv für Rechts- und Sozialphilosophie Beihefte* 136 (2013), pp. 19–52.

[19] Beitz, *The Idea of Human Rights*, p. 111.

[20] Ibid., p. 128.

[21] Ibid., p. 197.

[22] I see two options here but both seem problematic. On the one hand, in order to provide a nonarbitrary justification for ascribing human rights only to human beings (and not to other legal subjects, other animals, etc.) defenders of the political conception would need to appeal to something that only human beings have in common. This line of argument, however, would seem to support rather than undermine the view that human beings have human rights by virtue of being human. On the other hand, defenders of the political conception could stipulate that, per definition, only human beings have human rights. However, including such a stipulation in their theories would seem to directly conflict with their methodological contention that a theory of human rights ought to give authority to human rights practice in determining what human rights are. The ascription of legal human rights to corporations within current human rights practice would seem in direct conflict with such an arbitrary stipulation.

[23] In this article I focus on business corporations, but it should be clear that similar tensions might arise from the recognition of other types of collective entities as human rights bearers (e.g., indigenous peoples, families, churches, unions). An analysis of such additional cases is beyond the scope of this article. However, it is important to note that the difficulties I am focusing on here do not arise merely from the fact that human rights *practice* may recognize collective entities as beneficiaries of human rights. So long as human rights practice accepts that human rights derive from the dignity of the human person, establishing priorities on that normative basis in order to resolve potential conflicts between different types of rights and of rights bearers seems in principle possible. For an example, see James Nickel, *Making Sense of Human Rights*, 2nd edition (Oxford: Blackwell Publishing, 2007), pp. 154–68. The difficulties I discuss here arise specifically for a *theory* of human rights that aims to eliminate any reference to the humanist core of human rights practice (i.e., any appeal to underlying values such as human dignity, equal moral worth of the human person, etc.). I am thankful to an anonymous reviewer for pressing the need to clarify this point.

[24] McCrudden, "Jurisprudence of Dignity," p. 19. For an in-depth analysis, see Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2006).

[25] In fact, it should come as no surprise that an approach explicitly refraining from humanist assumptions can offer little assurance that the resulting theory will end up underwriting them. Beitz explicitly cautions against treating humanist inferences about the content and basis of international human rights as analytic (see Beitz, *The Idea of Human Rights*, p. 72). If so, it may also be a mistake to regard the claim that only human beings have human rights as analytic. Instead, the authority for determining what human rights are should be left to the practice itself.

[26] Winfried van den Muijsenbergh and Sam Rezai, "Corporations and the European Convention on Human Rights," *Global Business & Development Law Journal* 25, no. 1 (2012), pp. 62, 67–68; my italics.

[27] It is important to note that the political conception may not only be over-inclusive (insofar as it may include all legal subjects as human rights bearers). More problematically, it may also be under-inclusive.

If human rights are those rights that one has by virtue of being subject to state authority, it would seem that stateless persons who find themselves in international waters do not have human rights (e.g., Palestinians crossing the Mediterranean Sea to flee from Syria or Rohingya people fleeing Myanmar by boat).

[28] McCrudden, "Jurisprudence of Dignity," p. 19.

[29] European Convention on Human Rights (ECHR), 213 UNTS 222.

[30] Ibid., Art. 34.

[31] See Art. 1 of Protocol 1.

[32] E.g., Société Colas Est v. France (2004) 39 EHRR 17.

[33] See Art. 1 of Protocol 1 to the ECHR; the *Yukos* case is an obvious example.

[34] E.g., Agrotexim v. Greece (1996) 21 EHRR 250; Immobiliare Saffi v. Italy 30 (1999) EHRR 756; Application No. 7261/06 Stavebná v Slovakia.

[35] E.g., National and Provincial Building Society v. U.K. (1997) 25 EHRR 127.

[36] E.g., Application No. 9905/82 Association A and H v. Austria (1984) 36 DR 187; Application No. 41579/98 AB Kurt Kellermann v. Sweden (2004) (both cases concerned nonnatural legal persons that were not companies). See Anat Scolnicov, "Lifelike and Lifeless in Law: Do Corporations Have Human Rights?" (May 2013), University of Cambridge Faculty of Law Research Paper No. 13/2013, p. 4, ssrn.com/abstract=2268537.

[37] E.g., Application No. 16163/90 Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey (2008).

[38] E.g., Application No. 18147/02 Church of Scientology Moscow v. Russia (2007) ECHR 258. This and other such cases concern organizations (i.e., churches) and not companies.

[39] E.g., Autronic AG v. Switzerland (1990) 12 EHRR 485. This case is particularly contentious because it protects commercial speech. See Scolnicov, "Lifelike and Lifeless in Law," pp. 17–19.

[40] Comingersoll S.A. v. Portugal, 2000-IV European Court of Human Rights (ECtHR) 355.

[41] See, e.g., Scolnicov, "Lifelike and Lifeless in Law"; Anna Grear, "Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights," *Human Rights Law Review* 7, no. 3 (2007), pp. 511–43; Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 2002), pp. 234–75.

[42] See, e.g., van den Muijsenbergh and Rezai, "Corporations and the European Convention on Human Rights."

[43] Ibid., p. 60.

[44] See, e.g., Grear, "Challenging Corporate 'Humanity,'" p. 536.

[45] However, it should be noted that the European human rights system differs from other regional human rights systems as well as the UN treaty monitoring bodies in that it accepts applications from corporate entities whereas the latter only accept petitions or complaints submitted by groups or organizations insofar as they concern alleged violations of the rights of individual human beings.

[46] I take this expression from David Luban, although he uses it for a different line of argument. See Luban, "Human Rights Pragmatism and Human Dignity," p. 269.

[47] I discuss this issue at length in "Sovereignty and the International Protection of Human Rights," *Journal of Political Philosophy* 24, no. 1 (2015), and "Human Rights, Sovereignty and the Responsibility to Protect," *Constellations* 22, no. 1 (2015), pp. 68–78.

[48] Turkuler Isiksel, "The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights" (2015), forthcoming, p. 69.

[49] For an overview of the key differences between treaty-based rights and human rights, see Isiksel, "The Rights of Man and the Rights of the Man-Made," pp. 67–75.

[50] For an overview of these important differences, see Jose E. Alvarez, "Are Corporations 'Subjects' of International Law?" *Santa Clara Journal of International Law* 9, no. 1 (2011), pp. 19–21.

[51] See Isiksel, "The Rights of Man and the Rights of the Man-Made," p. 72.

[52] See Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/10/7, at www.italaw.com/arbitration-rules/icsid#sthash.GsBIoVUN.dpuf.

[53] See Isiksel, "The Rights of Man and the Rights of the Man-Made," pp. 89–90; also Alvarez, "Are Corporations 'Subjects' of International Law?" p. 21.

[54] Ongoing arbitration proceedings against Germany at the ICSID were initiated by the Swedish company Vattenfall, which owns two nuclear plants in Germany. According to media reports, Vattenfall is claiming compensation of USD 5.8 billion, plus 4 percent interest, for both past and future lost profits.

[55] E.g., the well-publicized conflict on the right to water in Bolivia. See Aguas del Tunari S.A. v. Bolivia ICSID Case No. ARB/02/03. See Alvarez, "Are Corporations 'Subjects' of International Law?" p. 22.

[56] Alvarez, "Are Corporations 'Subjects' of International Law?" p. 21.

[57] McCrudden, "Jurisprudence of Dignity," pp. 29ff.

[58] See McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," p. 669.
[59] Ibid., p. 679; McCrudden, "Jurisprudence of Dignity," p. 5.
[60] Let me briefly summarize McCrudden's account of the extending and contextualizing functions of human dignity. Accepting the protection of human dignity as the purpose of human rights practice offers a justification for *extending* the list of rights actually enumerated in human rights documents to include additional rights that are deemed necessary for the effective protection of human dignity. This can involve *expanding* the scope of rights already included in human rights law (e.g., the decision by the Inter-American Court of Human Rights to expand the right to life to include basic socioeconomic rights), *importing* rights that may have been intentionally excluded from specific human rights instruments (e.g., the appeal to freedom of religion as protecting human dignity by the Israeli Supreme Court, a right that was not included in the Basic Law), or *generating new* rights in light of social, political, and technical developments (e.g., new reproductive rights). The aim of protecting human dignity also justifies the *contextualization* of human rights in response to the threats that are most salient in different countries due to their specific social circumstances and historical experiences (e.g., restrictions of freedom of speech related to denial of the Holocaust as upholding human dignity in German law in contrast to the less restricted understanding of that right that is prevalent in the United States).
[61] Dieter Grimm, "Dignity in a Legal Context: Dignity as an Absolute Right," in Christopher McCrudden, ed., *Understanding Human Dignity* (New York: Oxford University Press, 2013), pp. 381–91.
[62] Ibid., p. 390.
[63] I have not been able to find any cases from global or regional human rights courts that ascribe human dignity to corporations. However, nothing in my argument turns on excluding the possibility of a legal extension of the concept of dignity to corporations. If priorities based on considerations of human dignity can be established in conflicts between rights that only concern natural persons, the same would hold true in conflicts that concern both natural and legal persons. The same applies to the possible extension of the concept of dignity to animals. For some legal examples of the latter, see McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," p. 708.
[64] In fact, the ECtHR offers some examples. See, e.g., Tatar v. Romania, ECtHR, App. No. 67021/01 (2009).