

In this way, you may be compelled—in order to advance the cultural politics of a ‘Europe’—to choose a purely strategic attitude towards rights. Even as you know that rights defer to policy, you cannot disclose this, as you would then seem to undermine what others (mistakenly) believe one of your most beneficial gifts to humanity (a non-political and universal rights rhetoric). It is hard to think of such an attitude as a beneficial basis from which to engage other cultures or to inaugurate a transcultural sphere of politics.

The question would then not be so much which rights we have, or should have, but what it takes to develop politics in which deviating conceptions of the good—whether or not expressed in rights language—can be debated and realized without having to assume that they are taken seriously only if they can lay claim to an a-political absoluteness that is connoted by rights as trumps.

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The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture

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I. EUROPEAN HUMAN RIGHTS AND THE POLITICAL CULTURE OF A COLLECTIVE MEMORY OF INJUSTICE AND FEAR

To ask for a European approach to human rights is ambivalent. If the question is whether the genesis, nature, and scope of human rights are essentially European, one runs immediately into the endless debate about universalism versus particularism of human rights. Obviously, the question does not aim at a European approach to human rights as the expression of a particular historical culture which should be extended to all different cultures of the world. Instead of this, the question seems to aim at a specific European contribution to human rights which are already considered to be valid for all human beings, as is declared in the Universal Declaration of Human Rights.¹

To ask the question in this way of course does not mean that one could avoid the problem of cultural relativism. Every European approach and every European contribution to human rights has to keep in mind that the idea of universal human rights is in itself a particular European idea and that it has a long history of misreading, selective interpretation, and wrong application. The idea of universal human rights, as well as the history of its selective realization, is therefore deeply rooted in European history and culture. To say that *all* human beings are created equal and that *every* human being is provided by nature with inalienable rights presupposes something that is common to all human beings as human beings. It is still the language of the Christian religion. The idea that all human beings are equal was interpreted by the Christians on the basis of a belief in a God who is the creator of human beings, and who has created them according to his own image. This reading of universality already included particularity, because it referred primarily to those human beings who believed in the Christian God, and it excluded all those who did not. After

¹ Universal Declaration of Human Rights, adopted by GA Res. 217 A (III) 1948. In United Nations, *A Compilation of International Instruments* (1994) i, part 1, 1.

secularization, these presuppositions were often interpreted in a specific way which led to an exclusion of certain human beings who lacked certain features from the realm of human rights. For example, if reason was considered as the fundamental common feature of human beings, and women were regarded as human beings who lacked the full capacity of reason, then it seemed to be only natural to exclude women, at least in part, from the protection of human rights.² And if the common feature of all human beings was interpreted according to the standards of the western, European-American 'civilization', then it seemed to follow that members of other cultures lack certain capabilities and competences which were considered as necessary for a human being to be a bearer of human rights. Thus, it was the experience of the people who were colonized by European States that made the experience that universalism can turn into cultural, economical, and political hegemony. The consequences are often dramatic. Human rights, interpreted and treated in this way, give a licence to draw a distinction between human beings who are under the protection of human rights and beings who are considered as not being completely human, and who therefore have no rights at all. Furthermore, it seems to be that this licence also gives a right to discriminate, expropriate, chase, imprison, torture, rape, and kill those dehumanized men, women, and children. The violation of human rights does not begin with their explicit negation and rejection, but with their implicit neutralization—at first with perceiving a human being as somebody who does not in all respects belong to the community of human beings, and secondly with the right to treat them as something which does not deserve the protection of human rights.

'We', living in the rather secure milieu of Western Europe, have no reason at all to feel superior not merely with regard to our own history. How difficult it can be here and now to avoid exclusionary distinctions based on dehumanizing images of human beings becomes clear for 'us', if we look at our attitudes towards those human beings who—according to 'our' point of view—are or behave as if they were barbaric, who are considered as perpetrators of human rights, or who allegedly 'abuse' human rights for their own private interests. Foreigners or asylum seekers from poor countries belong to this category, or certain criminals—not to mention the asylum seeker *as* a criminal. When we look at a television or newspaper report about a man who sexually abused and killed a child, or when we listen to politicians describing a wealthy drug dealer, or a Mafia boss, then we can sometimes observe how human beings are presented as non-members of the community of human beings. The implicit question which follows is: should these people have human rights? Let us imagine the extreme case of an *enemy* of human rights. Are human beings who command, organize, or execute genocide really human beings who deserve to be protected by human rights; for example, by a fair trial and a kind of punishment which respects Protocol No. 6 of the European Convention on Human Rights (ECHR) (Abolition of the Death Penalty)? On a low level of self-observation we can easily discover in our own imagination at least some categories of human beings which provoke a reaction of dehumanization already in our perception. Before we argue

² For such an interpretation of Art. 1 of the Universal Declaration and its critique see C. Bretherton, 'Universal Human Rights', in C. Bretherton and G. Ponton (eds.), *Global Politics* (1996) (quoted from the German translation in U. Beck (ed.), *Perspektiven der Weltgesellschaft* (1998), 263).

about the legitimacy of a claim which is raised by a foreigner who refers to his or her human rights, we should carefully look at our perception and imagination of the other.

Even the more subtle versions of universalism cannot completely avoid a dehumanizing misreading. The attempt to look for and to accept differences, to create new human rights for members of minorities and for the protection of different cultural identities, is still in danger of simply extending the European reading of human rights. This is true as long as the differences are marked, described, and considered from the point of view of our own identity. The interest in differences does not naturally turn into equal concern and respect for the Other. As the example of 'Orientalism' has demonstrated, an interest in the Exotic Other can satisfy needs of our own cultural identity.³ As the contemporary debates about the academic field of Area Studies (like Chinese or Indian studies) demonstrate, one can never be sure that the interest in differences does not serve some strategic interests in self-maintenance—as long as the other is not regarded as someone with whom one has to enter in a dialogue among equals.⁴

II. SIMPLE AND COMPLEX UNIVERSALISM

In order to deal with these problems, one could, as Richard Rorty suggests, reject any kind of 'foundational' thinking and justification of human rights, and turn to 'sentimentality'.⁵ This means to tell stories about people suffering from pain, humiliation, and injustice, like 'Uncle Tom's Cabin', in order to convince others of the value of human rights. Instead of this, I would like to pursue the idea of entering into a dialogue with the other instead of describing and marking differences from one's own point of view. To distinguish these two approaches more adequately, I suggest distinguishing between two kinds of universalism: simple or Archimedean versus complex universalism. Simple universalism is abstract, epistemic, and essentialist. It presupposes general common features of human beings which can be observed and recognized and which are considered as pre-given. It uses them as a criterion for exclusion and inclusion; it applies them like a litmus paper in chemistry in order to distinguish between acid and base. It has some similarities with Michael Walzer's critical concept of 'covering law universalism', which consists in a simple extension of one culture's law to other cultures.⁶ Complex universalism is not epistemic, i.e. based on pretended knowledge of properties which can be observed or ascribed. Complex universalism goes a step further. It makes the step from difference to dialogue, and therefore it refers to human beings who are speaking and acting—to their performance of voice and agency. If one takes this step seriously, it forces us to make

³ E. Said, *Orientalism. Western Conceptions of the Orient* (2nd edn., 1995).

⁴ R. Heilbrunn, 'The News From Everywhere' [1996] *Lingua Franca* 49–56.

⁵ R. Rorty, 'Human Rights, Rationality, and Sentimentality', in S. Shute and S. Hurley (eds.), *On Human Rights* (1993), 111–34.

⁶ M. Walzer, 'Two Kinds of Universalism', Tanner Lectures on Human Values (German translation: *Zwei Arten des Universalismus*) (1990) 7 *Babylon* 10.

an important shift in the discourse on human rights. What is at stake is not this or that particular human right, its content, and its claim to universal validity and recognition. Instead, complex universalism focuses on the question whether human rights can be traced back and linked with the voice and agency of individuals. The context and procedure of the formation of human rights become more important than a particular human right. This kind of universalism is procedural and deliberative. The procedural element consists in the inclusion of every single individual who raises his or her voice. What will in the end be recognized as a human right does then not depend on certain properties of the person, but on the procedure of common will-formation, in which every human being is equally included. Of course, a complex universalism which starts with human beings who have a voice and who can say 'yes' or 'no' will also include more or less severe conflicts about what should be regarded as a human right that is universally valid. But what matters here is that the conflict is not considered and treated as an obstacle to will-formation, but as an enabling condition or a medium. Conflict and dissent presuppose and provoke good reasons, by which every opponent could be convinced—provided that common will-formation by arguing about reasons is regarded as an alternative to violence. This is the deliberative element of complex universalism. To look for convincing arguments in order to overcome a dissent also includes the procedural element that every single participant in the conflict has to be recognized as an equal human being who has a 'right to voice' and who has a right to participate in a procedure which consists of an exchange and critique of reasons.

The kind of difference which is important here is not the one which I discover, when I compare myself to the Other, but the difference which I realize when the Other says 'no', the difference of *dissent*. It forces us to de-centre our own point of view. But this is, of course, not enough. Neither 'we' nor 'they' speak with one voice only. It is one of the peculiar and irritating features of the current debate on cultural relativism that 'we' do not look carefully enough with whom we are talking when we are confronted with cultural differences in the human rights discourse. As long as we listen to dictators only, who defend the priority of communal values over individual rights, or with members of other cultures whose representative role has an unclear legitimation, we can never be sure that we still do not continue to deal with an artificial and wrong image of the Other.⁷ This is also true with ourselves. We can never be sure whether our dominating contemporary reading of human rights is not the reading of the privileged classes who are the winners of the social, political, economic, and cultural struggles in our own countries. Therefore, the procedure has to be really inclusive, particularly with regard to those who lack the capability and the courage to raise their voices.

Of course, even a complex universalism of this kind does not easily escape the danger of turning into a simple universalism. This would be the case if one linked the capability of having a voice and saying 'no' again with certain features which can or

⁷ How difficult it can be not to ignore a 'voice' which dissents from our own ideas is demonstrated by the case of clitoridectomy in Africa by K. Engle, 'Female Subjects of Public International Law: Human Rights and the Exotic Other Female', in D. Danielsen and K. Engle (eds.), *After Identity: A Reader in Law and Culture* (1995), 210–28.

cannot be ascribed to human beings. This becomes obvious in the case of human beings who are not able to speak or who do not want to speak, or those who have lost the courage to raise their voices. The property of having a voice was used as a criterion for inclusion or exclusion in the same way as the property of having reason. A difficult case is also that of the vicarious voice, someone speaking on behalf of someone else who has no voice or who is not able to raise his or her voice. Contemporarily we are facing these problems in the cases of abortion and euthanasia: is the foetus a human being with a 'voice' which should be respected? Is someone who has irreversibly lost consciousness someone with a 'voice'?

In order to avoid these dangers, I shall argue for complex universalism in a rather complex way. 'Voice' is a feature which is self-attributive. It can be attributed to someone by a third person, but the person to whom it is attributed also has to make use of it. He or she has to realize that he or she has a voice, and that it is his or her own voice. As a consequence, 'voice' is strictly individual, it is impossible to substitute one's own voice with the voice of somebody else. The voice of a person cannot be represented or generalized. On the other hand, 'voice' also implies an inter-subjective relationship. It requires a third person who listens and who answers. Although it is also possible to speak to oneself alone, this kind of making use of one's voice is not the prominent one. Listening and answering require at least a minimum of mutual recognition, of taking the voice of the other seriously. Obviously, this does not go without saying. It is the first step to recognition—before I take a position to the claim, which is raised by a speaker with his or her assertion, and before I react to what he or she has said, I have to recognize him or her as a competent speaker at all, as a person who has something to say, and who says it, among others, to me. Since I do not listen naturally, it can be a kind of obligation only. But where does this obligation come from, how is it justified, and why should I accept it? The obligation must be derived from principles which require that each individual shall be regarded as an end in itself.

These principles are explained and justified by different traditions of philosophy and moral theory, which are deeply rooted in European history. They provide arguments for the claim of human rights to be universally valid. One tradition refers to rationality as the most important element of social relationships. Rationality means—among other things—arguing with objections raised against a proposition, giving and testing reasons, and determining one's own position and intention according to the best reasons available. If we violate the principle of mutual recognition, we violate the idea of rationality, we behave irrationally. The other tradition refers to the emotional need of human beings to avoid pain and suffering. Every human being's need to avoid pain and suffering, and to maximize his or her pleasure, shall be recognized equally. According to these traditions, it is rational to recognize each individual's voice, and to be recognized is a necessary condition for each individual to express his or her interest in the avoidance of pain and suffering. The first tradition respects the autonomy of every individual, the second the basic need of every individual to avoid pain and suffering. Obviously, these two traditions are *traditions*, i.e. they express a cultural self-understanding of the people in Western Europe and North America. But this is not the whole story. Permanently arguing

against objections of ethnocentrism, the philosophical approaches, which are rooted in these traditions, meanwhile have reached a high degree of complexity.⁸ The procedural and deliberative approach, which I have presented in outline above, is one example. Although it is of course still possible to detect some hidden ethnocentric (and other exclusionary) premises of the argument, the advantage of this position consists in its capability of being open to those objections—critical self-correction is part of the claim to universalism.

But a problem remains even if one admits that the philosophical foundation of the mutual obligation to recognize each other's voice and to listen to each other as a prerequisite of human rights is sound, and—with the proviso of further corrections—convincing for every human being, at least in the long run. It does not explain why selective misreading of universal human rights occurs again and again. Furthermore, the philosophical foundation does not help to avoid the experience of those people who are confronted with abstract ideas only, without being able to link them to their own experience. Often, it is not their voice which is represented by human rights. Complex universalism remains too simplistic when it refers only to those human beings who already have a voice, who are articulate, and who claim that others must listen to their voice, and to whom others are always already listening. They are able to use human rights for the promotion of their interests. Human rights are then in danger of being transformed into human rights rhetoric, as it is described in Martti Koskenniemi's chapter.⁹ This is the other side of the history of misreading and selective application: the more human rights become an unproblematic part of daily political and legal practice, the more they operate with silent exclusions, ignoring suffering, needs, and interests as long as they do not fit with the scope of their application.

It seems to be that the problem is not so much the philosophical foundation of the universalism of human rights, but its insufficient degree of complexity. This is more a matter of the meaning and understanding of human rights. Struggles and debates about human rights refer to claims to universalism and their foundation in moral and legal principles only on the surface—in fact, what are at stake are often questions like this: which interest shall be recognized as a matter of human rights, who shall have the power to raise a claim to human rights—e. g. should pornography be considered as a violation of women's integrity, and how should the conflict with the right to freedom of expression be solved?¹⁰ Are those interests legitimately excluded from the scope of application of human rights? In order to deal with these questions, it seems to be necessary to start with the experience of those human beings who were or are excluded. This means considering the struggle on exclusion as a central part of the meaning of human rights. The step from content to procedure has already led us to the contexts and conditions under which a claim to a human right or a claim that a human right shall be recognized is raised. The procedural element of complex universalism referred to each human being's voice and the obligation to listen. The

⁸ See, as a contemporary example of a comprehensive approach to human rights which very convincingly ties together the two traditions, C.S. Nino, *The Ethics of Human Rights* (1991).

⁹ M. Koskenniemi, 'The Effects of Human Rights on Political Culture', in this vol.

¹⁰ See C. MacKinnon, *Only Words* (1993).

experience of exclusion then consists in the exclusion of one's voice, in the experience of ignorance with regard to one's claims and needs. This is the case not only when someone raises his or her voice and nobody listens, but already and most severely when someone does not raise his or her voice at all, because he or she lost the courage to do so, or because she considers her situation as fate which has to be endured in of silent suffering.

The discourse on human rights then refers to experiences of this kind. What happens there is a long and complicated process, which begins with negative experiences like pain, suffering, and fear. These experiences lead to a loss of voice, to silent suffering, because nobody listens to the persons who try to report their suffering. Human rights discourse is a process by which these negative experiences are overcome. First, pain, suffering, and fear have to be considered as injustice and not as fate or, in the worst case, as the victim's fault. The situation of the excluded victim has to be rejected with the claim of injustice. This claim entails a whole pattern of concepts and practices which are linked to each other: The concept of a person, his or her intention, and his or her capacity of control, which allow for the attribution of responsibility for the pain and suffering of the victim. When the human rights discourse has reached this level, the discourse on the justification and acceptability of the victim's claim can begin. But it already requires that the victim's voice is recognized and that the other participants attribute weight to his or her propositions. During the process of human rights discourse, the victim regains his or her voice which she lost after her negative experience. When her claim is accepted as justified and as a valid human right, she has completely regained voice and agency.

If one conceives of human rights discourse in this way, a supplementary meaning has to be added to the meaning of human rights. Human rights have to be considered and understood as the result of a process of the loss and recovery of voice with regard to negative experiences like pain, fear, and suffering. Because 'voice' is self-attributing, this process is always one for the individual who is concerned, who regains her own voice and standing in her relationship to the other members of the community of human beings. By the same process these other members change their attitude towards the negative experience of the victim, when they recognize it as a matter of injustice instead of a matter of fate or the victim's own fault. One could describe it as a learning process by negative experiences. Then, in any case in which a human being raises a claim to a human right which is already established and generally accepted, he or she refers to the collective memory of negative experiences which initiated the learning process that resulted in the particular human right to which he or she is appealing. And, by raising such a claim, or even by raising a claim to the participants of a human rights discourse that something, which hitherto was considered merely as fate or as the victim's own fault, shall be considered as an injustice or as the victim's own fault—by raising a claim that a rejection of a negative experience shall be accepted as a human right—in all these cases, the human being has to be recognized as a performative person, who has a voice and who takes a position with regard to her negative experience in relation to others, who has standing in the eyes of the others. This is the additional meaning of human rights and human rights discourse in the theory of complex universalism. Compared to usual definitions of the concept

of human rights, as they are for example suggested by Carlos Nino, this addition does not change these definitions. According to Nino,¹¹ human rights refer to:

- (i) the opportunity for the holder of the right to perform or not to perform certain actions;
- (ii) the exclusion of actions of third parties which involve some harm to the holder of the right (either they deprive him of something or do him some injury); or requirements on third parties which involve a benefit for the holder of the right;
- (iii) the enjoyment of some good or the avoidance of some evil.

What is characterized here as harm and injury, good and evil, and even as an opportunity to perform an action, can be traced back to negative experiences which are overcome by the recognition of human rights. In addition, it is important to emphasize a fourth element: a human right refers to the performative capacity of a person who can raise her voice in order to raise a claim.¹²

III. A EUROPEAN APPROACH: SUFFICIENT SENSITIVITY TO NEGATIVE EXPERIENCES

This complex way of explaining complex universalism in opposition to simple universalism leads us back to the question at the beginning—what could be a European contribution to human rights which does not fall prey to the selective applications, misreadings, and exclusions which characterize the European history of human rights? The only answer which is available with regard to the requirements of complex universalism is: Europe has to take its own history of exclusionary interpretation and practice of human rights seriously. A European approach to human rights has to make an *argument* out of the European history of human rights. What matters is not the foundation of the claim to universalism in moral principles and discourses, but the insufficient sensitivity to negative experiences of human beings under the regime of well established and sufficiently justified human rights. Complex universalism of human rights has to be sensitive to the voices of those human beings who suffer from pain and humiliation, who live with fear, and who reject it as injustice. It makes a difference if we talk to those members of a different culture who are in power or to those who are imprisoned, tortured, disadvantaged, or discriminated. Consequently, we have to deal with our own conception of human rights with the same attitude. We should listen to the stories of those who are excluded from the exercise and the advantage of human rights in our own cultures, to their experiences of pain, humiliation, fear, and injustice. A community becomes able to discover what is

¹¹ Nino, note 8 above, at 30.

¹² Cf. *ibid.*, at 27ff, where he criticizes the attempt to define rights as claims. Nino refers to the implication that rights as claims entail duties by third parties—which is not true in any case of human rights. Here, I would emphasize the activist meaning of rights as claims, as is suggested by Feinberg (see below, text accompanying note 35), so that Nino's critique does not apply to this aspect of the equation of rights as claims.

wrong with its own one-sided, exclusive reading of human rights if it begins to trace its own conception of human rights back to its own negative experiences. If we consider our European conception of human rights as the result of a long process of negative experiences, then we become more interested in talking to the dissidents and victims among the members of other cultures than to the officials or to the members of a majority. Of course, this approach cannot mean that any subjective experience of injustice leads to human rights. But it links the core meaning of human rights to something like a negative universality. It is the universality of recognition of those who suffer now or in the past from deliberate infliction of pain, humiliation, and fear, and who have reason to reject it as injustice. Nobody who suffers now or in the past from these experiences shall be excluded from raising his or her voice, and everybody must listen. The advantage of such a conceptual framework is that it allows for the consideration of a European approach to human rights which keeps in mind its historical and cultural dependency on negative experiences without any exclusionary consequences. It makes us sensitive to our own past and, at the same time, makes us sensitive to the negative experiences of others. It is because of this consciousness that Europe can affirmatively speak of a European approach to human rights.

Europe's history is a history of suppression, violence, war, and of the annihilation of human beings and groups of human beings.¹³ In the beginning, it is the experience of unequal and arbitrary treatment by the political power of people who are imprisoned indefinitely and without any legal reason. The right to be free from arbitrary and unjustified imprisonment could be considered the *original* basic right.¹⁴ It started with Article 39 of the Magna Carta. Later, arbitrary imprisonment became a major problem again, when it became part of the general unequal treatment of people by reason of their faith. As a consequence, this right was extended in the Petition of Rights in 1628, and reconfirmed in the Habeas Corpus Act in 1679. At the same time, the right to freedom of conscience and of religious faith was sought as a reaction against religious discrimination by the State. Then, it was the experience of suppression and unequal treatment of people by reason of their birth. Among other negative experiences, it led to the Declaration of Independence and the *Déclaration des Droits de l'Homme* in 1789. The fatal consequences of social, economic, and gender inequality are further experiences of the nineteenth and twentieth centuries. Unequal treatment, suppression and murder of human beings because of their ethnicity or 'race', is another example of the violation of human rights in this century. The most terrible violation of human rights took place in Germany, in the middle of Western Europe: the Holocaust. The Universal Declaration of Human Rights of 1948 is a reaction to this atrocity. At the end of this century, one can observe a change of attitude towards European history. We realize that the European history of human rights is written in blood. And it goes on. The violation of human rights in

¹³ Many of the thoughts which are set out in this chap. were elaborated together with Cornelia Vismann in Berlin, in particular during my stay at the *Wissenschaftskolleg* in Berlin in 1995–6. See C. Vismann, 'Das Recht erklären. Zur gegenwärtigen Verfassung der Menschenrechte' (1996) 29 *Kritische Justiz* 321–35. All flaws in the argument and lack of clarity are my responsibility.

¹⁴ For the characterization of the right against arbitrary imprisonment as the original basic right ('*Ur-Grundrecht*') see M. Kriele, *Einführung in die Staatslehre* (1990), 151–6.

civil wars is also a contemporary European experience. It seems to require a major change in the conception of human rights. From the Magna Carta to the Universal Declaration, the State—be it the State of the medieval or absolutistic monarch or the modern nation State—was at once the protector and the violator of human rights, the State was the addressee. Today, injustice and fear are experienced not merely as a result of the arbitrary use of state power, but also of the abuse of private power or the power of para-state organizations, like the war lords in former Yugoslavia or in some regions of Africa.

This brief and cursory European history of human rights has already led several authors to the conclusion that human rights have to do with negative historical experiences and collective traumata.¹⁵ They are embedded in a *memory of injustice and fear*. Of course, this memory is not explicitly incorporated in the text of human rights. But it forms an important, perhaps even the most important, part of the *political culture* in which these rights are accepted and criticized, given, claimed, interpreted, applied, and enforced. If you want to know what is meant by 'human dignity' or 'equal concern and respect' for every human being, you can either look at various kinds of legal definitions, at a huge record of legal cases, or you can think of the German Gestapo torturing a political opponent or the Holocaust of the European Jews. Human beings differ in wealth, gender, ethnicity, and other properties, but what they all have in common is the experience of pain and humiliation.¹⁶ It is this experience which gives us a feeling of belonging together, even if we are different.

It is difficult to draw a concrete political consequence from this link between human rights and the memory of injustice and fear. At the end of this century, when we look back at European history and begin to interpret it within the framework of human rights, then the focus shifts from political and social history, from the national history of different European countries, to the history of injustice and fear *within* these different countries, and *between* them—and to the individuals who had to suffer from violations of their rights or those who were responsible for their violation. A consequence would be to discover this history of injustice and fear as a common European history, and to maintain and to keep its memory, to discover that it is a memory that *is shared* by all people in Europe. The articulation, shaping, and reconstruction of this memory are, and can only be, a collective work in progress, a project that will never end. It has to be undertaken by the people themselves, as a part of their collective self-understanding and identity. But it is also a matter of education, of historical research, and of public reasoning and deliberation. As a consequence, the rights of freedom of information and expression have to be defended. It seems that we still have not uncovered all cases of violations, that there are still a lot of experiences of injustice and fear which are not made public and are not part of the collective memory. A perhaps surprising concrete consequence may be

¹⁵ E. Denninger, *Menschenrechte und Grundgesetz* (1994), 89; S. Brugger, 'Stufen der Begründung der Menschenrechte' [1992] *Der Staat* 19–38; E. Riedel, 'Menschenrechte der dritten Dimension' [1989] *EuGRZ* 10.

¹⁶ Rorty, note 5 above.

the following: a human right to access to the archives of the State and its institutions. The archives have to be opened to the public, and they may never be closed!

IV. WHAT FOLLOWS FROM THE POLITICAL CULTURE OF THE MEMORY OF INJUSTICE AND FEAR FOR THE INTERPRETATION OF HUMAN RIGHTS?

Embedded in the political culture of a memory of injustice and fear, the European concept of human rights has a hidden or supplementary meaning, which forms a part of every single human right. From a historical point of view, it becomes obvious that human rights are the result of a certain kind of interpretation of the experience of injustice and fear, from which he or she suffers by reason of the overwhelming social power, in most of the historical cases, of the State. A human right is the *rejection* of a concrete historical experience of injustice and fear, caused by actions of the State. By referring to a human right, a person *articulates* his or her suffering from an offence or a harm, and he or she claims that everybody is obliged *to listen* to the individual report of this experience. The declaration of a human right represents this experience, rejects it, and gives a conceptual framework to the interpretation of new experiences of injustice and fear, caused by actions of the State, in the future. This is the *performative* meaning of human rights. Its importance is obvious, for example, at the 'Truth Commissions' in South Africa (although this is not a European example). As a consequence, 'human rights' can never be completely and comprehensively declared. They depend on a concrete historical experience, and they come into being as a performative practice of human beings, which can never be completely transformed into positive law. Any convention or declaration of human rights can be 'amended', if new experiences of injustice and fear are articulated, and if human beings begin to 'talk' publicly about their experience. In the following, I shall give a more detailed reconstruction of the meaning of human rights.

A. The Experience of Pain and Humiliation and its Effects: The Loss of Voice and Control

The core of the experience is suffering from pain. Among the different kinds of pain it is the pain of being tortured and bodily violated which is most obvious. This example already includes what is presupposed in the following: that it is the State or another overwhelming social power which causes pain by infliction of torture. Of course, the feeling of pain is not necessarily connected with violation of the body. It can be painful to be captured and isolated against one's own will by armed forces or by people who act under the command of the State, without knowing why, where, and how long for. Correspondingly, people suffer from pain who lose their wives, husbands, children, relatives, and friends through the intentional force of state agents. These experiences are often accompanied by another experience, which can also be suffered without bodily violation. This is the experience of humiliation and

degradation. Being raped does not merely cause pain because of the violation of the body, but also the humiliation of being disregarded and of not being treated as an equal human being but as something minor, as a thing, as something that could and should be thrown away. This can reach the highest degree if one loses the sense of the value of one's own life, if one gives up oneself, wishes to be not alive any more, because one cannot bear it any longer.¹⁷

Some common features of the different grades and experiences of pain, suffering, and humiliation consist of the effects which they have for the subjects who suffer from pain and humiliation. The first and direct effect results from the mere presence of physical pain, another effect from the possibility and the anticipation of its repetition. Against a single action of torture you can react with a scream. When the presence of pain becomes overwhelmingly intense, you lose your voice, you are reduced to your body, and to pre-linguistic forms of expression like screaming.¹⁸ When torture is not just a singular event, but when it—as usual—continues, or when the torturers say that they will come back in ten minutes, an hour, the next morning, or sometime later without your knowing exactly when, and when you begin to imagine that it might happen again—then you will react with *fear* of repetition. When you are in a situation which makes it impossible for you to avoid the repetition, because you are imprisoned, because you cannot or will not leave the country, or because resistance to the regime of torturers is hopeless, then the fear will become a part of your self, it will capture your mind, your plans, your actions, your social relations—your life. And even if things change so that you are safe and certain that torture will not happen again, there remains a higher or lower degree of fear that will throw its shadow on your life. In many cases, when the fear is overwhelming, the victim becomes mute. Often, the loss of voice which is already the effect of the shocking experience of intense pain inflicted by torture is definite; you are unable to regain speech. The forward-looking fear of repetition increases the victim's quietness and passivity. Alone with his or her awful experience and with the fear that it might happen again, the victim not only keeps quiet, but he or she behaves very cautiously in general. It is better to say nothing. It is better not to ask someone for something. It is better not to trust other people. It is better not to do something which involves a small risk. In general, reality seems to be something which just happens to the victim; he or she has the impression or the certainty of having *no control* at all—no control over his or her body, no control over his or her social relations, even no control over things. The victim becomes helpless.¹⁹ Of course, we never have complete control over the world outside or even over ourselves, and we obviously ought not to have it. But the victim loses more; he or she loses—gradually—his or her fundamental feeling of agency, of

¹⁷ Torture is often analysed and rejected from the point of view of men as victims. But a special kind of torture refers to women only, as is demonstrated by Bretherton, note 2 above, at 269ff.

¹⁸ See the very comprehensive description and analysis of the effects of torture by E. Scarry, *The Body in Pain* (1985), 27ff, especially at 49: '[t]he goal of the torturer is to make the one, the body, emphatically and crushingly present by destroying it, and to make the other, the voice, absent by destroying it. It is in part this combination that makes torture, like any experience of great physical pain, mimetic of death; for in death the body is emphatically present while that more elusive part represented by the voice is so alarmingly absent that heavens are created to explain its whereabouts.'

¹⁹ See the classical study of M.E.P. Seligman, *Helplessness: On Depression, Development, and Death* (1974).

being able to change something by his or her own intentional action. It does not matter what he or she does—things will happen anyway, and he or she will not change the way in which things happen. This is already true for the initial experience of pain during torture, when the victim realizes that he or she cannot prevent the torturer's tools from intruding into his or her body, or when his or her body collapses. The victim loses his or her *voice* and the fundamental security of having a certain degree of *control* over him- or herself and his or her social and natural environment. This is the silencing and chilling effect of an experience of pain and humiliation and of the fear of its repetition. In an ironic way, it transfers agency from the victim to the State and its representatives—the power of the State becomes overwhelming, because it has monopolized agency and voice.

Of course, experiences of pain and humiliation are radically subjective and cannot in themselves be generalized. There are also different kinds of pain and humiliation with different kinds of causes and different reactive consequences, like, for example, illness or traumata caused by natural events such as an earthquake. Apart from the fact that there is also no simple connection between physical pain and verbal communication, pain itself is inexpressible. It essentially resists language and objectification in language.²⁰ From pain itself follows everything. It would be too simplistic to draw a direct line from the experience of pain to the idea of human rights. Human cultures have different schemes of interpretation and forms of communication for the expression of pain.²¹ This becomes more obvious in the case of humiliation. In order to interpret a violation as a case of humiliation, a whole pattern of social creations and constructions is necessary, like generalized expectations, rules, collective and individual identities, concepts of agency. What is and what counts as a case of humiliation is defined and interpreted within this pattern as well as the expected, obligatory, and appropriate ways of reaction like, for example, shame or revenge. These patterns also make possible descriptions, representations, and interpretations of the victim's experience which deny its meaning as a humiliation, which turn its expression in a different direction. The gap between pain and language is even deeper than between humiliation and language. There is no description of pain which does not make use of analogies. Therefore, the social and normative patterns of description and interpretation are much more alien to the experience of pain than to that of humiliation, of which they form a constitutive part. As a consequence, the danger of intentional or unintentional misdescription and misinterpretation of pain is much higher.²² Language as a medium of the expression of pain is

²⁰ Scarry, note 18 above.

²¹ For different attitudes towards pain and different consequences for the idea of human rights see T. Assad, 'On Torture, or Cruel, Inhuman and Degrading Treatment', in R.A. Wilson (ed.), *Human Rights, Culture and Context* (1997), 111–33. Below I will be concerned with infliction of pain against the will of the victim only. I am conscious of the fact that this description of this kind of case already presupposes an interpretive scheme ('against one's own will') which is in itself problematic, at least from a culturalist's point of view.

²² This is not only true just for authoritarian regimes which try to misrepresent the suffering of their subjects, but also for many kinds of commercial and professional images of suffering in modern societies. See A. Kleinman and J. Kleinman, 'The Appeal of Experience; the Dismay of Images: Cultural Appropriations of Suffering in Our Times', in A. Kleinman et al. (eds.), *Social Suffering* (1997), 1–23. E.g., the commercialization of images of victims which become an important part of the 'infotainment on the nightly news' (at 1) or 'the aestheticization of child sexual abuse' (at 11).

highly ambivalent. Language can be used to 'unmake' the experience of pain; for example, in the case of torture by representing it as a sign of the presence of power. When the state monopolizes the voice, it can talk about the pain which is deliberately inflicted on the victim, can 'justify' it or 'explain' why it is necessary. The creative capacities of the human condition and imagination are necessary in order to find more adequate ways of description and interpretation which do not simply wipe out the experience of a body in pain. It is, of course, impossible to detect the one and only authentic expression of an experience. But it is possible to distinguish between different kinds of expression and media of representation according to the degree with which they allow the victim's voice to make itself explicit. Elaine Scarry distinguishes different 'arenas in which physical pain begins to enter language'.²³ There is the individual who tries to find expressions and sentences besides the mere scream, or other persons who vicariously try to describe pain on behalf of the person who suffers. Another arena is the different kinds of medical discourses.²⁴ A third one is art as a medium for the description and expression of pain. At last, Scarry refers to the letters and annual reports of Amnesty International about the victims of torture and to transcripts of personal injury trials as records of 'the passage of pain into speech'.²⁵

As Scarry points out, communicative arenas for the passage of pain into speech, like the Amnesty letters or the personal injury trial, have additional goals and functions. They provoke or are intended to provoke certain reactions of other people, because of the report of pain. They should protest and intervene or take some legal, political, or even violent remedies in order to stop the infliction of pain. On the other hand, these records are often based on the reports of the victim. The victim has to tell his or her story, which becomes a part of the record. By this step, the victim begins to regain his or her voice, and his or her voice is strengthened by the voices of others who communicate the report. Obviously, these arenas also presuppose and make use of interpretive schemes, expectations, social rules, and cultural patterns.²⁶ But within these patterns, human beings try to make use of their creativity with the intention of overcoming the experience of pain without denying, misinterpreting, misrepresenting it, without giving a distorted report of their experience as does the State which justifies torture. Even if one admits that there is no pure and authentic description of pain, because every verbal description unavoidably makes use of analogies and metaphors, these arenas differ from others in which distorted reports are used to justify torturers, to legitimize the system of state power which organizes the deliberate infliction of pain. The difference lies in the focus on the recovery of the victim's voice in the presence of his or her memory of pain, and—by further steps—in the recovery of agency and control.

²³ Scarry, note 18 above, at 10.

²⁴ Medical discourse is of course—as is any discourse on pain and suffering—interrelated with cultural representations of suffering and with social and economic factors: see A. Kleinman, *Writing at the Margin: Discourse Between Anthropology and Medicine* (1996).

²⁵ Scarry, note 18 above, at 9. For the 'action files' of Amnesty International see *Amnesty International Report 1998* (German edn., at 63–6). For the role of NGOs for the passage from experiences of pain and humiliation to human rights discourse see E. Decaux, 'The Role of Civil Society', in this vol.

²⁶ For a contemporary account of the different discourses on and cultural representations of suffering see Kleinman *et al.*, note 22 above, at p. xxvi, 'Introduction': 'we have gone beyond the point where the subject of suffering can be examined as a single theme or a uniform experience'.

B. The Distinction between Misfortune and Injustice

If one tries to reconstruct the way in which the victim regains his or her voice and control, one could tell a meaningful story about the emergence of a sense of injustice. First of all, pain is not regarded as something that just happened because it had to happen. The pain does not result from a disease or from an accident, and it is not beyond the reach of human intervention, like an earthquake. It is not like the pain which one suffers from toothache or from a stone which falls on one's feet, and not even from another person who unintentionally, by accident, steps on one's feet. Among the causes of pain are other human beings, who acted deliberately, with knowledge of the consequences, and who inflicted pain intentionally.²⁷ This is obvious in the example of torture. The infliction of pain by torture implies human beings who are acting deliberately, who intentionally act in certain ways, or make use of instruments *because of* their property of producing pain. The anonymous and indefinite power of the State becomes present in the deliberate and intentional actions of its torturers who are acting under its command. The first fundamental distinction which is implied in the interpretive scheme is the distinction between *nature and fate* on the one hand and *meaningful human actions* on the other.

Several other concepts are included in this fundamental distinction. If the causes of pain are attributed to meaningful human actions, a concept of the person is presupposed according to which he or she can build his or her own aims and intentions, and can control his or her actions according to an intention, who has a voice and agency or control of him- or herself, and of the world outside. In general, a person in a normal psychic state who is not coerced by anybody else is regarded as being able to *avoid* an intentional action; for example, an intentional infliction of pain. Despite all the conflicts about the appropriate interpretation of the meaning of an action, despite all the explanations, justifications, and excuses which are offered by torturers or by government officials, according to which the 'strong interrogation' was 'unfortunately unavoidable', and despite all the hierarchies among those who give orders and those who execute them, there are at least some persons who have voice and control, and who, consequently, could have avoided the torture. Because certain kinds of pain, like those inflicted by torture, can be interpreted as effects of avoidable, meaningful human actions, it is possible to take a position on this action, to say 'yes' or 'no' to it. One can *reject* the intention to inflict pain, and one can claim that the corresponding action *should* be avoided. By this step, a human being begins to regain his or her voice. He or she does not quietly accept a fate, but is able to say 'no' to the things which happened to him or her. To reject an intention like the infliction of pain by torture and to claim that its execution can and shall be avoided means that it is *unjust* to do it. If the action is avoidable, it can be rejected and imputed to

²⁷ This distinction between suffering caused by 'nature' and by intentional human action is of course not *a priori*. Furthermore, the causes of illness and the kind of treatment are linked with social arrangements and structures which are again dependent on intentional human actions and omissions; e.g. the difference between poor and rich or the distribution and organisation of health care. See A. Young, 'Suffering and the Origins of Traumatic Memory', and P. Farmer, 'On Suffering and Structural Violence: A View from Below', both in Kleinman *et al.*, note 22 above, at 245–84.

the torturers and those members of the government who gave the command, and they can be regarded and treated as *responsible* for an act of injustice.

This kind of rejection, which includes a judgement about the injustice of the act done and an attribution of responsibility to the actor, entails a specific meaning for the victim. It means that the infliction of pain was neither a matter of nature and fate nor *the victim's fault*. To consider damage as the result of one's own fault is also a reason to keep quiet—because, for example, one feels ashamed of one's own inability to anticipate and to avoid dangerous situations. As long as the victim interprets her situation as her own fault, she will have no reason to raise her voice and to say 'no'. In the best case, she will look for some strategy for avoiding the risk that bad things happen again. She will be unable to regain her voice unless she stops feeling responsible for the pain she suffers from and attributes responsibility to those who acted intentionally and who could have avoided their intentional action, i.e. the commanders and their executioners. The fundamental distinction between nature, fate, and meaningful human action can be extended to the distinction between *misfortune and injustice*.²⁸ The victim not only regains his or her voice by saying 'no' to the things that happened to him or her, but is now also able to *address* him- or herself to someone who is responsible for the things which happened, and to others who should accept the claim of injustice.

The concept of injustice is related to expectations and norms as well as to rules of imputation of unjust actions to persons who are held responsible for them. The distinction between misfortune and injustice is neither pre-given nor invariable. What is considered as something that just happens, for which nobody is responsible and which has to be borne by the victim him- or herself, depends on human ability to intervene in the world and, most of all, on the social interpretations of the world. A prominent example of the first requirement is genetic engineering. As long as the genes of an individual human being were simply inherited by his or her parents and, therefore, so to speak, given by nature without any opportunity of changing them, his or her genetic equipment with all its consequences for his or her life was nothing more than fate, misfortune, or luck. Nobody could be held responsible for his or her genetic equipment. To the extent that it is now and will in future be possible to alter genes by genetic engineering, the genetic equipment becomes a matter of intentional human intervention, of justice and injustice, and of responsibility. A prominent example of the second requirement is poverty. Is it the result of wrong decisions by the individual, i.e. the victim's fault, or is it the fate of an anonymous market—or is it something that could be prevented by political decisions, legal rules, and social institutions? The answer to this question depends not only on human ability to intervene in the world, but also on the social interpretations of individual achievement, of the interdependence between individuals and society.

No matter how the question ought to be answered, the assertion that something is unjust and that someone is responsible for it changes the communicative arena. It is at least possible to argue about the borderline between misfortune and injustice. If it is in general possible to react to meaningful social actions by taking a position and

²⁸ For the distinction between misfortune and injustice see J. N. Shklar, *Faces of Injustice* (1990), chap. 3 (German edn. 1997, 67ff.).

saying 'yes' or 'no' to them, then it is also possible to put social arrangements, social structures, institutions, laws, rules, and conventions, as far as they are constituted by and consist of meaningful human actions, into question and under the *demand of justification*. It at least makes sense to claim that negative discrimination and social exclusion by reason of gender, race, religion, or other human properties are not a misfortune and not the victim's own fault, but injustice. This is, of course, the result of a long history full of conflicts and obstacles. It is part of European history that some people began at some time not to take social exclusion by reason of birth as given by nature or by God, but demanded that any such exclusion be justified. In this regard, gender or race makes no difference to the critique of social exclusion.

The demand for justification is of course ambivalent. It is possible to justify negative discrimination and social exclusion. It is even possible to have a law that justifies all actions of the State which are done with the aim of exclusion, expropriation, exploitation, or even the annihilation of minorities. It is possible to have a law that justifies torture or the killing of a citizen who illegally crosses the border in order to leave the country. The claim that such actions are unjust and the demand of justification could easily be answered by saying that there is a law that justifies them. As a consequence, the assertion of injustice and the demand of justification have to be extended to the justifications which are offered for such atrocities.

Needless to say people differ very much one from another in what they believe to be an injustice. On the one hand, the experience and interpretation of injustice are radically subjective, on the other hand, in particular in pluralistic societies with a certain degree of cultural relativism, there are different convictions about what is just, about the primary rules, according to which one could identify an action as a matter of injustice.²⁹ Together with the ambiguity of primary rules and norms, which can also be used to justify torture and to legitimize an oppressive system of power, the distinction between injustice and misfortune and the demand of justification have to be extended to the rules and norms themselves. What matters is the recognition of every individual as an equal participant in the political process which leads to a decision on primary legal rules. To regain (or to preserve) voice and control does also mean that one has the power and the ability to criticize and to amend the rules of justice. This is the most important effect of human rights on political culture.

Whether or not a negative experience will be considered as an injustice, with its consequent rejection according to a valid human right, depends of course on the universal principles according to which a judgement on such an experience is made. This could be, for example, a principle of role-exchange.³⁰ A negative experience is an injustice, if everybody who takes the perspective of the victim rejects her experience as an injustice. There are similar principles, like the categorical imperative, utilitarian principles or the procedure suggested by discourse ethics, which comes close to the idea of taking each human being's voice seriously.³¹ But these principles can be

²⁹ For a very sensitive description of the experience of being a victim of injustice, see: *ibid.* (German edn., at 52).

³⁰ I am grateful to Robert Alexy for urging me to make this point clear.

³¹ See, e.g., C.S. Nino and R. Alexy, 'Diskurstheorie und Menschenrechte', in R. Alexy, *Recht, Vernunft, Diskurs* (1995), 127–64; J. Habermas, *Between Facts and Norms* (German edn. *Faktizität und Geltung* (1993), chap. 3).

applied to a negative experience only *after* it is already considered as a discourse on justice and injustice and not as fate or the victim's own fault. These principles cannot substitute the requirement of an increasing and sufficient sensitivity to negative experiences and their potential meaning as a matter of injustice.

V. THE EFFECTS OF HUMAN RIGHTS ON POLITICAL CULTURE

The idea of human rights emerges from the rejection of pain and humiliation, caused by the state or by an overwhelming social power, as an injustice. But the reconstruction of human rights as resulting from negative experiences like suffering from pain and humiliation focuses on other aspects too. What matters here is not so much the propositional content of a human right and its justification, but the way in which a victim regains voice and control facing a negative experience like pain and humiliation inflicted by the state. One step is the interpretive scheme, according to which suffering from pain is not misfortune—to which one can only adapt—and not the victim's own fault. It allows the victim to insist on his or her experience and to reject all misinterpretations and pseudo-justifications or excuses for the infliction of pain or for degrading treatment. But this is of course not the whole story. The victim would not be able to regain voice and control if nobody listened to his or her report of a negative experience, if nobody cared about it, or if everybody denied that it is really a negative experience, or, finally, if everybody considered it as a misfortune or as the victim's own fault. Whereas the latter reactions presuppose that the opponent has at least listened, although he or she denies what the victim claimed, the former reactions consist of mere ignorance. The victim becomes marginalized, because his or her voice is considered as having no meaning or simply as disturbing. What is necessary here—and this seems to be the decisive move—is that the victim is taken seriously, that others listen to his or her voice. Listening here implies of course more than the behaviour of a Nazi or Stalinist judge in a show trial. It means, first of all, that the story of the victim *counts*, that it has considerable *weight* with regard to the question whether his or her painful and humiliating treatment is an injustice.³²

When this move of recognition of the victim's voice is extended to all human beings, something like the idea of human dignity is established. One cannot deny that the history which led to the principle that human beings have to recognize each other as persons who have a voice which counts and has weight is a long and complicated one, which is full of hindrances and obstacles.³³ In addition, 'voice' has also to be understood metaphorically, because this concept has also to be applied to those who

³² Often, the victim's voice obtains weight indirectly, as is demonstrated by the examples of widows and relatives in Argentina or Guatemala, who do not stop searching for their husbands and kin who were killed during the time of dictatorship, and publicly asking questions about their fate.

³³ Contemporary examples of the difficulties of establishing a public forum for the expression of experiences of pain and humiliation are the cases of rape and sexual abuse during the civil war in former Yugoslavia. See K. MacKinnon, 'Crimes of War, Crimes of Peace', in Shute and Hurley, note 5 above, at 83–110.

are mute or to future generations. With these additions in mind, one could say that the claim which is raised by a victim who gives a report on his or her experience of pain and humiliation is that nobody shall be excluded from the realm of human beings who take each other seriously by listening to each other and by each attributing weight to what the other says. The victim is now regarded by others and understands him- or herself as somebody who has preferences and intentions, who has agency and control, and who can raise claims and demand justifications. From now on, it is impossible to treat him or her as a mere object of one's own interests only, and he or she sees him- or herself with different eyes.

It is by this step that the idea of equal human rights comes into being. But instead of focusing on the propositional content of the right—for example, Article 5 of the Universal Declaration of Human Rights—I have tried to look at the process in which a victim of injustice regains voice and control. The idea of human rights is something like an *abbreviation* of this process by which the victim overcomes a negative experience of pain or humiliation with their consequences of muteness, passivity, and helplessness. The propositional content of a human right depends on the kind of social practice which is experienced as painful and humiliating, like torture, arbitrary imprisonment, exclusion from basic social goods. In the background of these rights are always individuals who suffer, who have fear, who raise their voices, who claim that others shall listen to their report of their negative experience, and who demand justification and reject the justifications for the kind of social practice which produces these negative experiences. This reconstruction is even more true in those cases where individuals claim to have human rights which are still not recognized and established. Here, the individual is not able to claim a right which already contains a symbolic abbreviation of the past ways out of the shadows of pain and humiliation, but he or she has to go on the long path of recognition of his or her experience of injustice.

Joel Feinberg has explained the concept of rights with regard to their activist and performative role and meaning. Looking for a distinctive feature of a right, which distinguishes rights from other entitlements, he discovers the internal link between certain rights and *claims*.³⁴ Claim-rights are the strongest kind of rights, because they entail corresponding duties of others. The possibility of claiming links an abstract and general right to the concrete situation of a person who raises a claim to have this right. For every right there is a right to claim in appropriate circumstances that one has that right. To claim a right is like asserting something to others with the claim that it shall be accepted. 'To claim that one has a right . . . is to *assert* in such a manner as to demand or insist that what is asserted be recognized.'³⁵ Feinberg pays particular attention to this activist meaning of claiming, because it is the feature of the concept of a right which is important for the social identity and the self-understanding of the person who raises a claim to a right. 'Why is the right to demand recognition of one's rights so important? The reason, I think, is that if one

³⁴ In the tradition of Roman civil law, the relationship (and difference) between rights and claims was first introduced by Winscheid in the nineteenth century.

³⁵ J. Feinberg, 'Duties, Rights, and Claims', in J. Feinberg, *Rights, Justice, and the Bounds of Liberty* (1980), 141.

begged, pleaded, or prayed for recognition merely, at best one would receive a kind of beneficent treatment easily confused with the acknowledgement of rights, but in fact altogether foreign and deadly to it.³⁶ This explains why and how rights are the medium in which the victim becomes able to regain voice and control in the presence of pain and humiliation.

In his reconstruction of *the activity of claiming* as the salient feature of rights, Feinberg distinguishes two different meanings of 'claiming' with regard to rights. It makes sense to say that a person is 'making a legal claim to' a right as well as to say that a person is 'claiming that' he or she has a right. The first meaning of claiming refers to rights which one already has, for example, those given by a legal system which already entails abstract individual rights which can be claimed by a person in a concrete case if he or she is qualified (by the appropriate circumstances) to make this claim. A more definite case is the claim to a title which follows from a person's right that is already recognized and (legally) confirmed. These are the usual ways in which a right becomes the right of a person in a concrete situation, in which it becomes something like a 'real' right that is exercised by the person who has it, with real legal consequences. For this reason, Feinberg attributes to the activity of claiming a performative meaning: '[l]egally speaking, making claim to can itself make things happen. This sense of "claiming", then, might well be called "the performative sense". The legal power to claim (performatively) one's right or the things to which one has a right seems to be essential to the very notion of a right.'³⁷

On the other hand, a person can claim that he or she has a right, although and because he or she does not have it, because, for example, it is not presupposed by the rules of a legal system. Here, it is the content that matters. Feinberg calls this kind of activity 'propositional claiming'. Whereas a claim to a right can be raised by the person who has this right only, the claim that one has a right can also be raised by others. As a German citizen, I can (currently) raise *the claim that* foreigners should have a voting right in parliamentary elections, and if it were the case that a legal rule existed which provided foreigners with such a right, then only a foreigner could *make a claim to* his or her voting right. As Feinberg points out, the former content-oriented kind of claiming has social consequences too, but they are different from the legal consequences of the exercise of a right: '[t]o claim that one has rights is to make an assertion that one has them, and to make it in such a manner as to demand or insist that they be recognized'.³⁸ This kind of claiming does not differ from the general claim to recognition and acceptance, which is raised for the propositional content of every sincere assertion, like the truth claim which is raised for the assertion that '[i]t is raining here and now'. With this kind of claim, a speaker addresses him- or herself to a hearer, he or she enters into a communicative space: 'part of the point of propositional claiming is to *make sure* people listen'.³⁹ If this interpretation is correct, one could say that propositional claiming also entails performative claiming. To claim *that* I have a right then has the performative meaning that I am willing to enter into

³⁶ J. Feinberg, 'Duties, Rights, and Claims', in J. Feinberg, *Rights, Justice, and the Bounds of Liberty* (1980), 141.

³⁷ J. Feinberg, 'The Nature and Value of Rights', in Feinberg, note 35 above, at 150.

³⁸ *Ibid.* ³⁹ *Ibid.*

the communicative space where I want to be taken seriously, where my voice has a weight, where others listen to me and argue about my claim by demanding and giving justifications. In a constitutional democracy, this communicative space is called the *public sphere*.

Feinberg's interpretation of the activity of claiming is relevant for the reconstruction of the idea of human rights which I am suggesting here. In the case of human rights, the claim to a human right is as important as the claim that one has a human right. Performative claiming prevents the victim from losing voice and control with regard to a concrete situation in which she suffers pain or humiliation. He or she can claim a right which she already has. 'Having rights, of course, makes claiming possible; but it is claiming that gives rights their special moral significance.'⁴⁰ The moral significance of the performative claiming to a right consists exactly in the ability to regain one's voice.

Having rights enables us to 'stand up like men', to look others in the eye, and to feel in some fundamental way the equal of everyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem for others. Indeed, respect for persons (this is an intriguing idea) may simply be respect for their rights, so that there cannot be the one without the other; and what is called 'human dignity' may simply be the recognizable capacity to assert claims.⁴¹

Of course, it happens quite often that the victim has a right, but that she is prevented from making a claim to it. Propositional claiming is much more difficult, but it has a similar effect for the proponent of a human right as performative claiming—exactly because of its additional performative meaning. The proponent of a new human right at least makes claim to a right to enter into the public sphere, to be taken seriously in his or her report of pain and humiliation. Thus, the proponent of a (new) human right always makes a claim to the right to human dignity, apart from the claim that he or she shall have a human right with a new propositional content, for example, the right to development.

If a person makes a claim to a right or is claiming that he or she has a right, then it does not go without saying that the person already has or obtains the right. It all depends on a third aspect of claiming. According to Feinberg, a claim has to be justified or *valid*.⁴² This is obvious in the case of performative claiming, because a person can make a valid claim to a right only if the right is presupposed by the legal system and if he or she is able to demonstrate and to prove that the appropriate circumstances are given and that the conditions are met under which the claim to the right is valid. To make a claim to a right then means that one has a *prima facie* case of a right. Propositional claiming is, again, more difficult, because there is (still) no right. Feinberg takes the example of 'manifesto writers' who identify needs and argue for their recognition as human rights. It is intriguing, according to Feinberg, that these proponents speak of these rights as already given. By this, they try to suggest that the needs they identified are already valid claims to rights. But it is only an effective

⁴⁰ *Ibid.*, at 151.

⁴¹ *Ibid.* The text was published in 1979, but I think what is meant here can easily be extended to women.

⁴² *Ibid.*, at 152.

rhetorical tool to urge the world community to recognize certain needs as valid claims to rights, and 'a powerful way of expressing the conviction that they ought to be recognized by states here and now as potential rights and consequently as determinants of present aspirations and guides to present policies'.⁴³

Again, one can interpret this effect as the performative meaning of claiming *that* one has a right. In addition, this case demonstrates how the proposal of a (new) human right can become in itself a case of performative claiming. The so-called manifesto writers argue as if there already were an existing right to which one could make a *prima facie* claim, because they refer to a 'higher law', for example, to natural law, which already entails a right which should be recognized and confirmed by a system of positive law. From their point of view, the 'new' right turns out to be an 'old' one. In this case, propositional claiming not only has the additional performative meaning of entering into the public sphere and claiming for an audience which listens, but it is also always linked to performative claiming in the strong sense, as far as it refers to a 'higher law' which already entails the kind of rights to which the claim is made.

By this step, the manifesto writer does more than merely express himself in a powerful way and make use of effective rhetorical skills, as Feinberg seems to suggest. By referring to 'higher law', she gives a reason for the claim that people should have certain rights, which shall justify the claim to recognition. At the same time, she traces her authority, her right to a voice, back to such a 'higher law', which gives her the legal power to make a claim to the right. It is of course difficult to say what is meant by 'higher law', particularly if one addresses the world community which consists of a plurality of different cultures with different opinions about 'higher law'. The appeal to 'natural law' was a historical European approach to justifying the claim to rights which were not recognized by the State and a majority of people in a community as something which is already given by nature, so that nobody could ever deny or abolish them. This appeal also provided the proponents with power and authority in order to justify their licence to speak against a power which denied this right. The members of the *Assemblée Nationale* in 1789 could legitimize themselves as authors of the Declaration of the Rights of Man only by referring to an 'incontestable and irresistible authority'.⁴⁴ In a similar way, the authors of the American Declaration of Independence acted in the name of 'the laws of nature and in the name of God'.⁴⁵ As Gauchet, Derrida, and several other authors have pointed out, this is a case of self-authorization on the one hand and authorization in the name of some higher law and authority on the other *at the same time*. The authors of the declarations could derive their authority only from themselves—but by empowering themselves, they have put themselves under a higher authority or a higher law, which bound them from the moment in which they received their power. Although 'natural law' or 'God' are no longer appropriate references, every contemporary claim *that* a human right, which is not recognized yet, *should* be recognized, traces its performative power back to some 'higher law'. There is something like a performative circle between claiming a

⁴³ J. Feinberg, 'The Nature and Value of Rights', in Feinberg, note 35 above, at 153.

⁴⁴ M. Gauchet, 'Menschenrechte', in F. Furet and M. Ozouf (eds.), *Kritisches Wörterbuch der Französischen Revolution*, (1996), ii, 1189.

⁴⁵ J. Derrida, 'Nietzsches Otobiographie oder Politik des Eigennamens' [1980] *Fugen* 67.

human right and claiming to have a human right. The political debate in the public sphere about the claim *to have* a right is already bound by human rights—although it is the political process which creates these rights. This is the interplay between self-rule and self-authorization on the one hand, and law rule and authorization by prior law on the other, which is already established in constitutional democracies and which has to be extended to human rights legislation.⁴⁶

A consequence of this *performative* nature of human rights is that they are dependent on citizens, who are not only able, but also willing, to make use of their rights, to participate in the performative practice. To become 'rights in action', and not merely 'book rights', they have to be used. The willingness to make use of rights can be threatened by different political, social, economic, cultural, and individual obstacles. The experience of such threats is also a specific European experience. The effectiveness of human rights also, but not only, depends on public conventions and judicial institutions for the enforcement of these rights. It is also necessary that people see themselves as holders of these rights, that they see themselves as citizens conscious of a community of human rights. This is a matter of political culture. People have to be empowered and enfranchised to raise their claims. As long as I am poor, belong to a minority which is publicly despised and systematically disadvantaged, which is excluded from communication, I lack the courage to use my rights—even if I am a holder of those rights. Here one can observe a kind of interplay between political culture and human rights. Rights to social welfare and education, rights to individual liberty, and rights to political participation have, apart from their specific meaning, the general meaning of encouraging people to consider and to treat themselves as well as each other as conscious subjects of human rights, as equal members of a legal community, which is constituted by the subjects of human rights, and which exists only as long as they make use of their rights. As a consequence, human rights have to be defended and strengthened not merely because they are human rights, but also because they have an effect on the European political culture which enables its citizens to make use of their rights and to develop the identity of equal members of a community of human rights.

To sum up, one could say that the performative meaning of human rights is most important for the status and self-understanding of the human being who articulates his or her negative experience of injustice and fear. If somebody refers to human rights when he or she articulates his or her experience of injustice and fear, he or she claims to have a *voice*. As an interpreter of his or her experience, he or she becomes the author of the human rights which he or she claims to have. Of course, a mere expression of injustice is not enough for the recognition of a violated right. The claim of the performative practice of human rights that everybody has *to listen to* the

⁴⁶ This loop between law and politics is recognized even by opposing political philosophies: see J. Derrida, *The Force of Law* (German edn. *Gesetzeskraft* (1991), 58), and Habermas, note 31 above, at chap. 3. For a 'joint interpretation' of Derrida's and Habermas' account see A. Wellmer, 'Menschenrechte und Demokratie', in G. Lohmann and S. Gosepath (eds.), *Philosophie der Menschenrechte* (forthcoming, 1998). For a reconstruction of this loop in constitutional democracies see F. Michelman, 'Can Constitutional Democrats be Legal Positivists? Or Why Constitutionalism?' (1996) 3 *Constellations* 293ff; O. Gerstenberg, *Deliberative Demokratie. Zur Rekonstruktion des Zirkels von Rechtsstaat und rechtserzeugender* (1997).

report of an individual experience entails the claim that everybody can put him- or herself in the shoes of the victim. This explains why human rights are always rooted in an individual and *particular* historical experience, but at the same time are declared to be rights which claim to *universal* recognition. Together with the claim that everybody can put him- or herself in the shoes of the victim, the person refrains from asserting a concrete identity: he or she becomes the abstract identity of a bearer of rights, and claims to be recognized as such a person.

VI. CONTEMPORARY PROBLEMS: FROM PUBLIC TO PRIVATE POWER

The European approach to human rights, which consists in a complex universalism with a sufficient degree of sensitivity to negative experiences of human beings, faces at least two problems, which could even become a serious objection, because they are linked together by current developments and changes in the political culture and the institutions of human rights. The first problem results from the emphasis on negative experiences, the loss and regaining of the victim's voice, and the memory of injustice and fear as the most salient features of the political culture of human rights. Human rights are considered by this approach from *the victim's point of view*. The second problem results from my primary concern in explaining complex universalism as a particular European contribution to human rights. Hitherto, my primary concern has been experiences of pain and humiliation, which were caused by *the State and its representatives*. But contemporarily, many, perhaps most, of the negative experiences of pain and humiliation which can be legitimately rejected as cases of injustice and serious violations of human rights are not committed by a State and its representatives, but by powerful social groups or by para-state organizations: war lords operating in civil wars who deprive people from basic resources of food and who order or tolerate torture, rape, and genocide, as in some regions of Africa, in former Yugoslavia, or in Algeria; militant fundamentalist groups who deny basic rights to women, as in Afghanistan. Often, powerful economic organizations, like big oil companies, work together with repressive regimes in order to deny claims of aborigines to their land from which they are expropriated.⁴⁷ This is the problem of violations of human rights by private organizations.

The emphasis on the victim's perspective can be dangerous for two reasons. First, it tends to exclude, paradoxically, the victim for a second time. As long as the victim is labelled and treated as a victim, and as long as the victim labels him- or herself, he or she is kept and captured in a passive role. This becomes more obvious when the victim's claim to human rights also aims at its potential consequences: the attribution of responsibility to the perpetrators. Then, the claim to human rights is linked with a relationship between victim and perpetrator. Charles Taylor has observed that a 'discourse of accusation' which prevails in public discourse can easily become

⁴⁷ For a more detailed account of the role of corporations and non-state actors see M. Kamminga, 'Regulating Corporations and Other Non-State Actors: The EU Role', in this vol.

'sterile', as sometimes happens in societies which have to deal with a past of state terrorism.⁴⁸ As a consequence, those groups which are obsessed by their role as victim remain within the realm of the community, but do not participate actively in it.⁴⁹ This kind of exclusion and self-exclusion has to be avoided by a practice of complex universalism. The focus on negative experiences and the memory of injustice and fear will not keep human beings in the passive role of victim. Instead, the performative meaning of the claim to human rights has to be extended to the role of the victim. The claim to human rights refers to the status of an equal participant in the discourse of human rights. The role of the victim is only part of the memory of injustice and fear to which anyone appeals who raises a claim to human rights.

The other reason why the emphasis on the victim's perspective could be dangerous to complex universalism has to do with the second problem. From the victim's perspective, it makes no difference if he or she is tortured or raped by the agents of the State, by an ordinary citizen committing a crime, or by armed forces under the command of a war lord. Complex universalism of human rights, as is suggested here, blurs the distinction between crimes which consist in a violation of criminal laws that are given by the legislator of a particular State and human rights violations. The advantage of this position is that it allows one to deal with all violations of human rights which are not committed by the State but by powerful social groups or para-state organizations. The disadvantages are the change in the role of the State, which is required as a consequence, and the exclusionary consequences for the perpetrators.

The State was the traditional addressee of human rights. Its role was, although ambivalent, clearly defined. The State was considered as the pre-eminent protector of human rights as well as the pre-eminent violator. The experience of violation came first—this is why all approaches to human rights try to demonstrate how and why human rights are above the State and a legally constituted society, and why human rights are primarily negative rights, directed against unjustified interference by the State. The idea that the State is also protector of human rights emerged together with the experience that human rights can also be jeopardized by overwhelming social power, for example, by an unequal distribution of primary goods which are necessary for a decent life. As soon as the negative experience of economic inequality was declared as unjust (i.e. as not pre-given by nature, fate, or as the fault of the disadvantaged and poor), people raised their voices and made a claim to social rights. Their institutionalization depended on a kind of power which was able to redistribute goods—the welfare state. Human rights of the second and third generation resort 'to state as the guarantor of human rights'.⁵⁰

Meanwhile, private power became stronger and stronger. It increased the danger of violations of individual rights which cannot be overcome by tort law or criminal law. The division of labour between human rights, directed against the State, and internal laws, which included individual rights protected by tort law and criminal law, begins to fade. The State becomes more and more the vehicle for protection of the

⁴⁸ C. Taylor, 'Demokratie und Ausgrenzung' (1997) 14 *Transit* 95.

⁴⁹ *Ibid.*
⁵⁰ B. de Sousa Santos, 'Toward a Multicultural Conception of Human Rights' (1997) 18 *Zeitschrift für Rechtssoziologie* 2.

people against pain and humiliation inflicted by private power. This is the problem of third party-applicability of human rights,⁵¹ or their horizontal effectiveness in the relationships between citizens. Human rights as constitutional basic rights are interpreted as rights which entail 'duties of protection'⁵² ('*Schutzpflichten*') which are addressed to the State, which has to act in order to protect the citizens by, for example, enforcing strong criminal laws and providing an effective criminal justice system. The contemporary public debate about the enforcement of criminal law and the effectiveness of the criminal justice system, which takes place in many European countries today with regard, for example, to sexual abuse of children or organized crime, often takes the victim's perspective in order to raise a claim against the State to better protection against criminal offences.

A further step is already taken in those cases where the nation State is too weak to cope with severe violations of human rights or where the State is itself the perpetrator. The suggestion of establishing an international court of criminal justice transposes the idea of a 'duty to protection against violations of human rights' from the level of the relationship between State and citizens to the level of international relations between States, powerful social groups, and individuals—individuals as potential victims and bearers of human rights.

A consequence of this development is that the State and civil society, or even supranational organizations and individual human beings, begin to merge at least to the extent that the victim's perspective and civil society or the global society are identical. The State is no longer seen as the sole violator of human rights—although human rights in particular emerged from negative experiences with the State's power to punish. Arbitrary imprisonment was, as already said, the first right, the '*Ur-Grundrecht*'. In Europe today, many people have fewer negative experiences and less fear with regard to the punishing State than with regard to crime. But if the victim's perspective prevails, then the danger of dehumanization emerges again; this time with regard to the perpetrator. When the distinction between civil society and State is blurred by the idea that human rights generally entail a 'duty to protect' people from becoming victims of human rights violations, then the human rights of the (potential) perpetrator become important too. What is necessary, then, is a balance between the human rights of the potential victims of human rights violations and the human rights of the potential perpetrators. The emphasis on the victim's perspective may not mean that the perpetrator has no human rights at all—otherwise, the perpetrator him- or herself will become a victim, who can legitimately reject his or her negative experience (for example, torture by the police or cruel punishment) as a matter of injustice and as a violation of human rights.

⁵¹ W. Kälin, 'Menschenrechtsverträge als Gewährleistung einer objektiven Ordnung', in W. Kälin et al. (eds.), *Aktuelle Probleme des Menschenrechtsschutzes (Current Problems of Human Rights Protection)* (1994), 9–48, especially 32.

⁵² Denninger, note 15 above, at 23ff and 33.

VII. CONCLUSION: THE THREAT OF 'HUMAN RIGHTS TALK'

As Martti Koskenniemi has demonstrated in his chapter,⁵³ the institutionalization of human rights and daily human rights practice cannot ensure that human rights do not degenerate into mere talk. Such degeneration is facilitated by the abuse of human rights for other purposes, economic or political, or the ideological use of human rights for the legitimation of a *status quo*. This provokes the criticism that human rights are no more than ideology, rhetorical tools, which can be used for the purpose of stopping political struggle over the ordering of social affairs. This kind of criticism of human rights talk is as old as the idea of human rights itself. The classical topics were already named by Burke, Mill, and Marx. In general, the criticism is that human rights contain an individualistic bias, that they ignore the complexity of social relationships and individual needs, that they destroy collective identities, and that they insert artificial boundaries and barriers into politics, which is particularly dangerous when democratic self-legislation is at stake.⁵⁴

Koskenniemi's critique of human rights talk can be interpreted as another argument for complex universalism of human rights. Rights rhetoric can be criticized from within the idea of human rights, when it is traced back to negative experiences of injustice and fear, as it is suggested here. It relates human rights to those who are affected, whose voice is not or only insufficiently represented in human rights discourse and practice, and whose experiences are excluded from human rights discourse. This is the reason complex universalism suggests making a shift from particular human rights and their contents to the procedures, in which each human being has a right to a voice and to express his or her negative experiences as a matter of injustice. Only if human rights have the additional meaning of a claim to recognition of being an equal participant in these discourses, the division between politics and an empty and ritualized human rights talk can be avoided. Rights depend on politics, and they entrench politics at the same time. While human rights should be given in a democratic political process only, they also shape this process by presupposing and requiring that each participant shall be recognized a person with a right to a voice, with a right to express his or her negative experiences and to claim that these experiences are a matter of injustice. Democratic politics give rights—and at the same time, rights shape and organize the democratic process. This is why the circular relationship between rights and politics, as mentioned above, is necessary.

The dangerous development, described by Koskenniemi, cannot be halted by simply substituting rights by politics, but only by accelerating the interaction between rights and politics. This could happen if we conceived of human rights as a memory of injustice and fear, which is linked with experiences of individuals who lost and regained their voices with regard to negative experiences such as suffering from the intentional infliction of pain and humiliation. It would make us more sensitive to the silent exclusions of our daily human rights practice. Keeping the long history of

⁵³ Koskenniemi, note 9 above.

⁵⁴ See the following essays: Edmund Burke's *Reflections on the Revolution in France*, Jeremy Bentham's *Anarchical Fallacies*, and Karl Marx's *On the Jewish Question*, in J. Waldron (ed.), *Nonsense Upon Stilts—Bentham, Burke and Marx on the Rights of Man* (1987).

exclusionary readings and selective applications of human rights in mind, this could be the message of a European approach to human rights: to encourage people to recapture their human rights by regaining their voices with regard to experiences of pain and humiliation. When we begin to conceive of human rights as the legacy of injustice and fear, it could happen that the universalism of human rights turns out no longer to be a problem.

C

The Human Rights Context within which the European Union Functions