The European Journal of International Law Vol. 19 no. 4 © EJIL 2008; all rights reserved

Human Dignity and Judicial Interpretation of Human Rights

Christopher McCrudden*

Abstract

The Universal Declaration on Human Rights was pivotal in popularizing the use of 'dignity' or 'human dignity' in human rights discourse. This article argues that the use of 'dignity', beyond a basic minimum core, does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions. The meaning of dignity is therefore context-specific, varying significantly from jurisdiction to jurisdiction and (often) over time within particular jurisdictions. Indeed, instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion. That is one of its significant attractions to both judges and litigators alike. Dignity provides a convenient language for the adoption of substantive interpretations of human rights guarantees which appear to be intentionally, not just coincidentally, highly contingent on local circumstances. Despite that, however, I argue that the concept of 'human dignity' plays an important role in the development of human rights adjudication, not in providing an agreed content to human rights but in contributing to particular methods of human rights interpretation and adjudication.

* FBA; Professor of Human Rights Law, Oxford University; Fellow, Lincoln College, Oxford; Overseas Affiliated Professor, University of Michigan Law School. I would like to thank the following for reading and discussing earlier drafts: Gerald Neuman, Benedict Kingsbury, Joseph Weiler, Barbara Havelkova, Robin Allen, Tony Honoré, Nicholas Hatziz, Denise Réaume, John Finnis, Jeremy Waldron, Michael Rosen, Katja Ziegler, Catharine McKinnon, Robert Howse, Paolo Carozza, and William Twining. I am also grateful to participants at discussions of earlier versions of the article at the University of Notre Dame Law School, Hull University, the University of Michigan Law School, and, most particularly, at the NYU Institute for International Law and Justice Colloquium.

EJIL (2008), Vol. 19 No. 4, 655–724 doi: 10.1093/ejil/chn043

So many roads, so much at stake
So many dead ends, I'm at the edge of the lake
Sometimes I wonder what it's gonna take
To find dignity[1]

The 60th Anniversary of the Universal Declaration of Human Rights provides a suitable opportunity to reflect on one of the key concepts which underpins and informs the human rights enterprise. Due significantly to its centrality in both the United Nations Charter[2] and the Universal Declaration of Human Rights,[3] the concept of 'human dignity' now plays a central role in human rights discourse.[4] The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) both state that all human rights derive from the inherent dignity of the human person.[5] Dignity is becoming commonplace in the legal texts providing for human rights protections in many jurisdictions. It is used frequently in judicial decisions, for example justifying the removal of restrictions on abortion in the United States,[6] in the imposition of restrictions on dwarf throwing in France,[7] in overturning laws prohibiting sodomy in South Africa,[8] and in the consideration of physician-assisted suicide in Europe.[9] But what does dignity mean in these contexts? Can it be a basis for human rights, a right in itself, or is it simply a synonym for human rights? In particular, what role does the concept of dignity play in the context of human rights adjudication?

1 Finding Human Dignity in the History of Ideas

The incorporation of the concept of 'human dignity' in the Universal Declaration was the culmination of a significant historical evolution of the concept. Although the story is complex, for present purposes we can identify, since Roman times, several main (overlapping) developments of dignity as a Western philosophical-cum-political concept.[10]

The concept of *dignitas hominis* in classical Roman thought largely meant 'status'. Honour and respect should be accorded to someone who was worthy of that honour

1 Bob Dylan, *Dignity* (1963).
2 Charter of the United Nations, 26 June 1945, 59 Stat 1031, UNTS 993, 3 Bevans 1153.
3 Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810, at 71 (1948).
4 See, generally, D. Kretzmer and E. Klein, *The Concept of Human Dignity in Human Rights Discourse* (2002).
5 International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), at 49, UN Doc A/6316 (1966), 993 UNTS 3; International Covenant on Civil and Political Rights (ICCPR), GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16), at 52, UN Doc A/6316 (1966), 999 UNTS 171.
6 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833 (1992).
7 *Wackenheim v. France*, Comm. No. 854/1999: France, 26 Feb. 2002, UN Doc CCPR/C/75/D/854/1999.
8 *National Coalition for Gay and Lesbian Equality v. Minister of Justice,* 6 BHRC 127 (CC, 1998), 1998 (12) BCLR 1517 (CC).
9 *Pretty v. United Kingdom*, 35 EHRR (2002) 1.
10 The entry by Bayertz, 'Menschenwürde', in H.G. Sandkühler (ed.), *Enzyklopädie Philosophie* (1999), Band 1, at 824–826, is particularly helpful. I am grateful to Michael Rosen for drawing it to my attention and for sharing with me his illuminating 2007 Boston University Benedict lectures: '"The Shibboleth of All Empty-headed Moralists": The Place of Dignity in Ethics and Political Philosophy', which helped me enormously in understanding the role of dignity in the history of ideas.

and respect because of a particular status that he or she had. So, appointment to particular public offices brought with it *dignitas*. As Cancik writes, the term 'denotes worthiness, the outer aspect of a person's social role which evokes respect, and embodies the charisma and the esteem presiding in office, rank or personality'.[11] Indeed, *dignitas* was not confined to humans and applied to institutions and the state itself. This concept of dignity has long been incorporated in some legal systems in the private law context as the basis for providing protection for dignity in the sense of 'status', 'reputation', and 'privileges'. The English Bill of Rights of 1689, for instance, referred to 'the Crown and royal dignity'.[12] In legal systems based on Roman law, dignity was seen as a right of personality and status, and criminal and civil remedies were frequently provided if dignity in this sense was infringed.[13] In South Africa, for example, it was recognized in the private-law sphere, deriving from Roman-Dutch law, that '[i]nfringement of a person's *dignitas* constituted a delict and compensation could be claimed with the *actio iniuriarum*'.[14] In the international sphere, this concept of 'dignity' was frequently used to refer to the status of sovereign states[15] and, by extension, to the status of ambassadorial and consular staff serving their countries abroad.[16]

Only in scattered classical Roman writing was a second, broader, concept of dignity present, particularly in Cicero, where *dignitas* referred also to the dignity of human beings as human beings, not dependent on any particular additional status. In this use of dignity, man is contrasted with animals: ' … [i]t is vitally necessary for us to remember always how vastly superior is man's nature to that of cattle and other animals; their only thought is for bodily satisfactions … . Man's mind, on the contrary, is developed by study and reflection … . From this we may learn that sensual pleasure is wholly unworthy of the dignity of the human race.'[17] Taken in this way, where human beings are regarded as having a certain worth by virtue of being human, the concept of human dignity raises important questions such as 'What kind of beings are we? How do we appropriately express the kind of beings we are?'[18] Radically different answers are possible, of course, and therein lies the root of the problem with the concept of human dignity.

[11] Cancik, '"Dignity of Man" and "Personal" in Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105–107', in Kretzmer and Klein, *supra* note 4, at 19.

[12] The Bill of Rights (Act) 1689 Cap II (36), Art. II. Compare the Act of Settlement 1701.

[13] Chaskalson, 'Human Dignity as a Constitutional Value', in Kretzmer and Klein, *supra* note 4, at 133, 135.

[14] Kroeze, 'Human Dignity in Constitutional Law in South Africa', in European Commission for Democracy Through Law, *The Principle of Respect for Human Dignity* (Proceedings of the UniDem Seminar, Montpellier, 2–6 July 1998), (1998), available at: www.venice.coe.int/docs/1998/CDL-STD(1998)026-e.asp), at 87, 88. Honoré has identified this development with Ulpian and links this with contemporary human rights law developments, in that in a society which recognizes wrongs to personality, dignity serves among other things to point to the respects in which all human beings are equal and in which that equality is to be given effect in law: see T. Honoré, *Ulpian: Pioneer of Human Rights* (2nd edn, 2002).

[15] Resnick and Suk, 'Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty', 55 *Stanford L Rev* (2003) 1921.

[16] Vienna Convention on Diplomatic Relations, 1961, 500 UNTS 95, Arts 22, 29.

[17] Cicero, *De Officiis, I*, at 30.

[18] DiSanto, 'The Threat of Commodity-consciousness to Human Dignity', in R. Duffy and A. Gambatese, *Made in God's Image: The Catholic Vision of Human Dignity* (1999) 54, at 57.

From that time, essentially three strategies have been adopted in trying to answer these questions. The first is, broadly, religiously based – we can answer the questions by seeing them as linked to the supernatural. The second strategy is philosophical – we can answer these questions by using philosophical rigour. The third is historical – we can answer these questions by seeing what particular types of actions have taken place that we consider to constitute a violation of human dignity. These three strategies can be seen as playing off against each other continuously. Each of the major developments in the understanding and use of dignity illustrates one or more of these strategies in operation.

During the Middle Ages, with the ferment of debate in intellectual circles about the relationship between God and Man, the idea of *dignitas* came to be used as the way of distinguishing between Man and other creatures, as it had in Cicero. The humanists attempted to reconcile classical thought and dogmatic theology by emphasizing the idea of mankind as having dignity because Man is made in the image of God, distinguishing Man from other species. As Arieli has argued, 'The expression "the inherent dignity of man" … defines the ontological status of man which derives ultimately from the fundamental conceptions of the West created by the fusion of Jewish-Christian monotheism with those derived from classical and humanistic conceptions of man.'[19] The Catechism of the Catholic Church incorporates this idea of Man as made in the image of God as central to its conception of human dignity.

> Of all visible creatures only man is 'able to know and love his creator'. He is 'the only creature on earth that God has willed for its own sake', and he alone is called to share, by knowledge and love, in God's own life. It was for this end that he was created, and this is the fundamental reason for his dignity … Being in the image of God the human individual possesses the dignity of a person, who is not just something, but someone. He is capable of self-knowledge, of self-possession and of freely giving himself and entering into communion with other persons. And he is called by grace to a covenant with his Creator, to offer him a response of faith and love that no other creature can give in his stead.[20]

We can identify an interesting example of the practical uses to which the emerging idea of dignity as inherent in Man, and thus worthy of protection, was put. In *On the Law of War and Peace*, published in 1625,[21] Hugo Grotius considered how we should treat the remains of slain enemies, and this resulted in a long excursus on why funeral rites were important. In an important passage, he concluded:

> [T]he most obvious explanation is to be found in the dignity of man, who surpassing other creatures, it would be a shame, if his body were left to be devoured by beasts of prey. … For to be tore by wild beasts … is to be robbed of those honours, in death, which are due to our common

[19] Arieli, 'On the Necessary and Sufficient Conditions for the Emergence of the Dignity of Man and His Rights', in Kretzmer and Klein, *supra* note 4, at 1, 9.

[20] *The Catechism of the Catholic Church*, Part One: The Profession of Faith, Section 2: The Profession of the Christian Faith, Chap. 1, Art. 1, paras. 6 and 356–357, available at : www.vatican.va/archive/catechism/p1s2c1p6.htm (internal citation omitted).

[21] H. Grotius, *De Jure Belli ac Pacis* (trans. A.C. Campbell, London, 1814), Bk II, chap. 19.

> nature. … Consequently the rights of burial, the discharge of which forms one of the offices of humanity, cannot be denied even to enemies, whom a state of warfare has not deprived of the rights and nature of men.[22]

As we can see from this passage, being made in the image of God meant that Man was endowed with gifts which distinguished Man from animals. The humanists of the Renaissance (and before that Thomas Aquinas[23]) identified dignity as an important bridge between classical Roman thinking and Church doctrine in another important way. They argued that one of the most important of the gifts of God to Man was the gift of reason. Using reason, therefore, came to be closely connected with the idea of dignity. In his famous and influential[24] oration *On the Dignity of Man*, published in 1486, Pico della Mirandola argued that at the root of Man's dignity is the ability to choose to be what he wants to be, and that this is a gift from God. 'It is given to him to have that which he chooses and to be that which he wills.'[25] The idea of dignity as now divorced from office and hierarchy became central to the use of dignity in this tradition.

The subsequent development of dignity drew substantially on the importance of Man as having the capacity of reason, whilst dropping the religious elements of humanist writings such as those of Pico. We now move more squarely to 'the central existential claim of modernity – man's autonomy, his capacity to be lord of his fate and the shaper of his future'.[26] In the Enlightenment, the dignity of Man in this sense came to be developed philosophically, and used as the basis, most famously, of Immanuel Kant's use of the concept. It would be rash, indeed, for a non-Kantian scholar to purport to get fully to grips with Kant's use of the idea, since it is notoriously contested territory, but several aspects of Kant's use of the term seem clear. First, although it is anything but clear what exactly he intended, a passage in which the term is used in the *Metaphysics of Morals* has become the best-known source for the subsequent belief that Kant's understanding of human dignity required that individuals should be treated as ends and not simply as means to an end.[27] Secondly, over time, this connection between dignity and Kant has become probably the most often cited non-religiously-based conception of dignity. Some, indeed, regard him as 'the father of the modern concept of human dignity'.[28] Thirdly, whether rightly or wrongly, the conception of dignity most closely associated with Kant is the idea of dignity as autonomy; that is, the idea that

[22] In *ibid.*, Bk II, chap. 19. Compare the provisions in bilateral agreements relating to the preservation of the dignity and aesthetic character of the cemeteries by the state in which the cemeteries are located, where the cemeteries contain the war dead of another state. See, e.g., Netherlands–US Agreement on American Military Cemeteries, 1970, TIAS 6979; US–Panama Agreement Concerning the Use of Corozal Cemetry, 1999.

[23] See J. Finnis, *Aquinas* (1998), at 176–180, 280.

[24] Arieli, *supra* note 19, at 10.

[25] P. della Mirandola, *On the Dignity of Man* (trans. C. Glenn Wallis, ed. Hackett Publishing Company, 1965, with an Introduction by Paul J.W. Miller), at 5.

[26] Arieli, *supra* note 19, at 12.

[27] Kant, 'Metaphysics of Morals', Section 38 of the *Doctrine of Virtue* (Ak. 6:462).

[28] Bognetti, 'The Concept of Human Dignity in European and U.S. Constitutionalism', in G. Nolte (ed.), *European and US Constitutionalism*, Science and Technique of Democracy No. 37 (2005), at 75, 79.

to treat people with dignity is to treat them as autonomous individuals able to choose their destiny.

Political philosophy from a somewhat different tradition, however, contributed to the popularization of dignity, as it became closely connected with the growth of republicanism. In the French Revolution of the 18th century, 'dignities' (in the sense of aristocratic privileges) were extended to every citizen by the Declaration of the Rights of Man and of the Citizen.[29] Thomas Paine, writing in 1791 in reply to Burke's attack on the French Revolution, partly bases his political theory on 'the natural dignity of man'.[30] The connection between Republicanism, particularly of the French variety, and the concept of human dignity is even more prominent in the writings of Mary Wollstonecraft. Both in the *Vindication of the Rights of Man* (1790) and the *Vindication of the Rights of Women* (1796), Wollstonecraft uses the language of dignity to describe the appropriate state of women and men in her preferred political system. In William Wordsworth's 1805 *Prelude*, the concept of the 'dignity of individual man' is also used, as a counterpoint to the idea that the value of Man is to be judged only by economic capacity and contribution.[31] By 1848, in a text published in Paris that year, Charles Renouvier was able confidently to assert that a 'Republic is a state which best reconciles the interests and the dignity of each individual with the interests and dignity of everyone'.[32] Dignity also took on a much more communitarian face, in part due to the common association of dignity and communitarianism with republicanism. The philosophy of Jean-Jacques Rousseau has often been thought to bring a more communitarian flavour to justify human rights, 'exhibit[ing] more concern for equality and fraternity, and less exclusive emphasis on liberty' than that prevalent in North American traditions.[33] The influence of Rousseau on Latin America, for example, as Paolo Carozza argues, strongly influenced the development of an approach to human rights that was distinctive, being committed in particular to the importance of equality, education, and material security. Dignity, with a communitarian emphasis, thus appears to have become closely connected with republicanism in the late 18th and early 19th centuries.

The concept of dignity came to be used as a rallying cry for a variety of other social and political movements advocating specific types of social reform during the 19th century. One of Friedrich Schiller's epigrams, *Würde des Menschen* (1798), puts well the connection between dignity and social conditions which was beginning to develop: '[g]ive him food and shelter;/When you have covered his nakedness, dignity will follow by itself.'[34] In Europe and in Latin America, dignity came to be particularly

[29] Declaration of the Rights of Man and of the Citizen, 1789, Art. 6: '[a]ll citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents'.

[30] T. Paine, *Rights of Man*: Part the First (1791).

[31] Wordsworth, *The Prelude* (1805), Book Thirteenth, lines 76–88.

[32] C. Renouvier, *Manuel Républicain de l'homme et du citoyen* ((1848); with introduction by M. Agulhon, 1981), at 93. I am grateful to Rebecca Scott for drawing my attention to this reference.

[33] Carozza, 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights', 25 *Human Rights Quarterly* (2003) 281, at 300.

[34] Cancik, *supra* note 11, at 36.

associated with the abolition of slavery. Simon Bolivar, the Latin American military leader, statesman, and icon, justified the abolition of slavery as a 'shameless violation of human dignity' and laws perpetuating it as 'sacrilege'.[35] One of the decrees of the French Republic established as a result of the revolution of 1848 abolished slavery as 'an affront to human dignity'.[36] The idea of the 'dignity of labour' was used to encapsulate some of the egalitarian ambitions of these social movements, as well as providing a rallying cry by the growing Labour Movement to mobilize the working classes and argue for the state to provide social welfare.[37] Ferdinand Lassalle, a leading socialist and founder of Germany's Social Democratic Party, argued, for example, that the state had the duty to 'improve the situation of the lower classes, who had fallen into poverty and starvation, and thus provide a true humane existence for everyone'.[38]

The prevalence of the use of dignity in European political discourse during the 19th century was not without its critics, both from the left and the right. Arthur Schopenhauer's 1837 critique of Kant condemned the use of 'human dignity' as contentless: '… this expression "Human Dignity," once it was uttered by Kant, became the shibboleth of all perplexed and empty-headed moralists. For behind that imposing formula they concealed their lack, not to say, of a real ethical basis, but of any basis at all which was possessed of an intelligible meaning; supposing cleverly enough that their readers would be so pleased to see themselves invested with such a "dignity" that they would be quite satisfied.'[39] In 1847, Karl Marx denounced the use of dignity by a fellow socialist as a 'refuge from history in morality'.[40] In 1872, Friedrich Nietzsche railed against the ideas of the 'dignity of man' and the 'dignity of labour', judging them to be merely the outpourings of a sentimental egalitarianism used to persuade those who toiled to continue to do so. For Nietzsche, individuals had dignity only when they were used as instruments: 'every human being … only has dignity in so far as he is a tool of the genius, consciously or unconsciously; from this we may immediately deduce the ethical conclusion, that "man in himself", the absolute man possesses neither dignity, not rights, nor duties; only as a wholly determined being serving unconscious purposes can man excuse his existence'.[41]

[35] Simón Bolivar, Message to the Congress of Bolivia (Lima, 25 May 1826), quoted in Carozza, *supra* note 33, at 301.

[36] Decree of 27 Apr. 1848, Preamble.

[37] Alan Flanders has argued, e.g., that the value of a trade union to its members is 'less in its economic achievement than in its capacity to protect their dignity': A. Flanders, *Management and Unions* (1970), at 239.

[38] Eckert, 'Legal Roots of Human Dignity in German Law', in Kretzmer and Klein, *supra* note 4, at 41, 47.

[39] A. Schopenhauer, *The Basis of Morality* (trans. and intro. by A.B. Bullock, 2005), Pt II, Critique of Kant's Basis of Ethics.

[40] Marx, 'Moralising Criticism and Critical Morality, a Contribution to German Cultural History Contra Karl Heinzen', *Deutsche-Brüsseler-Zeitung* Nos 86, 87, 90, 92, and 94, 28 and 31 Oct., 11, 18, and 25 Nov. 1847.

[41] K. Ansell-Pearson and C. Diethe (eds), *Nietzsch: On the Genealogy of Morality*, 'The Greek State' (1994), at 176, 185.

In light of these attacks, it is noteworthy that the Catholic Church adopted 'human dignity' as the rallying cry for the social teaching it developed at the end of the 19th century. The threat that socialism was seen as posing, particularly with the development of Communism by Marx and the fear of radical redistribution, class war, and totalitarianism, contributed to the adoption of dignity as central to an all-encompassing Catholic social doctrine, beginning with Pope Leo XIII's Encyclical *Rerum Novarum* at the end of the 19th century,[42] and developed further throughout the 20th century by Pius XI.[43] This was further developed and refined in Pope John XXIII's encyclical *Pacem in Terris*[44] and in a key document of the Second Vatican Council *Gaudium et Spes*.[45] Dignity was also a significant feature of Pope Paul VI and Pope John Paul II's writings.[46] The approach to dignity developed in this context emphasized the limits of rights in being able to capture the full range of what was necessary to human well-being, the dangers of a conflictual politics, and the need for solidarity between the different interests in society, resulting in a more communitarian conception of human dignity. But dignity was not simply a conception of Man as a political and social animal, and the creation of Man in the image of God remained a key element in its formulation and understanding.

A particularly influential exemplar of this approach was Jacques Maritain, the prominent French Catholic philosopher, and a well-known presence at the time of the drafting of the United Nations Charter and the Universal Declaration of Human Rights. He was active in promoting a philosophy which applied the theology of Aquinas to modern conditions. Central to this philosophy, as developed by Maritain, was the concept of human dignity.[47] It was Maritain, above all, who made it central to his view not only of the nature of Man, but also of political life and human relations. For Maritain, dignity was a fact (a metaphysical or ontological status, as well as a moral entitlement), and it was he who brought it into practical international politics in the post-Second World War period. His position as a man of affairs as well as an academic enabled him to ensure that this message was heard widely in the circles that were at that time engaged in the construction of the post-War global architecture, not least the United Nations. This was a view of human rights that viewed rights not as espousing radical ethical individualism but rather as essential for the promotion of the common good.

Since then, human dignity has played an important role in several social and political movements of the 20th century. It has been shaped most by the reaction against Nazi ideology and practice before and during the Second World War, culminating in

[42] Pope Leo XIII, *Rerum Novarum* (1891). This and the documents in the following four footnotes are available at: www.vatican.va. See also C.E. Curran, *Catholic Social Teaching, 1891–Present* (2002).

[43] Pope Pius XI, *Quadragesimo Anno* (1931).

[44] Pope John XXIII, *Pacem in Terris* (1963).

[45] *Gaudium et Spes*, Vatican Council II (1965).

[46] Pope Paul VI, *Populorum Progressio* (1967); Pope John Paul II, *Centesimus Annus* (1991).

[47] E.g., J. Maritain, *Man and the State* (1998).

the horrors of the Holocaust. It was a central organizing concept in the civil rights movement in the United States, and in the articulation of feminist demands concerning the role of women (echoing Mary Wollstonecraft). Dignity is playing a major role in discussions on the ethics of biomedical research.[48] In the area of bioethics, it has been made a central issue in discussions of reproductive rights, in campaigns on the issue of appropriate treatment at the end of life, and in the issue of genetic manipulation, not least because of the influence of the Catholic Church. More generally, dignity has increasingly passed into vernacular use in a variety of very different contexts and circumstances.[49] It has been drawn on extensively in the international political context, most notably in critiques of Communism, and as the moral basis for attacking global poverty. Nelson Mandela, in his Trafalgar Square speech in 2005, argued that '[o]vercoming poverty is not a gesture of charity. It is as act of justice. It is the protection of a fundamental human rights, the right to dignity and a decent life.'[50] In the Australian Government's apology to the indigenous 'stolen generation', the Prime Minister apologized for past 'indignity' inflicted.[51]

Not only has the use of dignity become commonplace in the context of social movements, but there also appears to have been something of a resurgence of interest in the use and analysis of the concept of dignity among philosophers and political theorists.[52] This article does not attempt to engage with this debate. So far, at least, there is little evidence that the legal (and more importantly for the purposes of this article, the judicial) use of the concept has been directly affected by recent philosophical/political theory analyses, or vice versa.

[48] See, e.g., Beyleveld and Brownsword, 'Human Dignity, Human Rights, and Human Genetics', 61 *MLR* (1998) 661. An article by Macklin, 'Dignity is a Useless Concept', 327 *British Medical J* (2003) 1419, was highly critical of the use of dignity language in this context. Recently, the (US) President's Council on Bioethics published a set of essays exploring this theme: *Human Dignity and Bioethics:* Essays Commissioned by the President's Council on Bioethics (2008), available at: www.bioethics.gov/reports/human_dignity/index.html, which has generated some hostile commentary: see Pinker, 'The Stupidity of Dignity', *New Republic*, 28 May 2008, available at: www.tnr.com/story_print.html?id=d8731cf4-e87b-4d88-b7e7-f5059cd0bfbd.

[49] Here are a few. Vice Admiral Thad Allen, the federal officer in charge of recovering the dead after Hurricane Katrina told a news conference: '[w]e are mindful of the dignity needed to be afforded each [of the dead]'. A report on the eviction of Kalahari Bushmen from their ancestral lands in Botswana (25 July 2005) included an interview with a young Bushman who had been forced to live in a settlement outside his ancestral lands. He said, 'There is nothing here for me. My land is my dignity'. (I am grateful to Michael Rosen for drawing this to my attention.)

[50] Nelson Mandela, Trafalgar Square, 3 Feb. 2005.

[51] See www.aph.gov.au/house/Rudd_Speech.pdf.

[52] Here are just some examples: M. Nussbaum, *Women and Human Development: The Capabilities Approach* (2000); M. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (2006); R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (2008); J. Feinberg, *Social Philosophy* (1973); J. Griffin, *On Human Rights* (2008); Gewirth, 'Human Dignity as the Basis of Rights', in M.J. Meyer and W.A. Parent (eds), *The Constitution of Rights* (1992), at 10; Waldron, 'Dignity and Rank', 48 *Archives européennes de sociologie* (2007) 201; Lee and George, 'The Nature and Basis of Dignity', 21 *Ratio Juris* (2008) 173; Rosen, *supra* note 10.

2 Finding Human Dignity in Human Rights Texts

A *Human Dignity in National Constitutional Texts*

Despite its relative prominence in the history of ideas, it was not until the first half of the 20th century, however, that dignity began to enter legal, and particularly constitutional and international legal, discourse in any particularly sustained way.[53] The use of dignity in legal texts, in the sense of referring to human dignity as inherent in Man, comes in the first three decades of the 20th century. Several countries in Europe and the Americas incorporated the concept of dignity in their constitutions:[54] in 1917 Mexico;[55] in 1919 Weimar Germany[56] and Finland;[57] in 1933 Portugal;[58] in 1937 Ireland;[59] and in 1940 Cuba.[60] It seems clear that the combination of the Enlightenment, republican, socialist/social democratic, and Catholic uses of dignity together contributed significantly to these developments, with each being more or less influential in different countries. So, for example, in Finland the socialist influence was clear. In the Irish context the Catholic influence was dominant, as it was in Portugal[61] and Spain – in 1945 the Basic Law of Spain included a reference to dignity.[62] In the Central and South American context, the social democratic/socialist and Catholic influences were both significantly present.[63]

Though growing, this constitutional use of dignity remained pretty marginal, however, until the end of the Second World War. It was not surprising, perhaps, that of the new national constitutions which incorporated dignity between 1945 and 1950, three of the most prominent (Japan, Italy, and Germany) were of defeated nations of the Second World War responsible for a substantial part of the horrors that the human rights movement was aiming to eradicate. In 1946 Japan,[64] in 1948 Italy,[65] and in 1949 West Germany[66] incorporated dignity in the constitutional documents.

[53] But see Decree of 27 Apr. 1848 of the French Republic abolishing slavery in all French colonies and possessions, referring to slavery as an 'affront to human dignity'.

[54] Iglesias, 'Bedrock Truths and the Dignity of the Individual', 4 *Logos: A Journal of Catholic Thought and Culture* (2001) 114.

[55] Art. 3c.

[56] Reich Constitution of 11 Aug. 1919, Art. 151.

[57] Pt I; General Provisions.

[58] Constitution of Portugal, 1933, Art. 45.

[59] Preamble.

[60] Art. 32.

[61] 'Salazar used Quadragesimo Anno as a blueprint for his government', in Manuel and Mott, '*Une Messe est Possible': The Imbroglio of the Catholic Church in Contemporary Latin Europe* (CES Working Papers, Series No. 133 (2004)), at 10, available at: www.ces.fas.harvard.edu/publications/ManuelMott.pdf

[62] 'The Spanish State proclaims as a guiding principle of its acts, respect for the dignity, integrity and freedom of the human person … .'

[63] Constitution of the Republic of Costa Rica, 1949, Arts 33 and 56.

[64] Art. 24.

[65] The Constitution of the Italian Republic, 1948, Arts 3, 27, and 41.

[66] Chap. 1, Art. 1(1).

The movement to incorporate dignity into new constitutions was, however, by no means confined to European and Latin American states. When Israel declared independence in 1948, the Declaration of Independence referred to how '[s]urvivors of the Nazi holocaust in Europe, as well as Jews from other parts of the world, continued to migrate to *Eretz-Israel*, undaunted by difficulties, restrictions and dangers, and never ceased to assert their right to a life of dignity, freedom and honest toil in their national homeland'.[67] In 1950 the Constitution of India did likewise.[68] In his 1950 assessment of post-War constitutionalism, Carl Friedrich identified 'the stress laid upon the dignity of man' as its core value.[69]

Of these national constitutional references to dignity, we shall see subsequently that much the most influential was the incorporation of dignity into the West German constitution. The influence of Catholic, social democratic, and Kantian thinking on the drafting of that constitution is well known, and dignity has the most prominent place of all in the Basic Law which emerged in 1949.[70] The debate over the drafting of the provision was intense, focusing on whether the dignity of the human person should be based explicitly on natural law. The final text, however, avoided any reference to 'a specific philosophical or ethical concept of human dignity and remains open to different approaches',[71] providing (in English translation) '[t]he dignity of man is inviolable. To respect and to protect it shall be the duty of all public authority.'[72]

B *Dignity in Previous International and Regional Human Rights Texts and Proposals*

Dignity had also been incorporated in several drafts of earlier proposals for an international Bill of Rights. Even before the Second World War, the Dijon Declaration of 1936 referred to 'respect for human dignity and civilised behaviour'.[73] The American Jewish Committee's Declaration of Human Rights (1944) had provided: '[a]ll that we cherish must rest on the dignity and inviolability of the person, of his sacred right to live and to develop under God, in whose image he was created'.[74] Unsurprisingly, the Catholic Bishops in the United States in 1946 had included 'dignity' in the text of their proposed Declaration of Rights. The term had also been proposed by the Uruguayan Government in its detailed suggestions for what should be included in the United Nations

[67] The Declaration of the Establishment of the State of Israel, 1948.

[68] Preamble.

[69] Freidrich, 'The Political Theory of the New Democratic Constitutions', 12 *Rev of Politics* (1950) 215, at 217.

[70] See Andries, 'On the German Constitution's Fifthieth Anniversary: Jacques Maritain and the 1949 Basic Law (Grundgesetz)', 13 *Emory Int'l L Rev* (1999) 1.

[71] Walter, 'Human Dignity in German Constitutional Law', in European Commission for Democracy through Law, *supra* note 14, at 24, 26.

[72] Grundgesetz, Art. 1(1).

[73] The Dijon Declaration, 1936, translated in H.G. Wells, *The Rights of Man or What Are We Fighting For?* (1940). I am grateful to Brian Simpson for providing many of the references in the following para.

[74] Cited in Dicke, 'The Founding Function of Human Dignity in the Universal Declaration of Human Rights', in Kretzmer and Klein, *supra* note 4, at 111, 113.

Charter. The Cuban Declaration of Human Rights of 1946 included that every human being had the 'right to life, to liberty, to personal security and to respect for his dignity as a human being'.[75] Georges Gurvitch's Bill of Social Rights of 1946 referred to the need for society to protect 'liberty and human dignity'.[76] The American Federation of Labor's Preamble to its international Bill of Rights proposal in 1946 stipulated that the 'dynamic motive of a truly democratic society is to foster and enhance the worth and dignity of the individual human being …', and provided in Article 1: '[e]very human being – irrespective of race, colour, creed, sex or national origin – has the right to pursue his or her work and spiritual development in conditions of freedom and dignity'.[77] Even the United Kingdom's International Bill of Rights of 1947 included in the Preamble a reference to 'fundamental human rights and … the dignity and worth of the human person'.[78] The United States proposals for a human rights convention in 1947 provided that '[i]t shall be unlawful to subject any person to torture, or to cruel or inhuman punishment, or to cruel or inhuman indignity'.[79]

At the regional level, dignity was included in the American Declaration of the Rights and Duties of Man, the first international human rights instrument of a general nature, predating the Universal Declaration of Human Rights (UDHR) by more than six months.[80] The Preamble provided: '[a]ll men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another'. The first chapter established a catalogue of rights, whilst the second chapter contained a list of corresponding duties. Dignity played an important role in both. As explained in the preamble, '[t]he fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.' The treaty establishing the Organization of American States referred in chapter VII to the importance of dignity as a basis for social legislation. The text of the Bill of Rights of the European Movement of May 1948, by which time the UN draft declaration of human rights was available, provided in Article 1: '[a]ll men are born free and equal in dignity',[81] and in Article 29 that 'every one has a right that his dignity and health shall be preserved through the provision of a diet, of clothing, of housing and of medical requirements up to a standard corresponding to the resources of the European Union in relation to vital necessities'.

[75] E/HR/1, 22 Apr. 1946. Original in Spanish.

[76] G. Gurvitch, *The Bill of Social Rights* (1946), at Art. 1.

[77] American Federation of Labor, E/CT.2/2, 20 Aug. 1946.

[78] United Nations, *Yearbook on Human Rights for 1947* (1949), at 488.

[79] US Proposals for a Human Rights Convention (Nov. 1947), E/CN.4/37.

[80] It was adopted by the nations of the Americas at the Ninth International Conference of American States in Bogotá, Colombia, in Apr. 1948, the same meeting that adopted the Charter of the Organization of American States and thereby created the OAS.

[81] Text of Bill of Rights of European Movement, 4 May 1948.

C *Human Dignity in the UN Charter and the UDHR*

Much of the inspiration for the subsequent use of dignity in international and regional human rights texts derives from the use of dignity in the Universal Declaration of Human Rights. The Preamble mentions dignity in two places: '[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world …', and a little later: '[w]hereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedoms …'. Article 1 takes up this theme and provides: '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' There are also several more specific uses of dignity in the remainder of the text. Article 22, on the right to social security, provides: '[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'. Article 23(3), set in the context of right to work, provides that '[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection'.

D *Human Dignity in International Humanitarian Law Texts*

Apart from some scattered references during the 19th century to dignity in national provisions relating to the treatment of prisoners,[82] and in a draft treaty provision prior to the Second World War relating to the treatment of civilian populations,[83] the major boost in international humanitarian law to the use of dignity also came after the Second World War in the drafting of the Geneva Conventions. The importance of dignity as the basis for the approach adopted was clear from the outset. The International Committee of the Red Cross proposed to the Powers assembled in Geneva the text of a Preamble, which was to be identical in each of the four Conventions: '[r]espect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking. Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed "hors de combat" by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those among them who are in suffering shall be succored and tended

[82] 'Instructions for the Government of Armies of the United States in the Field' (Lieber Code), 24 Apr. 1863, Art. 75.

[83] First draft Convention adopted in Monaco (Sanitary cities and localities), 27 July 1934, Art. 3.

without distinction of race, nationality, religious belief, political opinion or any other quality …'.[84] The text of the Conventions, as adopted, incorporated 'dignity' most prominently in Common Article 3, which prohibits *inter alia* 'outrages upon personal dignity, in particular humiliating and degrading treatment'.[85] Such acts 'are and shall remain prohibited at any time and in any place whatsoever' with respect to persons protected by the Conventions.

Subsequently, Additional Protocol I to the Conventions relating to the protection of victims of international armed conflicts prohibited 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault' in Article 75 (relating to 'fundamental guarantees').[86] Article 85 provided that certain acts 'shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol' including '(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination'.[87] Article 4 of the Second Additional Protocol prohibited '(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'.[88] Since then, the statutes of *ad hoc* international criminal tribunals and the Rome Statute establishing the International Criminal Court have incorporated similar references to 'outrages upon personal dignity'.[89]

E *Dignity and International Human Rights Texts after the 1940s*

Since the relatively dramatic increase in the use of dignity in the international human rights law context during the 1940s, dignity has become commonplace in new international human rights and humanitarian law instruments. At the international level, dignity is now routinely incorporated in human rights charters, both general and specific. Unsurprisingly, given the role that dignity played in abolitionist politics, the preamble to the Slavery Convention of 1956 refers to the UN Charter's reaffirmation

[84] See 'Remarks and Proposals submitted by the International Committee of the Red Cross', Document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference of Geneva (21 Apr. 1949) (Feb. 1949), at 8.

[85] Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 Aug. 1949, Art. 3.

[86] Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

[87] *Ibid.*

[88] Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[89] See, e.g., the Agreement for and Statute of the Special Court for Sierra Leone, 16 Jan. 2002, Art. 3, prohibiting '[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 Jan. 1994 and 31 Dec. 1994, Art. 4; Rome Statute of the International Criminal Court, 17 July 1998, Art. 8, prohibiting 'outrages upon personal dignity, in particular humiliating and degrading treatment'.

of the Member's 'faith in the dignity and worth of the human person'.[90] So too, unsurprisingly given the importance attached to the 'dignity of labour' in the growth of the trade union movement, dignity is referred to, periodically, in the Preambles to several International Labour Organization (ILO) Conventions, although without any apparent explanatory pattern being perceptible.[91] Three of the core international human rights conventions concluded during the 1960s confirmed that dignity would continue to play a significant role in human rights texts. The International Covenants on Civil and Political Rights, on Economic, Social and Cultural Rights, and on the Elimination of Racial Discrimination all included dignity language both in their Preambles[92] and in the texts of several Articles, those relating to the treatment of those subject to a deprivation of their liberty through imprisonment or detention,[93] and the right to education.[94] This pattern of including references to dignity in the Preambles to major international human rights texts has continued since then and is reflected in the Preambles to the International Conventions regarding Discrimination against Women (1979)[95] and the Prevention of Torture (1984).[96]

By 1986, dignity had become so central to United Nations' conceptions of human rights that the UN General Assembly provided, in its guidelines for new human rights instruments, that such instruments should be 'of fundamental character and derive from the inherent dignity and worth of the human person'.[97] Since then, not surprisingly, the major conventions on the Rights of Children (1989),[98] the Rights of Migrant Workers (1990),[99] Protection against Forced Disappearance,[100] and the Rights of Disabled Persons (2007)[101] have all included references to dignity, asserting the centrality

[90] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and practices Similar to Slavery 1956, 226 UNTS 3, Preamble.

[91] C156 Workers with Family Responsibilities Convention, 1981; C122 Employment Policy Convention, 1964; C111 Discrimination (Employment and Occupation) Convention, 1958; C107 Indigenous and Tribal Populations Convention, 1957; C104 (Shelved) Abolition of Penal Sanctions (Indigenous Workers) Convention, 1955.

[92] International Convention on the Elimination of All Forms of Racial Discrimination GA Res 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc A/6014 (1966), 660 UNTS 195, Preamble; ICESCR, *supra* note 5, Preamble; ICCPR, *supra* note 5, Preamble.

[93] *Ibid.,* Art. 10.

[94] ICESCR, *supra* note 5, Art. 13.

[95] Convention on the Elimination of All Forms of Discrimination against Women, GA Res 34/180, 34 UN GAOR Supp (No. 46), at 193, UN Doc A/34/46, Preamble.

[96] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46, annex, 39 UN GAOR Supp (No. 51), at 197, UN Doc A/39/51 (1984), Preamble.

[97] GA Res. 41/120, 4 Dec. 1986, quoted in A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), at 538.

[98] Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49), at 167, UN Doc A/44/49 (1989), Preamble.

[99] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, GA Res 45/158, annex, 45 UN GAOR Supp (No. 49A), at 262, UN Doc A/45/49 (1990), Arts 17 and 70.

[100] International Convention for the Protection of All Persons from Enforced Disappearance, E/CN 4/2005/WG 22/WP 1/Rev 4 (2005), Art. 19.

[101] International Convention on the Rights and Dignity of Persons with Disabilities, GA Res A/61/611 (2006), Preamble, Arts 3, 8, 16, 24, and 25.

of dignity to human rights in general and (often) its centrality to specific rights in play in that convention. But, in addition, international instruments in other more specific spheres as far apart as those dealing with the right to food[102] and the death penalty[103] have also adopted dignity language in their preambles.

A further major fillip to the use of dignity in the international sphere was given by the adoption of dignity as the central organizing principle of the Vienna World Conference on Human Rights in 1993. The Declaration and Programme of Action adopted dignity as foundational not just to human rights in general,[104] but also adopted the concept of dignity in their provisions dealing with particular areas of human rights, such as the treatment of indigenous peoples,[105] the prohibition of torture,[106] the prohibition of gender-based violence and harassment,[107] the abolition of extreme poverty,[108] and the issue of biomedical ethics.[109] Increasingly, the role of dignity has expanded beyond the preambles to international human rights documents and into the texts of their substantive articles. References to dignity have expanded to include not only rights relating to conditions of (and treatment during) detention[110] and the right to education,[111] but also other rights: rights in the criminal justice process,[112] rights to be provided minimum conditions of welfare,[113] the right to health,[114] the right of disabled persons to be treated as autonomous individuals,[115] the right of children to be treated with dignity following abuse,[116] rights to reputation,[117] rights of indigenous

[102] The Preamble to the Agreement establishing the International Fund for Agricultural Development of 1977, TIAS 8765, 1059 UNTS 191, recognizes 'that the continuing food problem of the world is afflicting a large segment of the people of the developing countries and is jeopardizing the most fundamental principles and values associated with the right to life and human dignity'.

[103] Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, GA Res 44/128, annex, 44 UN GAOR Supp (No. 49), at 207, UN Doc A/44/49 (1989), Preamble.

[104] Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14–25 June 1993, UN Doc A/CONF 157/24 (Pt 1), at 20 (1993), Preamble.

[105] *Ibid.*, Art. 20.

[106] *Ibid.*, Art. 55.

[107] *Ibid.*, Art. 18.

[108] *Ibid.*, Art. 25.

[109] *Ibid.*, Art. 11.

[110] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 99, Art. 17.

[111] Convention on the Rights of the Child, *supra* note 98, Art. 28; Convention on the Rights of Persons with Disabilities, *supra* note 101, Art. 24.

[112] Convention on the Rights of the Child, *supra* note 98, Arts 37 and Art. 40.

[113] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 99, Art. 70.

[114] Convention on the Rights of Persons with Disabilities, *supra* note 101, Art. 25.

[115] *Ibid.*, Art. 16.

[116] Convention on the Rights of the Child, *supra* note 98, Art. 39; Convention on the Rights of Persons with Disabilities, *supra* note 101, Art. 3; Convention on the Rights of Persons with Disabilities, Arts 1 and 3.

[117] *Ibid.*, Art. 8; International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 100, Art. 24; Convention on the Rights of the Child, *supra* note 98, Art. 23.

cultures,[118] rights to control access and use of personal data,[119] and the conduct of biomedical experimentation.[120]

F *Dignity in Regional Texts*

The use of dignity is not restricted to the sphere of international human and humanitarian rights texts. Increasingly, dignity language has become embedded in the texts of regional human rights instruments. Dignity is central to the Preambles to the principal Inter-American,[121] Arab,[122] African,[123] and (some) European[124] human rights instruments, thus appearing to demonstrate a remarkable degree of convergence on dignity as a central organizing principle. Although it was not included in the text of the European Convention on Human Rights (ECHR),[125] it is included prominently in several later Council of Europe conventions, notably the Revised European Social Charter[126] and the Convention on Human Rights and Biomedicine.[127] The aim of the latter Convention is to protect the dignity and identity of human beings and to guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine. It protects the dignity of everyone, including the unborn, and its main concern is to ensure that no research or intervention may be carried out that would undermine respect for the

[118] C107 Indigenous and Tribal Populations Convention, 1957, *supra* note 91, Art. 2; UN Declaration on the Rights of Indigenous Peoples, Adopted by GA Res 61/295 on 13 Sept. 2007, Arts 15 and 43.

[119] C185 Seafarers' Identity Documents Convention (Revised), 2003, at para. 8; International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 100, Art. 19.

[120] The UNESCO Universal Declaration on the Human Genome and Human Rights, 1997, UN GA Res AIRES/53/152, 9 Dec. 1998, gave a central role to the idea of human dignity: Preamble, Arts 1, 2, 6, 10, 11, 12, 15, 21, and 24.

[121] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women 'Convention of Belem do Para', 33 ILM (1994) 1534, Preamble; Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series No. 67, 25 ILM (1992) 519, Preamble; American Declaration of the Rights and Duties of Man, OAS Res XXX (1948), American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123, Preamble, Arts 6 and 11.

[122] League of Arab States, Revised Arab Charter on Human Rights, 22 May 2004, 12 *Int'l Human Rights Rep* (2005) 893: '[b]ased on the faith of the Arab nation in the dignity of the human person whom God has exalted ever since the beginning of creation and in the fact that the Arab homeland is the cradle of religions and civilizations whose lofty human values affirm the human right to a decent life based on freedom, justice and equality …'.

[123] Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2000, reprinted in 1 *African Human Rights LJ* (2001) 40, Art. 3; African Charter on Human and Peoples' Rights, 1981, 21 ILM (1982) 58, Preamble; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT/III, Preamble.

[124] Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Council of Europe, CETS No. 184, Preamble.

[125] ECHR, 213 UNTS 222.

[126] European Social Charter (Revised), ETS No. 163 (1996), Preamble, Art. 26.

[127] Convention on Human Rights and Biomedicine, CETS No. 164 (1997), Preamble, Art. 1.

dignity and identity of the human being. Finally, it is not surprising that dignity also features prominently in the European Union Charter of Fundamental Rights.[128]

So too, the use of dignity in the context of specific textual provisions of the conventions shows a remarkable degree of consistency between the regional human rights instruments, and between these instruments and the international instruments we have examined in the previous section. Thus we find dignity used in the context of specific provisions dealing with slavery and forced labour,[129] persons with disabilities,[130] treatment of children,[131] harassment,[132] treatment of those incarcerated,[133] freedom from torture,[134] education,[135] forced disappearances,[136] violence against women,[137] and biomedical research.[138]

G *Dignity in Domestic Constitutional Texts More Recently*

Clearly one of the influential sources for the subsequent incorporation of human dignity into national constitutions was the influence of these international and regional

[128] Charter of Fundamental Rights of the European Union (2000/C 364/01), OJ (2000) C 364/1, Preamble, Arts 1, 25, and 31.

[129] African Charter on Human and Peoples' Rights, *supra* note 123, Art. 5; American Convention on Human Rights, *supra* note 121, Art. 6.

[130] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), Art. 13; Revised Arab Charter on Human Rights, reprinted in 12 *Int'l Human Rights Rep* (2005) 893, Art. 40.

[131] African Charter on the Rights and Welfare of the Child, *supra* note 130, Arts 20 and 21; Revised Arab Charter on Human Rights, *supra* note 130, Arts 17 and 33.

[132] The European Community's prohibition of sexual harassment is essentially based on the need to promote the dignity of the individual in the workplace. Council Dir 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ (2000) L 180/22, Art. 3; Council Dir 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, OJ (2001) L 303/16, Art. 3; Dir 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ (2006) L 204/23, Art. 2; Council Dir 2004/113/EC of 13 Dec. 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ (2004) L 373/37, Art. 2. See Friedman and Whitman, 'The European Transformation of Harassment Law: Discrimination Versus Dignity', 9 *Columbia J European L* (2003) 241.

[133] American Convention on Human Rights, *supra* note 121, Art. 5; African Charter on the Rights and Welfare of the Child, *supra* note 130, Art. 17; Revised Arab Charter on Human Rights, *supra* note 130, Art. 20.

[134] Cairo Declaration on Human Rights in Islam, 1990, UN GAOR, World Conference on Human Rights, 4th Sess., Agenda Item 5, UN Doc A/CONF.157/PC/62/Add.18 (1993), Art. 20.

[135] Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, OAS Treaty Series No 69 (1988), Art. 13; African Charter on the Rights and Welfare of the Child, *supra* note 130, Art. 11.

[136] Inter-American Convention on Forced Disappearance of Persons, 33 ILM (1994) 1429, Preamble.

[137] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 121, Arts 4 and 8.

[138] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicines: Convention on Human Rights and Biomedicine, Council of Europe CETS No 164 (1997), Preamble, Art. 1; Additional Protocol to the Convention on Human Rights and Biomedicine concerning Biomedical Research, Council of Europe CETS No 195 (2004), Preamble, Art. 1.

texts. The incorporation of dignity into the Charter and the Universal Declaration thus took place at the same time as human dignity was being incorporated into other regional human rights instruments and national constitutions. There appears to have been an injection of the concept of dignity throughout the world at that time. Identifying which particular document influenced which other document is thus a somewhat pointless enterprise as the concept was so much in the political ether, as it were, that it tended to crop up all over the place. The impulse to incorporate dignity was clearly strongest in those circles which were influenced by Catholic or socialist thinking, and probably most strongly in those circles where both influences were present.

As regards constitutional rights at the domestic level in Europe, there have been two periods when dignity language came to the fore since the 1940s. In the 1970s, with the fall of the dictatorships in Greece, Spain, and Portugal, dignity was incorporated into the new democratic constitutions.[139] The most dramatic increase came in the 1990s following the fall of the Berlin Wall and the transition to democracy in central and eastern Europe. The desire to draft new national constitutions and the incorporation of human rights in these documents led to discussions on which existing constitutions might be a suitable model. Frequently, the German constitution and its interpretation by the German Constitutional Court was a prime influence in the drafting of these constitutions generally, explaining the extent to which dignity also became incorporated in these new instruments.[140] The German influence extended beyond central and eastern Europe, however, playing a major role in the drafting of the new South African constitution post-apartheid, bringing with it a central place for dignity.[141] The German influence is also apparent in the drafting of Israel's Basic Law on Human Dignity, which was to serve as the basis for a Bill of Rights.[142]

H *Differences in Dignity in Human Rights Texts*

However, as might be expected from the variety of differing approaches that are apparent in the historical development of the idea of dignity, there are some significant differences in the use of dignity in human rights texts. A more pluralistic, more culturally relative approach to the meaning of human dignity can be identified by looking briefly at some of the differences in the use of dignity language between the regional

[139] Constitution of the Hellenic Republic, 9 June 1975, Art. 7; Constitution of the Kingdom of Spain, 27 Dec. 1978, Art. 10; Constitution of the Portugese Republic, 2 Apr. 1976, Arts, 1, 26, and 59.

[140] Constitution of the Republic of Hungary, Act XX of 1949, as amended, Art. 54; Constitution of the Czech Republic (Constitution Act No. 1/1993 of 16 Dec. 1992), Preamble; Charter of fundamental rights and basic freedoms (Resolution of the Presidium of the Czech National Council of 16 Dec. 1992, Act No. 2/1992); Constitution of Estonia, 28 June 1992, Art. 10; Constitution of the Republic of Lithuania, 25 Oct. 1992, Art. 21; Constitution of the Republic of Poland, 2 Apr. 1997, Preamble, Arts 30 and 41; Constitution of the Republic of Slovakia, 23 Dec. 1991, Arts 21 and 34; Constitution of the Slovak Republic, 1 Sept. 1992, Arts 12 and 19.

[141] Constitution of the Republic of South Africa (108 of 1996), ss 1, 7, 10, 35, 36, 39, 165, 181, 196, and Sched 2.

[142] (Israel) Basic Law: Human Dignity and Liberty (17 Mar. 1992, amended 9 Mar. 1994).

texts, and between the regional texts and the international texts. There are significant differences relating to the extent to which dignity should be regarded as related to national liberation and self-determination,[143] as an appropriate limit on freedom of speech,[144] as grounding a basis for protecting honour and reputation,[145] as grounding individual duties to the community as well as rights,[146] as requiring the provision of socio-economic rights in general (or particular socio-economic rights such as workplace rights, or the right to property),[147] as related to the role of dignity in the context of rights of women,[148] and as relevant to freedom of religion.[149]

[143] Revised Arab Charter on Human Rights, *supra* note 122, Art. 2(3): '[a]ll forms of racism, Zionism and foreign occupation and domination constitute an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples; all such practices must be condemned and efforts must be deployed for their elimination'. See also African Charter on Human and Peoples' Rights, *supra* note 123, Preamble.

[144] Cairo Declaration on Human Rights in Islam, *supra* note 134, Art. 22: ' … Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.'

[145] American Convention on Human Rights, *supra* note 121, Art. 11(1): '[e]veryone has the right to have his honour respected and his dignity recognized'.

[146] The Protocol of Amendment to the Charter of the Organization of American States (Protocol of Buenos Aires), OAS Treaty Series No. 1-A, provides in Art. 43(a), that '[a]ll human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security'. Art. 43(b) provides, '[w]ork is a right and a social duty, it gives dignity to the one who performs it …'. The American Declaration of the Rights and Duties of Man, *supra* note 121, Preamble, states: '[t]he fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.'

[147] *Ibid.*, Art. 23: '[e]very person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home'; European Social Charter (revised), *supra* note 126, Art. 26 states: '[w]ith a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations: 1. to promote … prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct'. The Preamble to *ibid.* states: 'The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realized … 26. All workers have the right to dignity at work.' See also Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, OAS Treaty Series No. 69 (1998), Preamble.

[148] Cairo Declaration on Human Rights in Islam, *supra* note 134, Art. 6(a): '[w]oman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage. (b) The husband is responsible for the maintenance and welfare of the family.' The Revised Arab Charter on Human Rights, *supra* note 130, Art. 3(3), states: '[m]en and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.'

[149] Cairo Declaration on Human Rights in Islam, *supra* note 134, Art.1(a): '[a]ll human beings form one family whose members are united by their subordination to Allah and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations. The true religion is the guarantee for enhancing such dignity along the path to human integrity.'

What emerges from these differences is that some jurisdictions use dignity as the basis for (or another way of expressing) a comprehensive moral viewpoint, 'a whole moral world view', which seems distinctly different from region to region.[150] In this sense, to speak of human dignity is a shorthand way of summing up how a complex, multi-faceted set of relationships involving Man is, or should be, governed: relationships between man and man, man and God, man and animals, man and the natural environment, man and the universe. The classic examples of this use of dignity are to be found in Catholic and Islamic doctrine. Legally, this use can be seen in some of the more general references to dignity in several constitutional texts, most notably those the drafting of which was most influenced by Catholic social teaching in the 1920s and 1930s, such as Ireland's 1937 Constitution[151] and the human rights texts emerging from the Arab world.[152] What also emerges from an analysis of these texts is significant differences in the ways in which human dignity has been incorporated into positive law. In many of the instruments, dignity is to be found in the preamble, whereas in others it is used to explicate particular rights. In some it is referred to as foundational in some sense; in others not. In some, human dignity is a right in itself (and in some systems, a particularly privileged right), whilst, in other jurisdictions, it is not a right but a general principle.

3 Finding an Overlapping Consensus: A Minimum Core of Human Dignity?

We need, at this point, to step back from the detail. It is clear that the idea of dignity has become a central organizing principle in the idea of universal human rights, although with interesting differences between jurisdictions, and that there are several different strands of metaphysical and philosophical thinking feeding these differences. Despite these differences, can we identify a common core to the idea of dignity?

A *Dignity as Placeholder in the UDHR and Other Human Rights Texts?*

We can attempt to answer this question in several ways. At this point, a brief excursus into the drafting history of the UN Charter and the UDHR will be useful. Central to the development of dignity in the UDHR was the earlier incorporation of the concept of dignity in the Preamble to the Charter of the United Nations. It would be most satisfactory to be able to tell a nicely researched story of how the term came to be included in the UN Charter but it is shrouded in some mystery, and we can only speculate as to

[150] Shultziner, 'Human Dignity – Function and Meanings', 3(3) *Global Jurist Topics* (2003) 5, at fn. 24.

[151] Bunreacht Na hÉireann (1937), Preamble: '[i]n the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, … Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ … And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured …'

[152] See, *supra* notes 122, 130, and 134.

the precise source of the proposal. What is clear is that the originator of much of the Preamble was Jan Christian Smuts, the South African general and former member of the British War Cabinet. It was his draft which formed the basis for the Preamble, and incorporated the important reference to human rights as a foundational principle of the new United Nations. However, his draft did not include a reference explicitly to human dignity.[153] That phrase appeared only after a further committee discussion, and I have been unable to identify precisely from where it originated.[154]

All that can be said, without further evidence, is that the phrase was by then in such common use in the circles devising the new United Nations global architecture that it was unsurprising that it emerged from the drafting Committee. The International Labour Organization had already incorporated the language of dignity as early as 1944 in the Philadelphia Declaration, which effectively re-established the aims and purposes of the ILO, originally established in 1919 in the Versailles Treaty.[155] Part II of the Declaration brought the concept of dignity to centre stage: '[b]elieving that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice, the Conference affirms that: *(a)* all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity …'.[156] A few months after the incorporation of 'dignity' in the Charter, it also played a prominent role in the Preamble to the treaty establishing the United Nations Educational, Scientific and Cultural Organization (UNESCO).[157]

In contrast to the dearth of information on the inclusion of dignity in the Preamble to the United Nations Charter, we can be somewhat clearer on how the term 'human dignity' came to be included in the UDHR.[158] There has long been a debate over the relative importance of René Cassin and John Humphrey in the drafting of the Declaration.[159] The better view, according to the most thorough scholarly literature, is that Humphrey was considerably more important than he has sometimes been given credit for, producing (effectively) the first draft of the Declaration. Whilst that is no doubt true, the incorporation of the concept of dignity in the text of the Declaration

[153] R.B. Russell, *A History of the United Nations Charter* (1958), at 911–913, although it did refer to 'the sanctity and ultimate value of human personality …'. See also Marshall, 'Smuts and the Preamble to the UN Charter', 358 *The Round Table* (2001) 55.

[154] Russell, *supra* note 153, at 916. Smuts' original phrase was changed to 'the dignity and value of the human person'. Mary Ann Glendon reports Charles Malik, a prominent member of the UN Human Rights Commission at the time, as saying that the term had been inserted at the suggestion of Smuts: M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001), at 144.

[155] Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), May 1944.

[156] *Ibid.*, II.

[157] Constitution of the UN Educational, Scientific and Cultural Organization (UNESCO), adopted in London on 16 Nov. 1945, 3 Bevans 1311.

[158] The detailed drafting history is set out in the United Nations, *supra* note 78, Annex, at 484 ff.

[159] See J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (2000).

was due not to Humphrey but to Cassin. Humphrey's first draft did not include any reference to dignity, and it was included first by Cassin when he redrafted Humphrey's draft. The inclusion of dignity in the Declaration obviously drew on its inclusion already in the Preamble to the United Nations Charter, of course, but it nevertheless was controversial. Humphrey himself, for example, clearly considered that the reference to dignity did not add anything at all to his draft and that its incorporation as Article 1 of the Declaration was mere rhetoric.[160] For others, however, it was a vital attempt to articulate their understanding of the basis on which human rights could be said to exist. Mary Ann Glendon recalls how, when the South African representative questioned the use of the term, Eleanor Roosevelt argued that it was included 'in order to emphasize that every human being is worthy of respect … it was meant to explain why human beings have rights to begin with'.[161] As we have seen, it was included in the final Declaration in five different places, twice in the Preamble, most prominently in Article 1, and twice in those articles setting out socio-economic rights (Articles 22 and 23).

Moving beyond the drafting history and thinking more broadly, we can see that the significance of human dignity, at the time of the drafting of the UN Charter and the UDHR (and since then in the drafting of other human rights instruments), was that it supplied a theoretical basis for the human rights movement in the absence of any other basis for consensus. We need to remember the global context in which the UDHR was being negotiated. To achieve a successful outcome, it was necessary to persuade states of vastly different ideological hue that the Declaration was consistent with their conceptions of human rights. What would a theory of human rights have to consist of for it to be a successful theory in this context? It would need, probably, to be one (i) that gives a coherence to the concept of human rights so that the whole is greater than simply the sum of its parts, and not just a ragbag collection of separate unconnected rights, (ii) that is not rooted in any particular region of the globe and appeals across cultures, but is sensitive to difference, (iii) that places importance on the person rather than the attributes of any particular person, but that also places the individual within a social dimension, (iv) that is not dependent on human rights originating only from the exercise of state authority (not least because what the state gives the state can also take away), (v) that is non-ideological (in the sense that it transcends any particular conflicts, such as between capitalism and communism), (vi) that is humanistic (in the sense that it was not based on any particular set of religious principles or beliefs but is nevertheless consistent with them), and (vii) that is both timeless, in the sense that it embodies basic values that are not subject to change, and adaptable to changing ideas of what being human involves.[162] Such a theory has long been the Holy Grail of human rights.

At the time of the drafting of the Charter and the Universal Declaration, there was no shortage of theories seeking to support human rights, but none by themselves

[160] J.P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (1984), at 44.

[161] Glendon, *supra* note 154, at 146.

[162] Weisstub, 'Honor, Dignity, and the Framing of Multiculturalist Values', in Kretzmer and Klein, *supra* note 4, at 263.

would satisfy the need to have sufficient consensus in order to move forward.[163] A significant role in trying to achieve an intellectual and ideological consensus on the basis for human rights was given by UNESCO to the philosopher, Jacques Maritain, whose own political philosophy (as we have seen) was strongly based on Catholic social teaching, according dignity a central role. Maritain's strategy, however, was not to attempt to get agreement on anything as divisive as a theoretical basis for human rights.[164] He advised that in order to get agreement on any international declaration of human rights, those negotiating it should concentrate on what particular practices they could agree were necessary or should be prohibited. They should agree, for example, that torture should be prohibited but should put to one side any consideration of why torture was wrong. To go further than simply agree on the prohibition of the practice was to court interminable delays and ultimate failure.

Those drafting the Charter and the Universal Declaration largely adopted this strategy. A theory of human rights was a necessary starting point for the enterprise that was being embarked upon. Dignity was included in that part of any discussion or text where the absence of a theory of human rights would have been embarrassing. Its utility was to enable those participating in the debate to insert their own theory. Everyone could agree that human dignity was central, but not why or how. As Doron Shultziner puts it, '[t]here is a major advantage to this approach, for the abstention from a philosophical decision regarding the source and cause for rights and duties paves the way for a political consent concerning the specific rights and duties that ought to be legislated and enforced in practice without waiving or compromising basic principles of belief. Thus, the different parties that take part in a constitutive act can conceive human dignity as representing their particular set of values and worldview. In other words, human dignity is used as a linguistic-symbol that can represent different outlooks, thereby justifying a concrete political agreement on a seemingly shared ground.'[165] This is not to imply that dignity has no content at all. Unlike in linguistics, where a placeholder carries no semantic information, dignity carried an enormous amount of content, but different content for different people. As we have seen, human dignity was a rallying cry in intellectual debate across the political and philosophical spectrum. At the same time as Maritain, the Catholic philosopher, was publicizing his conception of human dignity, Jean Paul Sartre was arguing that genuine human dignity could be achieved only through existentialism.[166] Although coming from apparently opposite ends of the philosophical spectrum, they agreed that the proper objective was human dignity.

[163] E.g., during the drafting of the UDHR, the Netherlands delegate regretted that 'man's divine origins and immortal destiny had not been mentioned in the declaration, for the fount of all those rights was the Supreme Being, who laid a great responsibility on those who claimed them. To ignore that relation was almost the same as severing a plant from its roots, or building a house and forgetting the foundation': UN GA, Summary Records, at 874, quoted in S.R.S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (2007), at 52.

[164] *Human Rights: Comments and Interpretations: A Symposium edited by UNESCO* (intro. J. Maritain, 1948), especially at 16. On Maritain's role see Glendon, *supra* note 154.

[165] Shultziner, *supra* note 50, at 5.

[166] Sartre, 'Existentialism is a Humanism' (1946), in W. Kaufman, *Existentialism: From Dostoevsky to Sartre* (1975), at 345.

B *An Overlapping Consensus: Towards a Minimum Core?*

That said, it is possible to discern certain 'family resemblances'[167] between these differing ways of viewing human dignity. In this family resemblance we can, perhaps, see the outlines of a basic minimum content of 'human dignity' that all who use the term historically and all those who include it in human rights texts appear to agree is the core, whether they approve of it or disapprove of it. This basic minimum content seems to have at least three elements.[168] The first is that every human being possesses an intrinsic worth, merely by being human. The second is that this intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth. The first element is what might be called the 'ontological' claim; the second might be called the 'relational' claim. This minimum core of the meaning of human dignity seems to be confirmed both by our discussion of the historical roots of dignity, and by the ways in which it has been incorporated into the human rights texts we have considered. The human rights texts have gone further and supplemented the relational element of the minimum core by supplying a third element regarding the relationship between the state and the individual. This is the claim that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa (the limited-state claim). In the remainder of the article, I shall use the term 'minimum core' to describe these three basic elements. Although I shall go on to identify the incompleteness of the concept of dignity thus identified, we should not underestimate its importance. The concept of dignity, thus defined, as Gerald Neuman has written, may be contrasted with political theories that have in the past commanded considerable support, such as 'organic theories of nationalism that submerge the individual, with authoritarian political doctrines that condemn human nature as degraded by sin, with racist doctrines of biological inferiority and with aristocratic doctrines of national hierarchy'.[169]

This concept of human dignity is, of course, stated at a very high level of generality. Even if we accept these three claims, the concept of human dignity holds within it the seeds for much debate. We can say, on the basis of what we have described up to this point, that whilst there is a *concept* of human dignity with a minimum core, there are several different *conceptions* of human dignity,[170] and these differ significantly because there appears to be no consensus politically or philosophically on how any of the three

[167] L. Wittgenstein, *Philosophical Investigations* (trans. G.E.M. Anscombe, 2nd edn, 1958), at 32 (paras 66 and 67).

[168] I am grateful to Gerald Neuman for this insight. See 'Human Dignity in United States Constitutional Law', in D. Simon and M. Weiss (eds), *Zur Autonomie des Individuums: Liber Amicorum Spiros Simitis* (2000), at 249, 249–250, from which the three elements are derived.

[169] *Ibid.*, at 250.

[170] I am grateful to Jeremy Waldron for this insight. The distinction probably originates in Gallie, 'Essentially Contested Concepts', 56 *Proceedings of the Aristotelian Society* (1956) 167. Alexy, *A Theory of Constitutional Rights* (2nd edn, 2002), at 233, also distinguishes between 'a single concept and varying conceptions of human dignity' in his discussion of the use of human dignity in German constitutional law.

claims that make up the core of the concept are best understood. They differ, in other words, on their understanding of what the intrinsic worth of the individual human being consists in (the ontological claim), in their understanding of what forms of treatment are inconsistent with this worth (the relational claim), and in their understanding of what the detailed implications of accepting the ontological and relational claims are for the role of the state *vis-à-vis* the individual, beyond the core idea that the individual does not exist for the state (the limited-state claim).

4 Finding Human Dignity in Judicial Discourse on Rights: Beyond the Minimum Core?

Further discussion of the meaning and implications of differing conceptions of dignity might have remained largely confined to political and philosophical debate, as some have argued would be preferable.[171] Instead, we shall see in this part of the article that dignity has also come to be used extensively in the *judicial* interpretation and application of human rights texts. Given the very diversity of the use of dignity throughout the judicial world, this section cannot claim to be comprehensive. Instead, I shall draw on examples at the international, regional, and domestic levels to illustrate the range of this judicial dignity language. What we shall see are attempts to engage, in diverse settings, with each of the three claims that I have described as making up the core concept of human dignity. The issue we shall be concerned with is how far, if at all, an overlapping consensus can be identified which goes beyond simply accepting the core identified above. Has progress been made on developing a judicial consensus on how we should best understand the basis for and the implications of the ontological, relational, or state claims?

On the basis of this analysis, we can identify several understandings that those using dignity language in the judicial context seem to have. In one use, dignity is seen as providing the basis for human rights in general, in the sense of providing a key argument as to why humans should have rights, and what the limits of these rights may be. In this sense, dignity is the basis for human rights to exist, and there are thinner and thicker variations of this approach.[172] In the thinnest approach, dignity is viewed as simply another way of expressing the idea of a catalogue of human rights.[173] Dignity neither adds to, nor detracts from, rather it is coterminous with, human rights and therefore adds little to the debate on what rights there are or how they should be interpreted.[174] Others adopt a somewhat thicker view of dignity,

[171] See, e.g., Schachter, 'Human Dignity as a Normative Concept', 77 *Am Soc Int'l L* (1983) 848, at 853.

[172] Schultziner, *supra* note 50, round fn. 28.

[173] This also has several modern philosophical exponents such as Joel Feinberg and James Griffin, *supra* note 52.

[174] So, Joel Feinberg, e.g., writes: '[r]espect for persons 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. To respect a person then, or to think of him as possessed of human dignity simply is to think of him as a potential maker of claims': 'The Nature and Value of Rights' [1970] *J Value Inquiry* 243, at 252.

seeing it not as a synonym for human rights but rather as expressing a value unique to itself, on which human rights are built. It is this thicker view that appears to be at work in the judicial decisions we shall consider below. In this thicker use, the role that dignity plays is primarily to help in the identification of a catalogue of specific rights. This catalogue is not closed, however, and the general principle may continue to generate more rights over time as its implications are better understood or changes occur which give rise to new situations that require the application of the general principle for the first time. More generally, however, dignity becomes an interpretive principle to assist the further explication of the catalogue of rights generated by the principle. Some (or all) of the rights then come to be seen as best interpreted through the lens of dignity.

Dignity can, additionally, be seen as itself a right or obligation with specific content, and not only as the basis for human rights in general, or a catalogue of specific rights. In some jurisdictions, human dignity is recognized as a right enforceable by an individual in the same way as any other right. In others, human dignity is a principle which stands behind other individual rights but does not give rise to enforcement by an individual. In Germany, there is a continuing academic debate as to what particular status human dignity has in this respect,[175] although in that context the significance of the debate may be less than it appears, since '[i]n all cases before the Constitutional Court in which questions of human dignity arose the alleged violation of human dignity went along with alleged violations of other individual rights so that access to the Court never depended on the qualification of human dignity as an individual right'.[176]

This multi-faceted approach to the role of dignity is well captured in *Dawood v. Minister of Home Affairs*, a South African Constitutional Court decision.[177] 'Human dignity … informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis.'[178] The Court continued: 'dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.'[179]

[175] Klein, 'Human Dignity in German Law', in Kretzmer and Klein, *supra* note 4, at 145, 147.

[176] Walter, 'Human Dignity in German Constitutional Law', in European Commission for Democracy through Law, *supra* note 14, at 27.

[177] [2000] 5 Law Reports of the Commonwealth 147, 2000 (3) SA 936 (CC).

[178] *Ibid.*, at para. 35 (O'Regan J).

[179] *Ibid.*

A *Dignity is Drawn On by Judges in a Wide Range of Different Jurisdictions*

1 International Court of Justice

At first sight, the International Court of Justice (ICJ) appears to be an exception to the trend of courts resorting to dignity language. It is true that the concept of dignity appears not infrequently in the judgments of the Court, but these uses are confined to dignity as referring to the dignity of nation states, and by extension to the dignity of ambassadorial and consular officials, rather than in the human rights context. So far as I have been able to discover, the Court has not used the concept of human dignity in the human rights context. However, on closer inspection, there has been a significant use of dignity (in the human rights context) in concurring and (more often) dissenting opinions by individual members of the ICJ.[180] Thus, we find dignity being drawn on by Judge Tanaka[181] and Vice President Ammoun[182] in the 1971 *South West Africa* case to support their argument that the practices of racial discrimination and apartheid were contrary to international law; by Judge de Castro[183] and Vice President Ammoun[184] to suggest how administrative procedures should operate where they were applied to employees in the 1973 case reviewing a decision of the United Nations Administrative Tribunal; by Judge Shahabuddeen[185] to support his 1996 conclusion that the use of nuclear weapons was contrary to human rights guarantees; by Judge Weeramantry in 1996 as part of his argument relating to the application of the crime of genocide;[186]

[180] See, in general, Bedi, *supra* note 163.

[181] Dissenting Opinion of Judge Tanaka in the *South West Africa Case*: '[i]n any case, as we have seen above, all human beings are equal before the law and have equal opportunities without regard to religion, race, language, sex, social groups, etc. As persons they have the dignity to be treated as such. This is the principle of equality which constitutes one of the fundamental human rights and freedoms which are universal to all mankind. … The Respondent probably being aware of the unreasonableness in such hard cases, tries to explain it as a necessary sacrifice which should be paid by individuals for the maintenance of social security. But it is unjust to require a sacrifice for the sake of social security when this sacrifice is of such importance as humiliation of the dignity of the personality': *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa* (Second Phase), Judgment of 18 July 1966, [1966] ICJ Rep 6, at 308, 312.

[182] Separate Opinion of Vice-President Ammoun (translation) in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep 16, at 77: '[i]t is not by mere chance that in Article 1 of the Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom: "All human beings are born free and equal in dignity and rights." From this first principle flow most rights and freedoms. Of all human rights, the right to equality is far and away the most important. It is also the one which has been longest recognized as a natural right: it may even be said that the doctrine of natural law was born in ancient times with the concept of human equality as its first element.'

[183] Dissenting Opinion of Judge de Castro in *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* [1973] ICJ Rep 166, at 291.

[184] Dissenting Opinion of Vice-President Ammoun (translation) in *ibid.*, at 247.

[185] Dissenting Opinion of Judge Shahabuddeen in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, at 383 (quoting Max Huber, Acting President, ICRC).

[186] Separate Opinion of Judge Weeramantry in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections [1996] ICJ Rep 595, at 641: '[o]ne of the principal concerns of the contemporary international legal system is the protection of the human rights and dignity of every individual'.

in 2002 by Judge Ranjeva regarding the attempted exercise by Belgium of universal jurisdiction;[187] by Judge Elaraby in 2004 regarding the mutual obligations of Israelis and Palestinians in the context of the disputed security fence erected by Israel in occupied Palestinian territory;[188] and by Judge Koroma to underscore the importance of the international obligations which he held Uganda had violated in its armed activities in the Democratic Republic of the Congo.[189]

2 European Court of Human Rights and the European Court of Justice

In the European context, an apparent exception to the incorporation of dignity in human rights texts after the Second World War is to be found in the ECHR. Subsequently, however, interpretations of the European Commission and Court of Human Rights, particularly of the Article 3 ECHR prohibition of torture and inhuman and degrading treatment and punishment, have drawn extensively on the concept of human dignity as a basis for their decisions. The first references to human dignity appeared in the decision of the Commission in the *East African Asian* case where the racial discrimination the applicants were subjected to constituted an infringement of their human dignity,[190] which in the particular circumstances of the case amounted to degrading treatment. The first reference by the Court (ECtHR) to human dignity was in *Tyrer v. UK* in which corporal punishment, administered as part of a judicial sentence, was held to be contrary to Article 3 on the ground that it was an assault 'on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity'.[191] Since then, it has been drawn on in the context of the right to a fair hearing,[192] the right not to be punished in the absence of a legal prohibition,[193] the prohibition of torture,[194] and the right to private life.[195] The Court now regards human dignity as underpinning all of the rights protected by the Convention.[196]

Human dignity has also been incorporated judicially as a general principle of European Community law, deriving from the constitutional traditions common to Member States. Advocate General Jacobs stated in 1993, 'the constitutional traditions of the Member States in general allow for the conclusion that there exists a principle according to which the State must respect not only the individual's physical well-being, but also

[187] Declaration of Judge Ranjeva in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Rep 3 at 55.

[188] Separate opinion of Judge Elaraby in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2005] ICJ Rep 136, at 255.

[189] Declaration by Judge Koroma, Dissenting Opinion, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep, at paras 6 and 13.

[190] *East African Asians v. United Kingdom*, 3 EHRR (1981) 76, at paras 203–207.

[191] *Tyrer v United Kingdom*, 2 EHRR 1, at para. 33.

[192] *Bock v. Germany*, 12 EHRR (1990) 247, at para. 48.

[193] *SW v. UK; CR v. UK*, 21 EHRR (1995) 363, at para. 44.

[194] *Ribitsch v. Austria*, 21 EHRR (1995) 573, at para. 38.

[195] *Goodwin v. United Kingdom*, 35 EHRR (2002) 447, at paras 90–91.

[196] *Pretty v. United Kingdom*, 24 EHRR (1997) 423, at para. 65: '[t]he very essence of the Convention is respect for human dignity and human freedom'.

his dignity, moral integrity and sense of personal identity'.[197] In a second case, interpreting the Community Directive prohibiting sex discrimination in employment, in which it was held that the Directive prohibited dismissal from employment on the basis of a person's transsexuality, the European Court of Justice (ECJ) stated that 'to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard'.[198] In *Omega*, the Court held that 'the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law'.[199]

3 Domestic Judicial Interpretation of Rights

The judiciary in several national jurisdictions enthusiastically further the incorporation and use of dignity in domestic rights discourse.[200] The concept of dignity was introduced into United States Supreme Court jurisprudence by the two justices most influenced by labour thinking (Frankfurter and Murphy JJ) and Catholic thinking (Murphy J) in the immediate post-War period.[201] Indeed, that tradition continued most prominently in the opinions of Brennan J who was also strongly influenced by both Catholic and labour thinking, and was also the justice most associated with the concept of dignity.[202] Since then, the Supreme Court has used the concept of human dignity in the interpretation of the Eighth Amendment,[203] the Due Process Clause,[204] the extent of privacy rights in the abortion context,[205] and in First Amendment free speech cases.[206] More recently, justices have referred to 'personal dignity' in striking down legal prohibitions on homosexual sodomy,[207] and the 'dignity of man' in prohibiting the execution of those who are mentally retarded.[208]

[197] Case C–168/91, *Christos Konstantinidis* [1993] ECR I–1191, at para. 39 of the AG's Opinion.

[198] Case C–13/94, *P v. S and Cornwall County Council* [1996] ECR I–2143, at para. 22. See also Maduro AG in Case C–303/06, *Coleman v. Law*, Judgment of 31 Jan. 2008, at paras 8–10, 12–13, 15, and 22.

[199] Case C–36/02, *Omega Spielhallen und Automatenaufstellungs- GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I–9609, at para 34. See also Case C–377/98, *Netherlands v. European Parliament and Council* [2001] ECR I–7079.

[200] See, e.g., Moon and Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality', 6 *European Human Rights L Rev* (2006) 610, at 626, referring to the 'exponential growth in dignity discourse in the courts of England and Wales'.

[201] For Murphy J's use of dignity see the immediate post-War cases *In re Yamashita*, 327 US 1, at 29 (1946) (dissent); *Homma v. Patterson*, 327 US 759, at 760 (1946) (dissent); *Duncan v. Kahanamoku*, 427 US 304, at 334 (1946) (concurrence). For an example of Frankfurter J's use of dignity see *American Federation of Labor v. American Sash and Door Co*, 335 US 538, at 542 (1949). See further H.N. Hirsch, *The Enigma of Felix Frankfurter* (1981); St Antoine, 'Justice Frank Murphy and American Labor Law', 100 *Michigan L Rev* (2002) 1900.

[202] Berger, 'Justice Brennan, "Human Dignity" and Constitutional Interpretation', in M.J. Meyer and W.A. Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (1992), at 129.

[203] *Trop v. Dulles*, 356 US 86, at 1000 (1958) ('[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man'). For a review of the use of dignity in the US Sup. Ct up to the early 1980s see Paust, 'Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content', 27 *Howard LJ* (1984) 145.

[204] *Rochin v California*, 342 US 165, at 174 (1952).

[205] *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992).

[206] See generally S.J. Heyman, *Free Speech and Human Dignity* (2008).

[207] *Lawrence v. Texas*, 539 US 558, at 574 (2003) (Kennedy, J).

[208] *Atkins v. Virginia*, 536 US 304 (2002).

Even in countries where dignity had been earlier incorporated but removed (such as in the Canadian Bill of Rights), the courts continued to use the idea of dignity to interpret the new Charter of rights, indeed building it into a central principle of adjudication.[209] In other jurisdictions, the courts anticipated the introduction of human dignity into legal texts. In Israel, human dignity was frequently invoked by the Supreme Court prior to the adoption of the Basic Law on human dignity.[210] Where it was not explicitly written into the text of the constitutions which emerged in central Europe from the first wave of constitutional revisions in the 1990s, several constitutional courts inferred it anyway, for example in Poland,[211] anticipating its subsequent incorporation in the text of the 1997 Constitution.[212] So too in other European states, such as France, the concept of dignity was drawn on in important *Conseil d'Etat* and *Conseil Constitutionnel* decisions. In one of its judgments the *Conseil Constitutionnel* held that '[t]he preamble to the 1946 Constitution reaffirmed and proclaimed rights, freedoms and constitutional principles, declaring … "In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights"; it follows that the protection of human dignity against all forms of enslavement or degradation is a principle of constitutional status'.[213]

B *Dignity is Increasingly Present in the Interpretation of Particular Substantive Areas*

Whether dignity is used as a principle with specific content, or as a right, or as an obligation, or as a justification, particular values seem particularly closely related to the judicial interpretation of the core idea of dignity. Sometimes dignity is viewed as particularly associated with individual autonomy where, for example, a woman's freedom to have an abortion is upheld on the basis of dignity. Sometimes dignity is viewed as particularly associated with freedom from humiliation as, for example, where restrictions are placed on the publication of information or data that would lead to a person being pilloried. Sometimes dignity is seen as particularly associated with protecting individuals from severe physical or mental torment inflicted by the authorities, thus prohibiting torture and other forms of inhuman or degrading treatment. Sometimes dignity is seen

[209] Ullrich, 'Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany', 3(1) *Global Jurist Frontiers* 1.

[210] Kretzmer, 'Human Dignity in Israeli Jurisprudence', in Kretzmer and Klein, *supra* note 4, at 161, 163–165.

[211] Polish Constitutional Tribunal, judgment of 17 Mar. 1993, referred to by Lewaszkiewicz-Petrykowska, 'The Principle of Respect for Human Dignity', in European Commission for Democracy through Law, *supra* note 14, at 17.

[212] Polish Constitution, 1997, *supra* note 140, Art. 30.

[213] *Conseil Constitutionnel*, decision 94/343/344 DC, 27 July 1994, available at : www.conseil-constitutionnel.fr/langues/anglais/a94343dc.pdf.

as particularly associated with protection from discrimination. In an important intervention, Andrew Clapham has usefully suggested that:

> concern for human dignity has at least four aspects: (1) the prohibition of all types of inhuman treatment, humiliation, or degradation by one person over another; (2) the assurance of the possibility for individual choice and the conditions for 'each individual's self-fulfilment', autonomy, or self-realization; (3) the recognition that the protection of group identity and culture may be essential for the protection of personal dignity; (4) the creation of the necessary conditions for each individual to have their essential needs satisfied.[214]

We can use this rough categorization as a useful starting point for our analysis of the cases, whilst recognizing that these are overlapping categories.

1 Prohibition of Inhuman Treatment, Humiliation, or Degradation by One Person Over Another

Dignity has figured prominently in decisions concerning the meaning and scope of prohibitions on torture and cognate terms, such as inhuman or degrading treatment. In his separate opinion in *Ireland v. United Kingdom*,[215] Judge Sir Gerald Fitzmaurice identified the concept of human dignity as central to the idea of what constituted 'degrading' treatment under Article 3 ECHR: '[i]n the present context it can be assumed that it is, or should be, intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt …'.[216] So too, in the separate opinion of Judge Evrigenis in the same case, dignity is regarded as central to what is protected by prohibitions on inhuman treatment.[217] 'By adding to the notion of torture the notions of inhuman and degrading treatment, those who drew up the Convention wished … to extend the prohibition in Article 3 … of the Convention – in principle directed against torture … to other categories of acts causing intolerable suffering to individuals or affecting their dignity rather than to exclude from the traditional notion of torture certain apparently less serious forms of torture and to place them in the category of inhuman treatment which carries less of a "stigma" – to use the word appearing in the judgment. The clear intention of widening the scope of the prohibition in Article 3 … by adding, alongside torture, other kinds of acts cannot have the effect of restricting the notion of torture.'[218]

Since then, the ECtHR has increasingly resorted to the use of dignity language in interpreting Article 3. In *Selmouni v. France*[219] the Court 'reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made

[214] Clapham, *supra* note 97, at 545–546.
[215] 2 EHRR 25.
[216] Opinion of Judge Fitzmaurice, *ibid.*, at para. 27.
[217] Opinion of Judge Evrigenis, *ibid.*, at (a).
[218] Opinion of Judge Evrigenis, *ibid.*, at (i).
[219] 23 EHRR (1999) 403.

strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3'.[220] In *Pretty v. United Kingdom*, the Court said, 'As regards the types of "treatment" which fall within the scope of article 3 of the Convention, the court's case law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3.'[221] So too, the Israeli Supreme Court has held that the concept of dignity was squarely implicated by similar interrogation methods adopted by the Israeli security forces.[222]

Dignity has also frequently been used by courts in the context of considering the death penalty. Brennan, J, of the US Supreme Court perhaps started the trend in *Furman v. Georgia*.[223] In considering the application of the Eighth Amendment's prohibition on cruel and unusual punishments, he summed up the previous jurisprudence on the Amendment as 'prohibit[ing] the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity.'[224] In *Gregg v. Georgia*,[225] he considered that '[t]he fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity"'.[226]

So, too, the Canadian Supreme Court has recognized in *Kindler v. Canada* that capital punishment constitutes a serious impairment of human dignity.[227] Three of the seven judges who heard the cases expressed the opinion that the death penalty was cruel and unusual: '[i]t is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. [It is] the ultimate desecration of human dignity…'[228] Three other Judges were of the opinion that '[t]here is strong ground for believing, having regard to the limited extent to which the death penalty advances any valid penological objectives and the serious invasion of human dignity it endangers, that the death penalty cannot, except in exceptional circumstances, be justified in this country'.[229] The Hungarian Constitutional

[220] *Ibid.*, at para. 99.

[221] 35 EHRR (2002) 1, at 33, para. 52.

[222] *Public Committee Against Torture in Israel v. State of Israel,* HC 5100/94, HC 4054/95, HC 6536/95, HC 5188/96, HC 7563/97, HC 7628/97, HC 1043/99, at paras 18 ff (President Barak).

[223] 408 US 238 (1972).

[224] *Ibid.*, at 270.

[225] 428 US 153 (1976).

[226] *Ibid.*, at 230.

[227] *Kindler v. Canada (Minister of Justice)* [1991] 2 SCR 779.

[228] *Ibid.*, at 818 (Cory J, dissenting).

[229] *Ibid.*, at 833 (La Forest J).

Court has also considered that capital punishment imposes a limitation on the essential content of the fundamental rights to life and human dignity, eliminating them irretrievably. As such it was unconstitutional.[230] The Court stressed the relationship between the rights to life and dignity, and the absolute nature of these two rights taken together. Together they were the source of all other rights.

These approaches strongly influenced the approach adopted by Chaskalson P in the South African *Makwanyane* case,[231] in which dignity also played a major role leading to the decision that the death penalty was unconstitutional. The carrying out of the death penalty, he wrote, 'destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable'.[232] The rights to life and dignity were 'the most important of all human rights, and the source of all other personal rights …'.[233] By 'committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.'[234] Mokgoro J also emphasized the importance of dignity in this context, and sought to link the concept of dignity with the native African concept of '*ubuntu*': '[g]enerally, ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.'[235]

2 Individual Choice and the Conditions for Self-fulfilment, Autonomy, and Self-realization

Dignity has been central to the approach which several jurisdictions take to the woman's interest in deciding whether to have an abortion. In the case of *Thornburg v. American College of Obstetricians and Gynaecologists,*[236] Blackmun J explained the fundamental nature of the privacy of a woman's decision to terminate her pregnancy: '[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision – with the guidance of

[230] Hungarian Constitutional Court, 24 Oct. 1990.
[231] *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC).
[232] *Ibid.*, at para. 95.
[233] *Ibid.*, at para. 144.
[234] *Ibid.*
[235] *Ibid.*, at para. 308.
[236] 476 US 747 (1986).

her physician and within the limits specified in *Roe* – whether to end her pregnancy. A woman's right to make that choice freely is fundamental.'[237] So too, in *Planned Parenthood v Casey*,[238] both the plurality opinion of Kennedy, O'Connor, and Souter JJ and the individual opinion of Stevens J used dignity language to support the woman's right to choose. In the plurality opinion, the woman's autonomy interest in making the abortion decision is seen as one of several spheres in which dignity required state abstention:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. … Our cases recognize 'the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' … Our precedents 'have respected the private realm of family life which the state cannot enter.' … These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[239]

Justice Stevens also considered the relationship between dignity and privacy to be a close one: '[t]he woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature. … The authority to make such traumatic and yet empowering decisions is an element of basic human dignity.'[240] So, too, in the decision of the Hungarian Constitutional Court regarding abortion, the Court considered that the issue of dignity was engaged: '[i]t has been constantly stated by the Constitutional Court that among the rights to be weighed against the State's duty to give increased protection to foetal life, the mother's right to self-determination – as part of the right to human dignity – is the most important one'.[241]

3 Protection of Group Identity and Culture

The principle of human dignity is often drawn on as one of several values that anti-discrimination norms further. We have seen already that Judge Tanaka and Vice President Ammoun drew on dignity in the *South West Africa* case to explain the underlying wrong which apartheid occasioned.[242] Some have argued, indeed, that the concept of dignity is the most appropriate normative basis for viewing anti-discrimination law generally. Réaume argues, for example, that unless equality or a prohibition on discrimination means that everyone must be treated the same all of the time, judges need some basis for deciding which distinctions are permissible and which are not.[243]

[237] *Ibid.*, at 772.
[238] 505 US 833 (1992).
[239] *Ibid.*, at 851 (internal citations omitted).
[240] *Ibid.*, at 915–916.
[241] Decision 48/1998 (IX.23) AB, at para. 3(b).
[242] *Supra* at notes 181 and 182.
[243] Réaume, 'Discrimination and Dignity', 63 *Louisiana L Rev* (2003) 645.

A conception of dignity can provide that explanation. So too, the Inter-American Court of Human Rights has held that the 'notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual'.[244] Because of this, the Court explained, 'it follows that not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity'.[245] Accordingly, no discrimination existed if the difference in treatment had a legitimate purpose.[246]

There has been a particular increase in the use of dignity arguments in the judicial interpretation of constitutional and statutory equality and anti-discrimination requirements in several jurisdictions.[247] We have already seen examples in the context of the interpretation of Article 3 by the ECtHR as applied to racial discrimination. The European Commission of Human Rights in *East African Asians v. United Kingdom* held that 'publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity',[248] a decision applied very recently in *Moldovan v. Romania*,[249] where the ECtHR upheld the claim of a number of Roma that their rights under Article 14 had been breached. In addition to providing a theoretical underpinning to constitutional and statutory equality guarantees, dignity has been drawn on heavily as a theoretical underpinning by judges in interpreting prohibitions against sexual harassment, both in Europe and the United States.[250]

Dignity has also come to play an increasingly important foundational role in the judicial interpretation of the meaning of constitutional anti-discrimination prohibitions in Canada[251] and South Africa.[252] Indeed, the purpose of the right to equality in the Canadian Charter, according to the Supreme Court of Canada, is to: 'prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which

[244] Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 Jan. 1986 (*Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica requested by the Government of Costa Rica*), at paras 55–56.

[245] *Ibid.*

[246] *Ibid.*

[247] Equality and non-discrimination law encompass a wide variety of different measures, of course. In the context of this discussion, I will confine myself to discussing the role that dignity plays in the context of what has been termed 'status equality', as it is in that context that the role of dignity is most prevalent.

[248] 3 EHRR (1973) 76, at 86, para. 207.

[249] 44 EHRR (2007) 16.

[250] See Ehrenreich, 'Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment', 88 *Georgetown LJ* (1999) 1.

[251] Mendes, 'Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity', 12(1) *Nat'l J Constitutional L* (2000) 3.

[252] Huscroft, 'Discrimination, Dignity and the Limits of Equality', 9 *Otago L Rev* (2000) 697; Chaskalson, 'Human Dignity as a Foundational Value of Our Constitutional Order', 16 *South African J Human Rights* (2000) 193; Sachs, 'Equality Jurisprudence: The Origin of the Doctrine in the South African Constitutional Court', 5 *Rev Constitutional Studies* (1999) 76; Grant, 'Dignity and Equality' [2007] *Human Rights Law Review* 299.

all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and deserving of concern, respect and consideration'.[253] In *Law v Canada (Minister of Employment and Immigration)*,[254] Iacobucci J, writing for a unanimous court, described the importance of human dignity: '[h]uman dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.'[255] Equally, the South African Constitutional Court's interpretation of the Constitution's equality guarantee has relied on a dignity-based approach, beginning with *President of the Republic of South Africa v. Hugo*.[256] Justice Goldstone stated that the prohibition of discrimination was intended to contribute to 'the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership in particular groups'.[257]

There has been a significant relationship in several jurisdictions between dignity and the granting of rights to gay, lesbian, and trans-gendered individuals, beginning with claims that the criminalization of sodomy was contrary to human rights principles, and continuing most recently in the context of claims to permit marriage between same-sex partners. In the 1998 South African case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*,[258] Ackermann J stressed the extent to which the common law offence of sodomy was an infringement of the right to dignity, as well as equality.

> There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution. … The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfillment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.[259]

[253] *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, at para. 51.

[254] *Ibid.*, at 530.

[255] *Ibid.*, at para. 53.

[256] 1997 (4) SA 1 (1997).

[257] *Ibid.*, at para. 41. For discussions of the South African approach, in addition to Chaskalson, *supra* note 252, and Sachs, *supra* note 252, see Ackermann, 'Equality and the South African Constitution: the Role of Dignity', Bram Fischer Lecture, Oxford, May 2000. For a comparison between the US and South Africa see Kende, 'Stereotypes in South African and American Constitutional Law: Achieving Gender Equality and Transformation', 10 *S California Rev L and Women's Studies* (2000) 3.

[258] 6 BHRC 127 (CC, 1998), 1998 (12) BCLR 1517 (CC).

[259] *Ibid.*, at paras 28 and 36.

Dignity has also been drawn on in order to support decisions which declared legal restrictions on marriage between same-sex couples to be unconstitutional. In *Halpern v. Attorney General*,[260] the Court of Appeal for Ontario recognized the relationship between dignity and access to the institution of marriage:

> Marriage is, without dispute, one of the most significant forms of personal relationships. … This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.[261]

Exclusion from marriage of same sex couples 'perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.'[262] Similarly, in the South African case of *Minister of Home Affairs v. Fourie*,[263] Sachs J argued, 'there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree. The effect has been wounding and the scars are evident in our society to this day. By both drawing on and reinforcing discriminatory social practices, the law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples.'[264]

4 Creation of the Necessary Conditions for Individuals to Have Essential Needs Satisfied

Control over the use of lethal force by the state's security forces has been seen as a necessary condition for guaranteeing survival by some courts. In cases dealing with the use of force by the security forces, the German Constitutional Court has emphasized the importance of reading the protection of the right to life and the protection of dignity as mutually reinforcing.[265] The Court held that provisions of the Aviation Security Act which authorized the armed forces to shoot down aircraft that were intended to be used as weapons in crimes against human lives was incompatible with the Basic Law, and hence void. These provisions were incompatible with the fundamental right to life and with the guarantee of human dignity to the extent that the use of armed force affected persons on board the aircraft who were not participants in the crime. By the state's using their killing as a means to save others, they were treated as mere objects, which denied them the value that was due to a human being for his or her own sake. So too, the Israeli Supreme Court in its decision on the use of targeted assassination by the Israeli security services in the Occupied Territories,[266] considered that

[260] (2003) 65 OR (3d) 161, CA for Ontario.
[261] *Ibid.*, at para. 5.
[262] *Ibid.*, at para. 107.
[263] 2006 (3) BCLR 355 (Constitutional Court).
[264] *Ibid.*, at para. 78.
[265] *Aviation Security Act Case*, BVerfG, 1 BvR 357/05 of 15 Feb. 2006 (Germany); Bundesverfassungsgericht, Press release No. 11/2006 of 15 Feb. 2006.
[266] *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02 (Sup Ct Israel Sitting as the High Court of Justice), 11 Dec. 2005.

'unlawful combatants are not beyond the law. They are not "outlaws". God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection'.[267]

Other courts have gone further, using dignity to expand the conception of the right to life to meet basic needs. The Inter-American Court of Human Rights, for example, held that the right to life 'includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence'.[268] On the basis of this interpretation, it challenged the lack of care provided to street children by the government of Guatemala. Similarly, the Indian Supreme Court interpreted the constitutional guarantee of life and personal liberty to include 'the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings'.[269]

The provisions on socio-economic rights in human rights texts have also been interpreted as strongly engaging with dignity. Both the Hungarian and South African Constitutional Courts, for example, have drawn on dignity to support their decisions regarding socio-economic rights. As regards the former, the Constitutional Court, in a case considering the characteristics and requirements regarding the right to social security, stated that (respecting the minimum level of benefits) 'the right to social security contained in Article 70/E of the Constitution entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realisation of the right to human dignity'.[270] In a subsequent case,[271] the Constitutional Court reiterated that 'the benefits to be offered in the framework of social institutions should secure a minimum level guaranteeing the enforcement of the right to human dignity. In case of services not reaching the above minimum level, the right to social security may not be deemed enforced.'[272] This required that 'in case of homelessness, the State obligation to provide support shall include the provision of a shelter when an emergency situation directly threatens human life. The State obligation to provide shelter does not correspond to guaranteeing the "right to have a place of residence".[273] Thus, the State shall be responsible for securing a shelter if homelessness directly threatens human life. Therefore, only in case of such an extreme situation is the State obliged to take care of those who themselves cannot provide for the fundamental preconditions of human life.'[274]

[267] *Ibid.*, at para. 25 (President (Emeritus) A. Barak).

[268] Inter-American Court of Human Rights, *Case of the 'Street Children' (Villagran-Morales v. Guatemala,* Judgment of Nov. 1999 (Merits), at para. 144.

[269] *Mullin v. The Administrator, Union Territory of Delhi,* AIR 1981 SCR (2) 516, at 518.

[270] Decision 32/1998 (VI. 25) AB, ABH 1998, 251, at 254.

[271] Decision 42/2000 (XI. 8) AB, Constitutional Court file number: 5/G/1998, published in the Official Gazette (Magyar Közlöny) MK 2000/109.

[272] *Ibid.,* at Sect. IV.

[273] *Ibid.,* at Sect. V(2).

[274] *Government of the Republic of South Africa and Others v. Grootboom and Others,* 2000 (10) BHRC 84 (CC).

A similar approach was taken by the Constitutional Court of South Africa in the *Grootboom* case,[275] in which Yacoob J also emphasized the connection between dignity and socio-economic rights: '[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in [the Constitution's Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.'[276] The right to adequate housing 'is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.'[277] In subsequent cases, the Constitutional Court has used the concept of dignity to develop a right for permanent residents to social security,[278] and a duty on a rail service provided by a state corporation to provide safe transportation for the communities which rely on it.[279]

C *Universalism, Naturalism, and Dignity*

There is an additional feature of the use of dignity in several jurisdictions that is noticeable. In applying dignity, judges in several jurisdictions draw on the judicial interpretation of dignity in *other* jurisdictions as well as their own, sometimes explicitly, sometimes without attribution. The German Constitutional Court has been particularly influential in Hungary and Israel, for example.[280] Judges in the common law tradition have become prominent in the spreading of dignity. The House of Lords, for example, has begun to use the concept of human dignity.[281] There is also a significant cross-fertilization between the German-influenced and the common law in this respect. German and Hungarian judicial decisions have influenced South African jurisprudence.[282] One of the attractions of dignity in the human rights context is the

[275] *Ibid.*, at para. 23.

[276] *Ibid.*

[277] *Ibid.*, at para. 44.

[278] *Khosa v. Minister of Social Development*, 2004 (6) SA 505 (CC).

[279] *Rail Commuters Action Group v. Transnet Ltd t/a Metrorail*, 2005 (2) SA 359 (CC). See further Davis, 'Socio-economic Rights, The Promise and the Limitation: The South African Experience', in D. Barak-Erez and A.M. Gross, *Exploring Social Rights: Between Theory and Practice* (2007), at 192.

[280] C Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (2003); Oz-Salzberger and Salzberger, 'The Secret German Sources of the Israeli Supreme Court', 3(2) *Israel Studies* (1998) 159.

[281] *Ghaidan v. Godin Mendoza* [2004] 2 AC 557, at 604, para. 130 (Baroness Hale); *R v. Secretary of State for Work and Pensions, ex parte Carson* [2005] UKHL 37, at para. 49 (Lord Walker).

[282] E.g., *Makwanyane*, *supra* note 231.

idea that different jurisdictions share a sense of what dignity requires, and this enables a dialogue to take place between judges on the interpretation of human rights norms, based on a supposedly shared assumption.

One of the best examples of this is to be found in the decision of the US Supreme Court in the case of *Roper v. Simmons*,[283] in which it held that the imposition of the death penalty on offenders under 18 was unconstitutional under the Eighth Amendment. In his opinion for the Court, Kennedy J drew on 'foreign' material, apparently demonstrating 'that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty',[284] to support a determination that such uses of capital punishment are unconstitutional under the US Constitution.[285] He stressed, too, that such information has relatively frequently been used by the Court 'as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments"'.[286]

No doubt anticipating an attack on his use of these sources, the relevant section of his opinion ended with his reflection on the question whether the use of 'foreign' material in some way undermined the independent role of the Court in interpreting the Constitution. He sought to dampen down concerns that it might. 'The document sets forth, and rests upon, innovative principles original to the American experience, such as … broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. … It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.'[287] O'Connor also saw the use of comparative material in the interpretation of the Eighth Amendment as particularly appropriate, 'reflect[ing its] special character' which 'draws its meaning directly from the maturing values of civilized society'.[288] The United States' 'evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement … that a particular form of punishment is inconsistent with fundamental human rights.'[289] The results of such an inquiry into these international values – and here she agrees with the majority – 'do not dictate the outcome of our Eighth Amendment inquiry', but where 'an international consensus of this nature' exists this 'can serve to confirm the reasonableness of a consonant and genuine American consensus'.[290]

[283] 125 S Ct 1183 (2005).
[284] Kennedy J in *ibid.*, at 1198.
[285] Kennedy J in *ibid.*
[286] Kennedy J in *ibid.*, at 1199.
[287] Kennedy J in *ibid.*, at 1200 (emphasis added).
[288] O'Connor J in *ibid.*, at 1215.
[289] O'Connor J in *ibid.*, at 1215–1216.
[290] O'Connor J in *ibid.*, at 1216.

Paolo Carozza's discussion of this phenomenon in the context of capital punishment adjudication considered that there was a 'common enterprise' across different jurisdictions in these cases, viz the 'concrete specification of the principles of natural law'.[291] He continued: 'the tendency of courts in the death penalty cases … to consistently place their appeal to foreign sources on the level of the shared premise of the fundamental value of human dignity is a paradigmatic example of naturalist foundations at work. Despite differences in positive law, in historical and political context, in religious and cultural heritage, there is the common recognition of the worth of the human person as a fundamental principle to which the positive law should be accountable. The "common enterprise" … is, first and foremost, the working out of the practical implications, in differing concrete contexts, of human dignity for the rights to life and physical integrity.'[292]

It certainly seems to be the case, as Carozza clearly demonstrates, that judges in several jurisdictions see dignity as giving them a licence to draw on decisions from other jurisdictions. There is clearly a perception that the conception of dignity is common to these jurisdictions and the use of dignity in one judicial decision justifies the use of that jurisprudence by courts interpreting the concept of dignity in another jurisdiction. Carozza's argument thus seems supported by judicial practice. Not only is the enterprise of human rights interpretation seen to be common, so too there seems to be a perception that there is a common understanding of what dignity is, at a deep level.

Carozza's explanation is one that sees the interpretation of dignity as a search for the universal. The universality of human rights is often thought to be central to a valid conception of human rights. In this, Carozza can be identified as aligning himself not only with a strong ideological position which regards human rights as normatively universal, but also with those in comparative law theory who see the function of comparative law as being to explore what is common between legal jurisdictions, even sometimes going so far as to view comparative law as the basis for identifying the 'best' approach with the ultimate aim of securing its universal adoption.[293] He differs from some traditional universalists in comparative law, however, by being willing to see this universalist consensus not as one that is simply *found* but one that is *constructed*. In this, he appears to share some common ground with that strand of comparative law theory which stresses the importance of dialogue. This theorizes the comparative method 'as a dynamic interpretive and discursive practice'.[294] In the context of comparative constitutionalism in particular, 'the dialogical approach focuses on the processes of constitutional interpretation. … Comparative exchange is not bound in path-dependent or hierarchic ways. Rather, it poses a comity-based "transjudicial[]"

[291] Carozza, 'My Friend is a Stranger: The Death Penalty and the Global Ius Commune of Human Rights', 81 *Texas L Rev* (2003) 1031, at 1081.

[292] *Ibid.*, at 1081–1082.

[293] Compare Tushnet's discussion of what he terms 'normative universalism' in M. Tushnet, *Weak Courts, Strong Rights* (2008), at 5–6.

[294] Teitel, 'Book Review: Comparative Constitutional Law in a Global Age', 117 *Harvard L Rev* (2004) 2570, at 2584–2585.

enterprise – a decentered view of constitutional practices deriving from pluralist sources, with the possibility of "cross fertilization".'[295]

D *Beyond the Minimum Core?*

In a previous part of this article (Part 3), we identified three elements of the minimum core of the concept of human dignity: the ontological claim, the relational claim, and the limited-state claim. We saw that there are different understandings of each of these elements of the concept of human dignity, reflected in the historical and textual use of the concept, which indicate that different conceptions of human dignity are identifiable. This part of the article demonstrated that courts have generally confirmed that when judges use the concept of human dignity, they too appear to adopt the minimum core. We can also see that the judiciary in several jurisdictions has attempted to explore, in particular, the second and third elements, and to do so, in part, through a transnational dialogic process. As a result of this judicial activity, we can also identify more clearly than before the contexts in which human dignity seems likely to have most resonance for understanding the relational and limited-state elements in the core concept.

5 Finding Significant Differences in the Judicial Discourse on Human Dignity: No Consensus Beyond the Minimum Core?

Can we say, therefore, that we are any further advanced in identifying a common conception of human dignity, either in any particular jurisdiction or transnationally? The answer which this part of the article gives to this question is 'no'. There are significantly differing expressions of the relationship between human rights and dignity, and significant variations between jurisdictions in how dignity affects similar substantive issues. We should not, however, reject the more universalistic analysis of Carozza simply because there may be differences between jurisdictions at any one point in time. A principled interpretation of a grand principle often seems to call for agreement on what the effect of applying the principle is, whilst nevertheless disagreeing on what a full theoretical basis for the principle may be. Cass Sunstein has described the process of deciding cases on their facts without necessarily agreeing on any particular theory supporting the decision as giving rise to 'incompletely theorized' agreements. Such agreements exist where individuals can agree on a specific result, even if they do not agree on all the aspects of the specific theory justifying that result.[296] But my argument in this part of the article will be that there are such profound differences between jurisdictions using the concept of dignity that this explanation just does not seem descriptively convincing. When we dig deeper, such significant differences appear to arise that a somewhat different story must be told. Unfortunately, perhaps, Carozza's preferred normative function of dignity does not seem to be supported by judicial practice. We shall find such significant differences in understanding dignity

[295] *Ibid.*, at 2586.

[296] C.R. Sunstein, *Legal Reasoning and Political Conflict* (1996).

that Carozza's universalistic naturalism seems overly optimistic a description. In practice, very different outcomes are derived from the application of dignity arguments. This is startlingly apparent when we look at the differing role that dignity has played in different jurisdictions in several quite similar factual contexts: abortion, incitement to racial hatred, obscenity, and socio-economic rights. In each, the dignity argument is often to be found on both sides of the argument, and in different jurisdictions supporting opposite conclusions.

A *Pluralism and Relativism*

Before turning to specifics, we can observe more generally that claims to universalism and naturalism in human rights discourse have proven deeply controversial, with some arguing that the inclusion of common principles in these texts or judicial decisions merely camouflages profound disagreement on their application as well the theory supporting them. Lord Hoffmann, for example, has stated: 'of course we share a common humanity. … Nevertheless … the specific answers, the degree to which weight is given to one desirable objective rather than another, will be culturally determined. Different communities will, through their legislature and judges, adopt the answers which they think suit them.'[297] All that is left of dignity, it might be said, is the relatively empty shell provided by the minimum core, but when the concept comes to be applied the appearance of commonality disappears, and human dignity (and with it human rights) is exposed as culturally relative, deeply contingent on local politics and values, resulting in significantly diverging, even conflicting, conceptions. Is this a better explanation for what is happening to the interpretation of dignity in judicial interpretation of human rights norms?

Just as Carozza's universalistic approach has parallels with universalistic approaches in comparative law theory, so too this more sceptical approach has some similarities with pluralistic approaches to comparative law.[298] In the pluralist camp are those who see the function of the comparative method as being the identification of what is different between jurisdictions, stressing the need for an understanding of local context and emphasizing the truth that, even when similar concepts are being used across jurisdictions, that does not mean that the concept plays the same role in each, or that the same conception is in play. These debates in comparative law echo the approach in human rights that veers towards cultural relativism. The more 'political' and 'constitutional' the issue (and few issues are more political and constitutional than human rights), the more comparative lawyers tend to move to the cultural relativist end of the spectrum.

B *Differences in the Conceptions of Dignity in Judicial Interpretation*

1 Weight and Status of Dignity

There are significant variations between jurisdictions on the legal status and weight of human dignity. Does human dignity have a status superior to that of other human

[297] Lord Hoffmann, 'Human Rights and the House of Lords', 62 *MLR* (1999) 159, at 165.

[298] This has close similarities with what Tushnet terms 'expressivism': '[e]xpressivism takes constitutional ideas to be expressions of a particular nation's self-understanding': Tushnet, *supra* note 293, at 5.

rights (as in Germany generally,[299] and in Hungary when combined with the right to life[300]), in the sense that it is the highest constitutional principle, subject neither to other rights, nor to other values? Thus, in Germany, 'human dignity has an absolute effect. There is, according to the jurisprudence of the courts, no way to balance other legal interests, be they of other individuals or of the community, with the dignity of a person. The principle of proportionality does not come into play as long as an intrusion upon human dignity has been established.'[301] Or, in contrast, is dignity less important in the hierarchy of human rights and not superior to other rights, as Kriegler J appears to say in the South African *Makwanyane* case,[302] and is subject to the same types of limitations that apply to other rights, as in Hungary (when dignity is not combined with the right to life),[303] and in Israel, where human dignity 'may be limited so as to accommodate other interests and rights'?[304] The French *Conseil Constitutionnel* in the *Abortion Decision* of 2001 decided that, although dignity may be a constitutionally protected principle, dignity is not an inviolable or a supreme principle. The *Conseil Constitutionnel*'s willingness to balance dignity against the freedom of the women demonstrates that dignity, in France, is not inviolable or accorded higher status than other constitutionally protected principles or rights.

2 Individualistic Versus Communitarian Conceptions of Dignity

We saw when considering the emergence of dignity historically that an important distinction could be identified between the use of dignity to express a communitarian ideal and one that was much more focussed on the role of dignity in furthering individual autonomy, in the sense of advancing individual liberty based upon the choice of the individual. This difference in approach is also reflected in the different approaches which courts adopt. In brief, the German Constitutional Court adopts a more communitarian approach, whilst the predominant approach to dignity in the US Supreme Court, the Canadian Supreme Court, and the Hungarian Constitutional Court is more individualistic. The South African Constitutional Court appears to be significantly split on the issue.

The reasoning of the German Constitutional Court's judgment in the *Lifetime Imprisonment Case* illustrates well a more communitarian approach: '[t]he constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free person and his dignity are the highest values of the constitutional order. The state

[299] D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, 1997), at 32.

[300] *Death Penalty Case*, *supra* note 230.

[301] Klein, *supra* note 174, at 149. But see *infra*, text at notes 391–404.

[302] Makwanyane, *supra* note 231, at para. 214: 'in the hierarchy of values and fundamental rights guaranteed [by the Interim Constitution], I see [human dignity, *inter alia*] as ranking below the right to life. Indeed, [it is] subsumed by that most basic of rights.'

[303] Dupré, 'The Right to Human Dignity in Hungarian Constitutional Case-law', in European Commission for Democracy through Law, *supra* note 14, at 72; C. Dupré, *Importing the Law in Post-Communist Traditions: The Hungarian Constitutional Court and the Right to Human Dignity* (2003), at 108, 111.

[304] Kretzmer, *supra* note 210, at 169.

in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself. *This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather of a person related to and bound by the community*. In the light of this community-boundedness it cannot be "in principle unlimited". *The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life;* yet the autonomy of the individual has to be protected.'[305]

Despite the fact that Hungary has borrowed so extensively from Germany, Dupré has argued that the importation of dignity has resulted in 'the development of a very different picture of the human person in Hungarian case law', one where the person is envisaged as someone 'considered in isolation and fighting against the state to protect her rights'.[306] In Hungary, 'human dignity is focused on individuality and autonomy'.[307] The Court's approach, at least up to 1998, was one in which 'human dignity is limited to the individual considered in his singularity. It empowers the individual to take control over his life without any interference, or indeed any help, from others or from the state. Human dignity … does not essentially facilitate interaction and relationships between people. Instead, human dignity surrounds the individual in a sort of protective sphere, and thus isolates individuals from each other.'[308] The *Casey* and *Lawrence* cases, considered previously, illustrate a similar individualistic approach adopted in the US Supreme Court. Another example, in a different context, is to be found in *Rice v Cayetano*, where Kennedy J held that an affirmative action measure, using classifications based on race, was unconstitutional because 'it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities'.[309]

These differences in approach are particularly important in the context of socio-economic rights, where the crucial question is how far, if at all, the state is under a positive duty to safeguard human dignity. We saw earlier that, in South Africa, socio-economic rights are regarded judicially as 'rooted in respect for human dignity'.[310] In Poland, in the context of unemployment, human dignity requires that the state 'ensure that individuals out of work are able to exercise their rights to existence and to freedom' and the Constitutional Tribunal has held, therefore, that 'social security benefits guaranteed to the unemployed by the state should at least guarantee them a basic level of social welfare'.[311] In Germany, the Constitutional Court initially 'refused

[305] Kommers, *supra* note 299, at 307–308 (emphasis added).

[306] Dupré, *Importing the Law, supra* note 303, at 122.

[307] *Ibid.*, at 123.

[308] *Ibid.*, at 125.

[309] Contrast approaches in India and South Africa, where affirmative action is regarded as a major method of fulfilling dignity: *Thakur v. Union of India* [2007] RD-SC 609 (17 May 2007), at para. 174 (per Balakrishnan, CJ) (Sup Ct India); *Minister of Finance v. Van Heerden*, 2004 (11) BCLR 1125, at para. 25.

[310] Corder, *supra* note 28, at 117, quoting Chaskalson, *supra* note 252, at 204.

[311] Lewaszkiewicz-Petrykowska, *supra* note 211, at 21.

to derive [from human dignity] an individual right to public welfare, [and then] left the question explicitly open'.[312] More recently, that Court has held that human dignity, in combination with other constitutional principles, 'imposes an obligation on the state to provide at least minimal subsistence to every individual'.[313] In Italy, the Constitutional Court has '"discovered" that human dignity requires that decent housing be secured for all citizens as a constitutional "social right"'.[314]

In Hungary, on the other hand, human dignity 'does not serve as a basis for recognizing social rights'.[315] Rather, it served as the basis for questioning and reinterpreting the scope of social rights enacted under the Communist regime,[316] allowing a switch to be made to a more economically liberal, individualistic conception of rights. In Israel, whilst the Basic Law has been interpreted as generating some socio-economic rights, these encompass only the most minimal material conditions necessary to exist: sufficient sustenance, a place of residence adequate to protect privacy and family life, adequate sanitary conditions, and basic medical services.[317] In the Canadian Supreme Court's decision in *Gosselin*,[318] a highly individualistic approach was taken by the Chief Justice. The issue was whether a provincial workfare scheme which provided social benefits below the poverty line for those aged below 30 was unconstitutional, particularly on grounds of age discrimination. As we have seen, in the Canadian context part of the test of what constitutes discrimination depends on whether the individual's dignity has been damaged. The majority of the Court held that there was no discrimination. The Chief Justice held that it was not discriminatory in part because there was no breach of the individual's dignity; rather, the reverse: '[t]he evidence shows that the regime set up under the Social Aid Act sought to promote the self-sufficiency and autonomy of young welfare recipients through their integration into the productive work force, and to combat the pernicious side effects of unemployment and welfare dependency. The participation incentive worked towards the realization of goals that go to the heart of the equality guarantee: self-determination, personal autonomy, self-respect, feelings of self-worth, and empowerment. These are the stuff and substance of essential human dignity.'[319]

[312] Walter, *supra* note 71, at 29. Similarly in Belgium see Court of Arbitration, judgment No. 66/97 of 6 Nov. 1997, quoted in Delpérée, 'The Right to Human Dignity in Belgian Constitutional Law', in European Commission for Democracy through Law, *supra* note 14, at 57, 62.

[313] Bognetti, *supra* note 28, at 75, 83. See further 99 BverfGE 246. See also Starck, 'The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions', in Kretzmer and Klein, *supra* note 4, at 179,189.

[314] Bognetti, *supra* note 28, at 75, 85.

[315] Dupré, 'The Right to Human Dignity', *supra* note 303, at 68, 69.

[316] Dupré, Importing the Law, *supra* note 303, at 146–147.

[317] HCJ 888, 366/03, *Commitment to Peace and Social Justice Association v. Minister of Finance* (decision of 12 Dec. 2005). See further Barak-Erez and Gross, 'Social Citizenship: The Neglected Aspect of Israeli Constitutional Law', in Barak-Erez and Gross, *supra* note 279, at 242, especially 244–252.

[318] *Gosselin v. Quebec,* 2002 SCC 84 (Sup Ct Canada).

[319] *Ibid.*, at para. 65.

3 Dignity as Rights-supporting, or Rights-constraining?

This discussion leads into the identification of another difference between jurisdictions in the role that dignity plays. We saw earlier that dignity has been viewed as a principled basis of support for the human rights enterprise. In practice, however, dignity has come to be used as a major constraint on (some) rights. This can arise because dignity is used by both sides of a dispute to support their particular rights claims. In the *Pretty* case, involving the 'right to die', the ECtHR, according to Susan Millns, has adopted the view that that 'the dignity of humanity expressed in its most universal and objective form so as to protect life is given force over and above the individual and subjective dignity of the person seeking assistance to terminate a state of personal suffering'.[320] Increasingly, the rhetoric of dignity is used to support restrictions on civil liberties as part of the 'war on terrorism', using the argument that the state has a duty to protect the dignity of individuals who will be adversely affected by such terrorism. As early as 1988, the Preamble to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, with Related Protocol, 1988, referred to the 'world-wide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings'.[321] Since then, the use of dignity language in this context has increased significantly.[322]

Dignity sometimes functions as a justification for limiting the protection of rights or obligations, like a public order or public morals exception, allowing the state to place limits on what particular rights would otherwise require. In the Israeli context, human dignity has been developed not only as a basis for rights but also as a constraint on rights, leading to decisions in which pornographic films could legitimately be censored where they were regarded as degrading to human dignity, especially the dignity of women. When the Film Censorship Board insisted on the deletion of scenes it considered degrading to women, the Supreme Court of Israel, in *Station Film Co. v. Public Council for Film Censorship*,[323] expressly recognized that the artistic value of the film had to be weighed against the need to protect human dignity.[324] In another case, the Court held that racism is an affront to human dignity, and speech which promotes racial hatred can thus legitimately be prohibited.[325] Indeed, these two areas where

[320] Millns, 'Death, Dignity and Discrimination: The Case of Pretty v. United Kingdom', 3(10) *German LJ* (2002), available at: www.germanlawjournal.com, at para. 8.

[321] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 UNTS 221, 27 ILM (1988) 668.

[322] President George W. Bush in his 2005 speech to the UN spoke of how it was necessary, in the context of countering terrorism 'to raise up the failing states and stagnant societies that provide fertile ground for the terrorists. We must defend and extend a vision of human dignity, and opportunity, and prosperity …'.

[323] *Station Film Co. v. Public Council for Film Censorship* (1994) 50 PD (5) 661.

[324] Kretzmer, *supra* note 210, at 169.

[325] *Ibid.* Cp. US–Federal Republic of Germany Agreement on Cultural Property, 1986, sect. 130 prohibited 'assail[ing] the human dignity of others' 'in a manner likely to disturb the public peace' by, e.g., provoking hatred against sections of the population, or vilifying, maliciously disparaging, or defaming them.

free speech principles come into conflict with the interests of others have proven a rich ground for conflict over the appropriate role for dignity arguments in several jurisdictions.

In the Supreme Court of Canada's decision in *R. v. Labaye*,[326] the judgment of the majority, delivered by McLachlin CJ, considered a conviction for keeping a 'common bawdy-house' for the 'practice of acts of indecency'. The issue was whether the acts committed in this establishment were acts of indecency. The Court drew on the idea of human dignity as part of its assessment of what 'indecency' involved: '[c]onduct or material that perpetuates negative and demeaning images of humanity is likely to undermine respect for members of the targeted groups and hence to predispose others to act in an anti-social manner towards them. Such conduct may violate formally recognized societal norms, like the equality and dignity of all human beings.'[327] In *De Reuck v. Director of Public Prosecutions*,[328] the Constitutional Court of South Africa considered whether the conviction of a film producer under a criminal provision relating to child pornography was unconstitutional. The decision by Langa DCJ for the Court considered the objective of the legislation: '[t]he purpose of the legislation is to curb child pornography, which is seen as an evil in all democratic societies. Child pornography is universally condemned for good reason. It strikes at the dignity of children.'[329] In deciding to uphold the legislation, Langa J continued, 'Children's dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth.'[330]

So too, the area of incitement to racial and other forms of group hatred has given rise to a similar use of dignity arguments. In *Faurisson v. France*[331] the concurring opinion of Prafullachandra Bhagwati in the Human Rights Committee emphasized that the restrictions in French law relating to denial of the holocaust (the Gayssot Act) were justified in part on the basis that the restrictions upheld human dignity. The restriction on the author's freedom of expression imposed under the Gayssot Act was necessary for respect of the rights and interests of the Jewish community. '[T]he necessary consequence and fall-out of such statements would have been, in the context of the situation prevailing in Europe, promotion and strengthening of anti-semitic feelings …. Therefore, the imposition of a restriction by the Gayssot Act was necessary for securing respect for the rights and interests of the Jewish community to live in society with full human dignity and free from an atmosphere of anti-semitism.'[332]

A very similar approach has been taken by the Canadian Supreme Court in *Kreegstra*.[333] Dickson CJ, for the majority, explained how, in his view, hate propaganda was

[326] 2005 SCC 80 (Sup Ct Canada).
[327] *Ibid.*, at para. 46.
[328] 2004 (1) SA 406 (Const Ct S Africa).
[329] *Ibid.*, at para. 61.
[330] *Ibid.*, at para. 63.
[331] Communication 550/1993, (1996) 2 BHRC, UN HR Committee.
[332] Individual opinion by Prafullachandra Bhagwati.
[333] [1990] 3 SCR 697 (Sup Ct Canada).

contrary to human dignity. 'A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs …. The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. … Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.'[334] So, too, McLachlin J, dissenting, agreed that hate speech implicated the dignity of the targeted group: '[t]he evil of hate propaganda is beyond doubt. It inflicts pain and indignity upon individuals who are members of the group in question.'[335] The Hungarian and South African Constitutional Courts have also adopted a very similar approach.[336]

The point of these examples is to emphasize the highly contested nature of the type of arguments which dignity is used to support. In the free speech context, this approach would find no support in the US Supreme Court, for example, where the judicial approach to the status of freedom of expression would be sure to lead, for example, to the explicit rejection of these decisions. It is noteworthy that, to my knowledge, such arguments based on dignity have not even been attempted in that court, undoubtedly because they would be doomed to fail.

So, too, dignity has come to be seen as equally controversial in the equality context. Several commentators have argued that the Canadian Supreme Court has effectively incorporated an additional barrier that applicants must surmount; that the individual or the group with which the victim identifies or is identified has been subject to discrimination of such a type that dignity has been under attack. Dignity has enabled courts to build limits into the reach and depth of the equality principle, limiting both the group of 'victims' who may legitimately claim and the distributive justice implications of the equality principle. Although this approach has been the subject of much supportive academic comment,[337] attempts to establish the utility of dignity as a foundational norm for equality at other than the rhetorical level have also provoked a wave of criticism.[338] Grabham offers some support for the view that the Canadian approach limits the opportunity to base equality arguments on distributive justice in her interpretation of the limited approach taken by the Canadian Supreme Court to the interpretation of human dignity under the Canadian Charter. For some the divorce of anti-discrimination law from distributive justice in this way is desirable. Indeed, dignity is regarded as desirable precisely because it provides an alternative rationale to distributive justice in the equality context. Such an approach, Réaume maintains, can

[334] *Ibid.*, at 746.

[335] *Ibid.*, at 812. See also *Taylor v. Canadian Human Rights Commission* [1990] 3 SCR 892 (Sup Ct Canada, Dickson CJ).

[336] Decision 30/1992 (V. 26.) AB, Constitutional Court file number: 1358/B/1991, published in the Official Gazette (Magyar Közlöny) MK 1992/53 (Hungarian Const Ct). See also *Islamic Unity Convention v. Independent Broadcasting Authority*, 2002 (5) BCLR 433 (Const Ct).

[337] Mendes, *supra* note 251, at 3.

[338] Gibbins, 'How in the World Can You Contest Equal Human Dignity?', 12 *Nat'l J Const L* (2000) 25.

explain many of the advances in modern anti-discrimination law without resorting to end-state distributive principles.[339] For others, however, this is anathema. Post has picked up the potential limits which dignity arguments may introduce, and argues that modern American anti-discrimination law should not be conceived, as is commonly supposed, as protecting the dignity of individuals but, rather, as attempting to transform social practices which define and sustain potentially oppressive categories such as race or gender.[340] This is not to argue that grounding the anti-discrimination principle in distributive justice is uncontroversial; simply that the Canadian approach, grounding it in dignity, has not escaped fundamental criticisms and remains a contested strategy. Indeed, it is interesting that the Canadian Supreme Court (long the main proponent of the use of dignity in the equality context) has in its most recent case sharply moved away from dignity language, recognizing that:

> several difficulties have arisen from the attempt … to employ human dignity *as a legal test*. … [A]s critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.[341]

4 Waiving Dignity?

How far, if at all, can dignity be waived by an individual? Where a choice-based autonomy approach to dignity is adopted, then it would seem strange to think that it cannot be waived by the person whose dignity is supposedly in issue. To do otherwise smacks of paternalism. On the other hand, a more communitarian approach to dignity seems potentially compatible with not being permitted to waive dignity. We are used in some contexts to viewing certain rights as not at the disposal of the individual, for example the right not to be enslaved cannot be waived.

In Germany, the Constitutional Court has held that 'human dignity means not only the individual dignity of the person but the dignity of man as a species. Dignity is therefore not at the disposal of the individual.'[342] The obligation on the state to protect human dignity may justify limiting the rights of the person whom the state seeks to protect, irrespective of the preferences of the individual.[343] The Federal Administrative Court, for example, has held that the dignity of women who work in 'peep-shows', exposing themselves to men for payment, is violated and they can legitimately be prohibited from doing so.[344] A prohibition on dwarf throwing, as part of a commercial

[339] Réaume, *supra* note 243, at 650.

[340] Post, 'Prejudicial Appearances: The Logic of American Antidiscrimination Law', 88 *California L Rev* (2000) 1.

[341] *R. v Kapp*, 2008 SCC 41, at paras 22–23 (McLachlin CJ and Abella J (Binnie, LeBel, Deschamps, Fish, Charron, and Rothstein JJ concurring).

[342] Klein, *supra* note 175, at 148.

[343] *Ibid.*, at 157–159.

[344] BverfGE 64, 274, at 279–280. Although Klein, *supra* note 175, at 158, notes that in a subsequent decision this approach was not adopted.

entertainment, by a local authority in France was upheld by both the *Conseil d'État*[345] and, subsequently, the Human Rights Committee on the ground that the restriction was justified on the basis of human dignity.[346]

In Canada, the position seems more ambiguous. Consent may be relevant but is 'not determinative'. In the *Butler* case,[347] from which this approach derives, the issue was the constitutionality of restrictions on pornographic material. Sopinka J concluded, 'Among other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not *necessarily* determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.'[348] In South Africa, the position is, again, ambiguous and context-dependent. Whilst a strongly anti-paternalist approach is adopted, as we have seen in the context of the gay rights cases discussed earlier, a very different approach is adopted in the case of prostitution. In the *Jordan* case,[349] the Constitutional Court upheld the criminalization of prostitution. The justification offered by O'Regan and Sachs JJ seems out of keeping with their earlier strongly autonomy-based approach in the gay rights cases: '[t]he very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished … by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.'[350]

5 *Dignity, From Whose Point of View?*

Jurisdictions also differ, therefore, on whether dignity is to be interpreted from the point of view of the victim or 'objectively'. One can sympathize with the difficulty courts have in this context. On the one hand, for the court to say that the appropriate approach is to adopt a particular individual's own judgement on what seems to breach his or her dignity is to risk putting in place an unmanageable and unworkable standard. On the other hand, adopting an entirely court-centred view of what constitutes a breach of dignity seems patronizing. In Poland, both the subjective feelings of the person seeking legal protection and the objective reactions to those claims are taken into account.[351] In Canada, the approach taken also seems to indicate that the courts want to have it both ways. In *Halpern v. Attorney General*,[352] the Court of Appeal

[345] Conseil d'Etat, 27 Oct. 1995, req. Nos 136–720 (Commune de Morsang-sur-Orge), and 143–578 (Ville d'Aix-en-Provence).

[346] *Wackenheim v. France*, CCPR/C/75/D/854/1999: France, 26 July 2002, at para. 7.4.

[347] *R. v. Butler* [1992] 1 SCR 452 (Sup Ct Canada).

[348] *Ibid.*, at 479 (emphasis added).

[349] *Jordan v. The State*, 2002 (6) SA 642 (CC).

[350] *Ibid.*, at para. 74.

[351] Lewaszkiewicz-Petrykowska, *supra* note 211, at 24.

[352] 2003 65 OR (3d) 161 (CA Ontario).

for Ontario summed up the Canadian approach thus: '[t]he assessment of whether a law has the effect of demeaning a claimant's dignity should be undertaken from a subjective-objective perspective. The relevant point of view is not solely that of a "reasonable person", but that of a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member" …. This requires a court to consider the individual's or group's traits, history, and circumstances in order to evaluate whether a reasonable person, in circumstances similar to the claimant, would find that the impugned law differentiates in a manner which demeans his or her dignity.'[353] Whilst it is understandable that a court would want to have it both ways, this hardly seems a particularly stable approach, and in practice has sometimes led to courts adopting what seems like an almost entirely objective approach, where the court effectively imposes its own views, as in the *Gosselin* case, discussed earlier.

6 Who Should Judge Dignity Claims?

An even more radical difference between jurisdictions can be identified. Who should make the decision whether dignity should be accorded to a particular entity, and who should decide whether the balance between dignity and other values is appropriate? The Hungarian Constitutional Court did not consider that the right to human dignity would limit abortion in ways equivalent to those found by the German Court unless *Parliament* had recognized the foetus as a human person.[354] In the French *Conseil Constitutionel's Abortion Decision*, referred to above, the constitutionality of three amendments liberalizing French abortion law was challenged. One amendment in particular, which widened the permissible window for abortions from 10 to 12 weeks where the woman was in distress, was challenged as violating the 'principle of safeguard of human dignity against any form of deterioration'[355] because of the risk of resulting eugenic practices. Deciding that the amendments were constitutional, the Court stated that the new 12-week limit had not upset the 'balance that the Constitution requires between safeguarding human dignity … and the freedom of women'.[356] The *Conseil Constitutionel* explained that it is not for the court to decide the appropriate balance between the freedom of the woman and the dignity of the foetus: that is the exclusive province of the legislature. In other words, the opinion implies that the job of the court is merely to ensure that the legislature is balancing, not to police how it is balancing.

7 Who, or What, Is Protected By a Claim to Human Dignity?

We have seen that what I termed the ontological claim is central to the minimum core of the concept of human dignity. How have courts treated this aspect of the concept? Does human dignity apply only to a live, sentient person? Apparently not, at least in some jurisdictions. In Israel, dignity attaches to those who have died, as well as to the

[353] *Ibid.*, at para. 79.
[354] Dupré, *Importing the Law, supra* note 303, at 116.
[355] Decision 2001-446 DC of 27 June 2001, at para. 2.
[356] *Ibid.*, at para. 5.

living.[357] In Germany, human dignity may also protect the dead, or at least their reputation.[358] In Hungary, the Constitutional Court has gone one stage further and 'seems to recognize … that certain legal entities can … enjoy the right to dignity, which is no longer regarded as an exclusively human quality therefore'.[359] The Supreme Court of Israel seems to have gone one step further still. In *Let the Animals Live v. Hamat Gader Spa Village*,[360] an organization concerned with the welfare of animals sought to ban the practice of 'alligator–man fights', presented for the benefit of visitors. The 'alligator–man fights' included a series of acts inflicted by the human on the alligator, including tumbling the alligator by grabbing its tail, forcibly opening its jaws, pulling the alligator's head backwards, pulling its back legs, turning it on its back, and pressing its lower jaw. The animal welfare organization argued that the show abused the alligators and caused them suffering and should therefore be stopped. Cheshin J interpreted the relevant provisions of the Protection of Animals Act 1994 as prohibiting any kind of conscious abuse of animals unless it could be justified, whether that abuse was severe or mild, physical or mental, and he rejected the lower court's interpretation of the provision as prohibiting only abuse that caused the animal extreme suffering. The purpose of the shows, presented exclusively for entertainment, did not constitute an appropriate aim that might justify the suffering inflicted on the alligators. 'I find no justification for inflicting pain and anguish on a helpless animal solely for the purpose of entertaining an audience. Such an act is simply immoral and we should not allow it. *The animal is a helpless creature, much like a helpless minor. Neither of them can protect themselves, or claim their insult, or regain their dignity*.'[361] Cheshin J considered that the show might cause humiliation for the alligators: 'I shall add, with the required caution, that this fight show not only causes the alligator suffering, but also leads to its humiliation. This is not to be taken lightly. I do not know if the alligator itself feels humiliated when the human wrestler hold its tail, tumbles it back and forth, turns it on its back, and so forth, as if it were a lifeless rag doll. However, this I know – that the acts inflicted by man on alligator, were they to be inflicted on man, would be considered humiliating and oppressing.'[362]

The greatest unresolved difference between jurisdictions over the application of human dignity arises, however, over the question whether a human foetus has dignity. It is clear that the foetus is under the protection of human dignity in Germany.

[357] *Shavit v. Rishon Lezion Jewish Burial Society*, CA 6024/97 (Sup Ct Israel sitting as the Court of Appeals, 1 July 1999) referring to the 'human dignity of the deceased'. See further Kretzmer, *supra* note 210, at 168.

[358] *Mephisto case*, BverfGE 30, 173; Kommers, *supra* note 299, at 301.

[359] Dupré, *supra* note 303, at 72; Dupré, *Importing the Law*, *supra* note 303, at 112–113.

[360] 1648/96, *Let the Animals Live v. Hamat Gader Spa Village Inc* (1997). I am grateful to Tamar Feldman for providing a translation of the key parts of the judgment. According to reports in the scientific press, a 2004 Swiss law was interpreted to prevent particular experiments on animals on the ground that the experiments offended the dignity of the non-human primates involved: see Abbott, 'Swiss court bans work on macaque brains', 453 *Nature* (2008) 833.

[361] *Ibid.*, at para. 41 (emphasis added).

[362] *Ibid.*

In the context of abortion, the German Constitutional Court 'used the human dignity clause to underline the constitutional requirement for protection of unborn life'.[363] According to the *First Abortion Decision* of the German Constitutional Court, 'developing life also enjoys the protection which Article 1(1) accords to the dignity of man. Wherever human life exists it merits human dignity; whether the subject of this dignity is conscious of it and knows how to safeguard it is not of decisive moment. The potential capabilities inherent in human existence from its inception are adequate to establish human dignity.'[364] The important point is that this and other decisions reject attaching human dignity only to those with the present capacity to make autonomous decisions. In the United States, there is no mention of the 'dignity' of the foetus until, in *Gonzales v. Carhart*,[365] Kennedy J giving the opinion of the Court, described the rationale for the prohibited (so-called 'partial birth') abortion procedure at issue in that case as 'express[ing] respect for the dignity of human life'.[366] In the ECtHR, even after 30 years of litigation, it is still uncertain whether dignity applies to the foetus and, if not, why not. In *Tysiac v. Poland*,[367] the dissenting opinion of Judge Borrego regarded dignity as directly engaged, but the Court did not take up this challenge.

In Hungary, as we saw above, the Hungarian Constitutional Court did not consider that the right to human dignity would limit abortion in ways equivalent to those found by the German court, unless Parliament had recognized the foetus as a human person.[368] The dissenting opinion by Judge Lábady, however, regarded the issue as one to be decided by the Court, and not left to Parliament: '[a]ccording to Article 54 para. (1) of the Constitution in the Republic of Hungary every human being has the inherent right to life and to human dignity of which no one shall be arbitrarily deprived. In the interpretation of the Constitutional Court, the right to life and human dignity is an absolute subjective right, i.e. it cannot be restricted and reduced, since it is a fundamental right which must be left intact by the law. Since in a biological sense, the foetus is a human, i.e. a genetically fully developed individual human being, and since the term "inherent right to life" means … a right not gained through birth, but one "formed" together with the man, i.e. a right that originates in the existence, the humanity of the man, the lack of human dignity and having no right to life cannot be justified by the Constitution in case of a foetus not yet born.'[369] Dupré writes that the decision of the majority is in 'stark contrast' to the approach adopted in Germany,[370] and that the 'gap between the two interpretations of human dignity appears to be

[363] Walter, *supra* note 71, at 28.

[364] *Abortion Case*, 39 BverfGE R 1 (1975); D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, 1997). at 338. This was confirmed in the *Second Abortion* decision: BverGE 88, 208 (1993).

[365] 127 S Ct 1610; 167 L Ed 2d 480 (2007) (US Sup Ct).

[366] *Ibid.*, at Part IV.A. of the decision.

[367] 45 EHRR (2007) 42, dissenting opinion of Judge Borrego Borrego, at para. 15.

[368] Dupré, *Importing the Law, supra* note 303, at 116.

[369] Decision 48/1998 (IX.23) AB, dissenting opinion by Dr Tamás Lábady, at para. 1.

[370] Dupré, *Importing the Law, supra* note 303, at 116.

even wider because it originates from constitutional provisions which are very similar, as well as from legal issues expressed in very similar terms'.[371]

D *Does Dignity Serve as the Basis for a Consensual Substantive Conception of Human Rights?*

The apparently common recognition of the worth of the human person as a fundamental principle to which the positive law should be accountable considered in Part 3 of this article seems to camouflage the use of dignity in human rights adjudication to incorporate significantly different theoretical conceptions of the meaning and implications of such worth, enabling the incorporation of just the type of ideological, religious, and cultural differences that a common theory of human rights would need to transcend. By its very openness and non-specificity, by its manipulability, by its appearance of universality disguising the extent to which cultural context is determining its meaning, dignity has enabled East and West, capitalist and non-capitalist, religious and anti-religious to agree (at least superficially) on a common concept. But this success should not blind us to the fact that where dignity is used either as an interpretive principle or as the basis for specific norms, the appearance of commonality and universality dissolves on closer scrutiny, and significantly different conceptions of dignity emerge.

Few courts acknowledge that the conception of human dignity that they apply is different from that applied in other countries. Indeed, to do so would appear to undermine a legitimizing function of human dignity. A possibly significant breach in the dyke has now appeared, however. In the *Omega* case, the ECJ seems to have accepted that human dignity *has* potentially significantly different meanings from country to country. The German authorities had prohibited Omega, a commercial enterprise, from operating a laserdrome where players try to 'kill' other players by firing a laser beam at a sensory tag placed on their jackets. The company argued that because the game was lawful in other Member States, Community law required that it be allowed in Germany on the basis that Community law protected the freedom to provide services in the Community. The German government argued that the prohibition was justified on the same grounds on which peepshows and dwarf throwing were prohibited, namely on grounds of human dignity. The company argued in rebuttal that a restrictive measure based on the protection of fundamental rights must be based on a *common* conception of those fundamental rights under European Community law across the Community. The ECJ disagreed; it was not indispensable for the restrictive measure adopted by a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or interest was to be protected.[372] By implication, the German approach to dignity was not a conception of dignity common to the Member States.[373]

[371] *Ibid.*, at 117.

[372] *Omega*, *supra* note 199, at paras 34–37. For commentary on the case see M.K. Bulterman and H.R. Kranenborg, 'Case Comment', 31 *European L Rev* (2006) 93; Ackermann, Comment, 42 *CML Rev* (2005) 1107.

[373] See also Case C–244/06, *Dynamic Medien v. Avides Media*, not yet reported.

We need to be careful, however, not to claim too much. There are several reasons to be cautious about drawing a conclusion that there is a lack of consensus on a particular conception of human dignity based on the evidence presented in this part of the article. First, much of the evidence supporting the divergence thesis (as it might be called) is taken from a limited range of jurisdictions, mostly at the domestic level. Secondly, it is arguable that I have put the bar too high in judging whether there is a judicial consensus on a common conception of dignity beyond the minimum core.[374]

Basing a strong divergence thesis on this (mostly) domestic material may be problematic because, as we have seen already, different jurisdictions incorporate the idea of human dignity into their legal texts in different ways, using different legal instruments. It may be unsurprising, therefore, if judges in different jurisdictions say different things about, for example, the weight or status of dignity if they are dealing with differently constituted texts which say different things about weight and status. Judicial differences may be attributable, in other words, to the texts, rather than to judicial interpretation. Clearly, it would be more telling at the interpretive level if there were examples of judges in different jurisdictions working with the *same* text but coming up with quite different interpretations. The examples I have used do not clearly do that. Instead, the examples are drawn from jurisdictions which seem to have *comparable* texts, but comparability is a matter of judgement, a judgement with which readers may reasonably disagree.

Have I put the bar on consensus too high? Using my approach, would consensus ever be achievable? Unanimity is unlikely ever to be achieved across all jurisdictions. Arguably, all I have done is to provide examples of judicial outliers. Germany says it is giving absolute weight to dignity when no one else does. The United States refuses to limit freedom of expression for the sake of the dignity of disadvantaged groups. Israel apparently uses the concept of dignity to protect alligators. These may all simply be examples of judicial outliers rather than illustrations of an absence of consensus. A related argument against my position is that the cases I use to illustrate the divergence thesis are all what Ronald Dworkin calls 'hard cases',[375] in which one might *expect* to find significant divergence. Divergent results in hard cases may not necessarily mean that a universal conception of dignity does not exist, but suggest only that a universal understanding of dignity does not exist *at the margins*.

Could a more sophisticated methodology be adopted? A richer approach would examine much more carefully the judicial discourse in particular countries in their historical, social, cultural, political, and legal contexts. This type of study is already underway in some countries where studies of the meaning of dignity in legal discourse in this richer sense have been completed.[376] Analysis of dignity discourse in the judicial

[374] I am grateful to Denise Réaume for this point.

[375] R. Dworkin, *Taking Rights Seriously* (2007), at chap. 4.

[376] Dupré, *Importing the Law*, *supra* note 303 (discussing Hungary); Kamir, 'Honor and Dignity Cultures: the Case of Kavod (Honor) and Kvod Ha-adam (Dignity) in Israeli Society and Law', in Kretzmer and Klein, *supra* note 4, at 231 (discussing Israel); Whitman, 'On Nazi "Honour" and the New European "Dignity"', in C. Joerges and N.S. Ghaleigh (eds), *Darker Legacies of Law in Europe* (2003), at 243 (discussing Germany).

context is, however, in its relative infancy, and even fewer attempts have been made to provide cross-cultural studies of the use of dignity in judicial discourse using these richer methods. Such work will be an important resource in the future. If such work is undertaken, as I hope it will be, it will however need to tackle the immensely difficult issue of how to deal with the concept of human dignity in different languages. Orit Kamir, for example, has stressed the important substantive implications in Israeli human rights interpretation of translating 'dignity' using the Hebrew word '*kavod*'.[377] I suspect, but cannot prove, that similar issues arise in other languages.

Given these problems, all that can be said is that the account given in this part of the article seems to me to show (but by no means incontestably) that judicial interpretation of the concept of human dignity has contributed little to developing a consensus on the implications of any of the three basic elements of the minimum core I sketched out earlier, and therefore that no common conception of dignity is yet discernible. Dignity discourse has, so far at least, done little to provide a conception with significant enough substantive content to solve the most profound issues in the judicial resolution of human rights claims: the appropriate balance between the individual and the community, including such questions as the appropriate limits on individual freedom; the appropriateness of the use of state power to ensure basic standards of material security; what rights should be attributed at the beginning of life and at the end of life; and how far we have responsibilities to ourselves and to the community. Nor, in the words of Weisstub, does it 'inform us about whether the core and substance of human dignity is best articulated through a consensus morality, if it can be located alternatively among the professional elite of the judiciary, or whether it can only be articulated over a long process through the amalgamation and interaction with other rights, values, principles and rules established nationally and trans-nationally in law and legislation'.[378] We are left, then with an apparently descriptively more accurate, but normatively disappointing, conclusion that in the judicial interpretation of human rights there is no common substantive *conception* of dignity, although there appears to be an acceptance of the *concept* of dignity.

6 Finding the Use of Dignity in Process

But perhaps it is too ambitious to assess the utility of dignity in human rights adjudication on the basis of whether it either creates or instantiates a *substantive* conception of human dignity. Perhaps we should think more modestly and ask whether dignity plays a different role. At this point in the article, we turn from the issue of whether there has been a substantive consolidation of the meaning of human dignity to consider the *institutional* use of the concept in human rights adjudication. My argument in this part of the article is that the 'common enterprise' which Carozza and I both agree is occurring is not 'the working out of the practical implications, in

[377] Kamir, *supra* note 376.
[378] Weisstub, *supra* note 162, at 274.

differing concrete contexts, of human dignity', as Carozza would have it,[379] but rather the establishment of a recognizably workable system of judicial interpretation and application of human rights. In this context, the concept of human dignity provides a useful, but limited, language with which to address certain institutional difficulties to which human rights adjudication gives rise.

Although dignity has yet to assist in providing a shared *substantive* basis for judicial decision-making,[380] dignity has, however, provided something else to human rights adjudicators. Weisstub's analysis provides a useful starting point: 'what is interesting about human dignity is how it colours differently, depending upon the social needs in question. Its centrality and attractiveness for global ethics may be, thereby, its malleability rather than the tightness of its logic. … To say this in no way throws into question the rhetorical value or *even the constitutional attractiveness* of the claims or projections about human dignity.'[381] Wherein lies this constitutional attractiveness? I will argue in the remainder of this article that we can identify from the previous analysis a distinctively useful *institutional* function which dignity plays in judicial interpretation, one that fulfils a need occasioned by the institutional characteristics of judicial decision-making in human rights adjudication. In other words, dignity plays an important legal-institutional function. I am not arguing that all judicial decision-making should be seen from the functionalist perspective which this particular argument presents. My more limited argument in this concluding part of the article is that the judicial use of dignity in human rights adjudication should not be seen only from the perspective of universalistic naturalism or from the perspective of pluralistic cultural relativism. Rather, we should see the role that dignity plays in adjudication at least partly from an *institutional* perspective.[382] If this analysis is correct, one implication would be that the use of dignity in human rights adjudication may, therefore, be rather different from its use in other contexts and social systems.

A *Judicial Review's Institutional Problems*

At least since the Second World War, courts have increasingly been given (or taken on) a role in interpreting and applying constitutional and human rights, sometimes in specially created constitutional courts, sometimes in courts of general jurisdiction, and sometimes in administrative courts. Such adjudication usually involves the judiciary being asked to adjudicate on disputes which involve an allegation of a breach of a claimed right by a public body such as a department of government, or by the legislature itself. This role of the courts is controversial not least because it runs the risk of creating tension with other constitutional principles, such as the separation of powers. Where judicial review involves judges striking down legislation on the ground that

[379] Carozza, *supra* note 291, at 1081–1082.

[380] Feldman, 'Human Dignity as a Legal Value' [1999] *Public Law* 682, at 698.

[381] Weisstub, *supra* note 162, at 265 (emphasis added).

[382] My approach in this article, focussing on the judicial-institutional context of the interpretation of dignity, is close to what Tushnet terms 'contextualism': Tushnet, *supra* note 293, at 10, in this article, focussing on the judicial-institutional context of the interpretation of dignity.

it breaches constitutional or human rights, it is particularly controversial because a body of unelected judges calls into question the decision of a democratically elected body, leading to the so-called 'counter-majoritarian difficulty'. These tensions have led to a continuing debate about the legitimacy of judicial review, particularly of this strong type, and how far it is compatible with notions of democratic self-government. In all the jurisdictions which have adopted dignity in their judicial decision-making, judicial review in the human rights context is more or less controversial, constantly aiming to justify itself, its methods, and its reasoning.

There are at least three particular institutional problems which are commonly identified with human rights adjudication which courts use dignity to help to deal with. The first arises from the need to decide how to resolve conflicts of rights, and conflicts between rights and other values. The second arises from the need to decide how far the rights which are to be interpreted should be seen as instantiating international standards, as opposed to how far they should be seen as protecting more national or local concerns where there is a conflict. The third arises from the need to decide how far the text of the national (or regional, or international) Bill of Rights should be seen as determinative, and how to react when the text appears not to support a strong judicial desire to intervene. I will consider each in turn.

B *Conflicts of Values and the Problem of Incommensurability*

I begin with the problem of how to handle conflicts of rights and conflicts between rights and other values. A key feature of this problem is the issue whether these rights and other values can be 'balanced' against each other. To engage in 'balancing' is clearly a metaphor in this context. We can balance an amount of sugar against an amount of flour because both have mass and weight and we therefore have a common measure to compare them by. Frequently, however, rights and other values are said to be incommensurable. Incommensurability is essentially the theory, first popularized by Isaiah Berlin,[383] that some values cannot be compared against each other, and this has been taken up in the legal context. John Alder, for example, argues that there is no single, ultimate scale or principle against which to compare conflicting values – no 'moral slide-rule' or universal unit of measurement.[384]

The *Evans* case is a prime example of an intra-rights conflict being seen to give rise to a problem of incommensurability. Mrs Evans was diagnosed with cancer in both ovaries and they had to be removed. The hospital advised her that it would be possible to 'harvest' her eggs, fertilize them with the gametes of her husband, and freeze them so that they might have a child in future. Her relationship with her husband broke down and he asked for the gametes to be destroyed. The British legislation allowed the withdrawal of consent at any time pre-implantation. Mrs Evans wanted the gametes preserved so that she could have a baby. Legally, the case was presented as involving a conflict between Mrs Evans' Article 8 right to found a family and her former

[383] I. Berlin, *Liberty: Incorporating Four Essays on* Liberty (ed. H. Hardy, 2002).

[384] Alder, 'The Sublime and the Beautiful: Incommensurability and Human Rights' [2006] *Public Law* 697.

husband's Article 8 right to protection of his private life. Before the issue reached the ECtHR, the English Court of Appeal rejected Mrs Evans' claim, Sedley LJ stating that the claim would 'require a balance to be struck between two entirely incommensurable things. Whatever decision was arrived at might be capable of being explained but would be practically impossible to justify.'[385] Arden LJ similarly stated that the court had no point of reference by which to make such a decision.[386] The Grand Chamber held that there was no violation of the Convention.[387]

One approach to conflicts of this kind is to say that resolving such conflicts is not a role for the courts. So, for example, Alder argues that when we reach the stage where values conflict, we must employ human emotions to resolve the conflict. The legislature, Alder argues, is the best forum for the discovery and application of such emotions. The courts have no special insight into the issue and the legislature is ultimately more suited. Translated into court-talk, courts should defer to the legislature. Effectively, this is what the ECtHR did in *Evans*. Another possible approach is for the court to resort to utilitarian balancing. Consider the *A* case,[388] involving the issue whether detention of alleged terrorists without trial was contrary to Articles 5 and 6 of the ECHR. We could convert the argument to a purely utilitarian form, something like the greatest good for the greatest number, asking the court to consider whether the damage of holding a person in a prison without allowing him to plead his innocence in a court is greater than the potential effect on national security of letting him free. Apart from the fact that this seems to be the type of decision which legislatures (perhaps even the Executive) are better able to make than courts, there is another problem. If we take liberty not as a utilitarian consideration but as an intrinsic value, valuable in and of itself, then it seems difficult to perform the utilitarian balancing act between the two.

There are various other ways of addressing the problem of such conflicts. An approach which is often, perhaps increasingly, adopted is for the court to adopt proportionality as a tool by which it can structure its analysis of the conflict. There are many variations in the ways courts formulate proportionality,[389] but for my purposes nothing hangs on these differences. Essentially, each formulation has several common elements: first, where a limit is placed on a claimed right, the court should first establish whether that limit furthers a legitimate aim; secondly, the court should consider whether the means chosen to achieve this aim are rationally connected to that aim; thirdly, the court should consider whether the measure is proportionate in the strict sense, meaning that the court should consider whether there are any means available to achieve the objective which are less restrictive of the claimed right, and whether the benefits of restriction outweigh the harms.

A problem which is commonly identified with proportionality analysis, however, is that the proportionality test requires the injection of a significant element of value

[385] *Evans v. Amicus Healthcare Ltd* [2004] EWCA Civ 727, at para. 66.
[386] *Ibid.*, at para. 110.
[387] *Evans v. United Kingdom*, 43 EHRR (2007) 21.
[388] *A. v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 WLR 87 (HL).
[389] *Silver and Others v. UK*, 5 EHRR (1993) 347, at para. 97.

judgement in at least two particular parts of the test: in determining whether the aim of the restrictive measure furthers a *legitimate* objective, and in carrying out the final balancing exercise. Courts applying the proportionality test will need to determine what constitutes a legitimate aim and its 'weight', and what the 'weight' of the right is that is being limited by the challenged measure. Rather than solving the problem of incommensurability, the court is still faced with the problem and the courts resort to similar techniques described in the previous paragraphs: deference to legislative judgment, creating a hierarchy of rights, engaging in crude utilitarian balancing, or, as Waldron[390] identifies, requiring that reasons be given explaining the considerations upon which the governmental decision was arrived at and scrutinizing the adequacy of such reasons.

The use of dignity is particularly associated with those jurisdictions which have adopted proportionality analysis, whether that word is used or not. That is not coincidental, I think. One important institutional function for dignity is to provide a language in which courts can indicate the weighting given to particular rights and other values in this context. When a particular right or other value is described as engaging dignity, this indicates that the court considers that considerable (even in some cases overwhelming) weight should be attributed to it.[391] Let us reconsider the *First Abortion Case* in this light. The German Constitutional Court (FCC) addressed the constitutionality of the Abortion Reform Act of 1974, which liberalized some restrictions on abortion. The Act was challenged as unconstitutional. In deciding the case, the FCC identified the conflicting interests at stake as the mother's right to personality under Article 2(1) and the state's duty to protect life under Article 2(2). Faced with balancing the mother's rights and the state's duty to protect life, the FCC turned to dignity. The Court identified dignity as the supreme value in German law, stating that '[i]n the ensuing balancing process, both constitutional values must be perceived in their relation to human dignity as the centre of the Constitution's value system'.[392] Although this statement implies that dignity is a superior value guiding the interpretation of the scope of *both* rights, the FCC went on heavily to emphasize dignity's connection to the life interest, declaring that '[h]uman life … is the vital basis of human dignity and the prerequisite of all other basic rights'.[393] By combining dignity with the state's duty to protect life, dignity became a technique whereby the court was able to apply stricter scrutiny to derogations from the state's duty to protect life and consequently restrict the rights of the mother. Once dignity entered the balancing calculus on the side of the life interest, the conclusion that

[390] Waldron, 'Fake Incommensurability', 45 *Hastings LJ* (1994) 813.

[391] In addition to the cases discussed in the text see also *R. (Carson) v. Secretary of State for Work and Pensions* [2006] 1 AC 173 (HL). For a useful discussion see Baker, 'Comparison Tainted by Justification Against a "Compendious Question" in Art. 14 Discrimination' [2006] *Public Law* 476.

[392] BverfGE 39, 1, quoting BverfGE 35, 202. The court emphasized the life interest as a community value rather than an individual right belonging to the foetus, although the court did recognize that '[t]he potential capabilities inherent in human existence from its inception are adequate to establish human dignity'.

[393] *Ibid.*

the protection of the foetus's life must receive priority over the women's freedom was inevitable. Thus, the FCC relied heavily on dignity to tip the scales in favour of finding the act unconstitutional, and restrict the rights of the mother.

So too, in the *Aviation Security Act Case*,[394] dignity performed a similar function to the one it played in the *First Abortion Case*. In this case, the FCC addressed the constitutionality of a law which empowered the Minister of Defence to shoot down a hijacked passenger plane where it was being used as a guided bomb similar to the way in which the planes were used on 9/11. The FCC decided that, despite its potential to avert a major disaster and save thousands of lives, the law was impermissible because it infringed the guarantee of human dignity to the extent that it allowed the lives of innocent people to be taken to save the lives of others. The FCC's use of dignity here resembles the use of dignity in the *First Abortion Case* because in both cases the FCC invoked dignity in conjunction with the right to life in order to imbue that right with a weight which justified the application of strict scrutiny when assessing whether incursions into the right were acceptable, and found that they were not.[395] When the court deems that dignity is not a factor, however, less weight is attributed to the life interest, and hence incursions into rights can once again be justified. Thus, the FCC concluded that, if terrorists are alone on the plane, shooting the plane down would be proportionate because the criminals are not being treated as objects; '[o]n the contrary, it corresponds to the position of the aggressor as a subject to make him accountable for the consequences of his autonomous actions'.[396]

So, too, when the FCC in the *Second Abortion* decision wanted to give greater weight to the rights of the woman, it began using the concept of dignity to describe those rights, thus indicating that they should be accorded greater recognition than in the *First Abortion* decision. In the *Second Abortion* decision, the FCC departed from its technique of attributing dignity primarily to the life interest in the foetus. Instead, the Court placed dignity on both sides of the rights-balancing equation, stating '[w]here the woman's constitutional rights, namely her right to free development of her personality … and to the protection of her dignity, collides with the duty to protect the unborn, the conflict must be solved in accordance with the principle of proportionality'.[397] Unlike in the *First Abortion* case, the woman's right to personality, and not just foetal life, was seen to engage dignity. Dignity was no longer used to tip the scales in favour of the life interest. Rather, dignity's association with both sides of the conflict resulted in the decision that the state's duty to protect life and the woman's basic rights must be balanced.[398] Consequently, the character of the opinion was decidedly more respectful of the woman's rights and reflected a more even-handed balancing overall.

[394] BverfGE, 1 BvR 357/05.

[395] See Möller, 'On Treating Persons as Ends: The German Aviation Security Act, Human Dignity, and the Federal Constitutional Court' [2006] *Public Law* 457.

[396] *Ibid.*, at 462.

[397] BverfGE 88, 208, 2 BvF 2/90, 2BvF 4/92, 2 BvF 5/92 (1993), at 164.

[398] It is not clear whether the FCC conceived that woman's dignity here is affiliated solely with the right to life or her right to personality, but the FCC appears to be associating dignity with both rights.

The *Second Abortion* decision also illustrates the use of dignity as providing a common metric within which balancing of apparently incommensurable values can take place, and a metric which is not simply expressed as utilitarian. This, too, is a common practice in other courts which use proportionality. So, for example, in the *South African Port Elizabeth Municipality* case,[399] the city sought an eviction order against a group of individuals occupying private land. Although the City proposed that the group move to a different piece of land, the individuals rejected the offer because the proposed site of relocation was crime-ridden, crowded, and would not offer them security from another eviction. The City had housing to serve the needs of the poor, but contended that allowing individuals to receive priority in the allocation of this housing was tantamount to rewarding them for illegally occupying land. The Court found itself in a situation of conflicting rights: the right of the landowners not to suffer arbitrary or unlawful deprivation of their land, and the right of the squatters to have access to adequate housing. Sachs J was clearly unwilling simply to use a utilitarian approach to resolve the conflict: '[i]n a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress could be avoided'.[400] Instead, in deciding the case, the Court emphasized that the 'starting and ending point of the analysis must be to affirm the values of human dignity, equality, and freedom'.[401] The Court made no attempt to identify dignity with only one side of the conflict, but rather concluded that both rights pertained to property and were underpinned by dignity. Given that they were commensurate, the Court's role was to seek the solution that would best comport with dignity. When the Court decided that it would not uphold the eviction order, it justified its decision to limit the right of the landowners to be free from unlawful deprivation of their land as being the choice more congruent with dignity.

Consider the similar role of dignity in the context of freedom of expression in the Canadian Supreme Court cases considering obscenity and hate speech. Traditionally, in both these contexts, other jurisdictions (perhaps particularly the United States) have contrasted the right to freedom of expression against the mere 'interests' of the government, and have come down heavily in favour of freedom of speech. In contrast, in the Canadian cases, the interests of the government were reformulated in dignity terms, and the result was markedly different. Thus, in *Keegstra*,[402] we saw earlier that Dickson CJ conceptualized the protection accorded by the legal restrictions on hate speech as heavily engaging dignity. The majority considered that the right to freedom of speech was also underpinned by dignity. 'Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because

[399] *Port Elizabeth Municipality v. Various Occupiers*, 2004 (12) BCLR 1268 (Const Ct S Africa).
[400] *Ibid.*, at para. 29.
[401] *Ibid.*, at para. 15.
[402] *R. v. Keegstra* [1990] 3 SCR 697 (Sup Ct Canada).

it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity.'[403] Since dignity is engaged on both sides of the conflict, therefore, dignity again provides a metric common to both, and thus the solution must be that which most comports with dignity. In this case, according to the majority, since the speech is one that undermines dignity, the dignity-based reasons why speech ordinarily should be protected from interference are substantially reduced. 'I am very reluctant to attach anything but the highest importance to expression relevant to political matters. But given the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the … rationale [for protecting free speech]. … [T]his conclusion leads me to disagree with the opinion of [the dissent] that the expression at stake in this appeal mandates the most solicitous degree of constitutional protection. In my view, hate propaganda should not be accorded the greatest of weight in the [proportionality] analysis.'[404]

C *Domesticating and Contextualizing Human Rights*

How far should human rights instantiate international or local standards? Carozza argues that there 'is an inherent tension in international human rights law' between upholding a universal understanding of human rights and 'respecting the diversity and freedom of human cultures.'[404a] For Carozza, the principle of subsidiarity 'gives us a conceptual tool to mediate the polarity of pluralism and the common good in a globalized world ....'[404b] But so, too, does the concept of human dignity. For example, it allowed the South African court in *Port Elizabeth* to contextualize its decision in light of the history of apartheid.[405] It allowed the Supreme Court of Canada to pick and choose what it regarded as discriminatory, based on local perceptions of what was contrary to dignity.[406] As the Chief Justice explained in *Gosselin,* 'To determine whether a distinction made on an enumerated or analogous ground is discriminatory, we must examine its context. … In each case, we must ask whether the distinction, viewed in context, treats the subject as less worthy, less imbued with human dignity, on the basis of an enumerated or analogous ground.'[407] It enabled the South African Constitutional Court to decide when 'equality' required equal treatment and when it did not.

[403] *Ibid.,* at 764.

[404] *Ibid.,* at 765.

[404a] Paolo G Carozza, Subsidiarity as a Structural Principle of International Human Rights Law, 97 *AJIL* (2003) at 1.

[404b] *Ibid.*

[405] 2004 (12) BCLR, at paras 9–10.

[406] *Gosselin v Quebec* [2002] SCC 84 (Sup Ct Canada), at para. 24 (McLachlin CJ).

[407] *Ibid.,* at para. 24.

As Sachs J explained in *Minister of Home Affairs v. Fourie*,[408] '[i]t is precisely sensitivity to context and impact that suggest that equal treatment does not invariably require identical treatment. … The crucial determinant will always be whether human dignity is enhanced or diminished and the achievement of equality is promoted or undermined by the measure concerned.'[409]

Indeed, some scholars have argued that this function of dignity has been vital in particular jurisdictions, not just in the context of individual cases but more generally. Dupré has argued that the Hungarian Constitutional Court's use of dignity can best be explained as 'being used first and foremost to break with the socialist law'.[410] Given the resistance during the transition to democracy to any resurrection of the despised egalitarianism of Communist ideology, it is not surprising that a non-redistributive justice approach to equality should be adopted. Dignity was ideally placed to supply an alternative theory in this context, and we should not be surprised, therefore, to find it heavily used by the Court. Dupré argues convincingly that the 'task of negating and destroying the former domestic [Communist] legal system has gone hand in hand, in constitutional case-law, with the foundation of a new order based on non-indigenous elements'.[411] Human dignity allowed the court to import these non-indigenous elements into Hungarian law, primarily from German constitutional law, but only to the extent that this was perceived as suiting the local need 'to reorient the conception of fundamental rights … from a communist concept of rights to a liberal one'.[412] In order to accomplish this switch, the Court 'used imported law in its early case law as a modern substitute for natural law, in that it enabled the Court to base its reasoning on new supra-constitutional values, while presenting them in a legal guise. At the same time, the use of imported law is couched in a discourse of globalization or ius commune, in which the Court presents itself as an active participant.'[413]

The point is not simply that the concept of dignity is vague and open to interpretation and gives judges discretion; in that it does not differ from all human rights obligations and rights. Rather, my argument is that, just as dignity played a significant role politically in smoothing over the transition to human rights in the post-Second World War period at the international level, so too dignity is playing a similar role judicially, enabling rights to be interpreted in a way that domesticates them. Its role, in practice, is to enable local context to be incorporated under the appearance of using a universal principle. Dignity, in the judicial context, not only permits the incorporation of local contingencies in the interpretation of human rights norms; it requires it. Dignity allows each jurisdiction to develop its own practice of human rights.

[408] 2006 (3) BCLR 355 (Const Ct), at para. 152 (Sachs J).
[409] *Ibid.*, at para. 152.
[410] Dupré, in European Commission for Democracy in Law, *supra* note 14, at 72.
[411] *Ibid.*, at sect. 1(B).
[412] Dupré, *Importing the Law*, *supra* note 303, at 6.
[413] *Ibid.*, at 157.

D *Justifying the Creation of New, and the Extension of Existing, Rights*

Dignity has functioned, thirdly, as a source from which new rights may be derived, and existing rights extended. In the Israeli context, for example, human dignity has been seen as providing a basis on which to import rights that had not, intentionally, been included in the text of the Basic Law: Human Dignity and Liberty. As Kretzmer observes, 'the Basic Law does not mention many of the fundamental rights that are protected under most constitutions and international human rights instruments …. The most blatant exclusions are equality, freedom of religion and conscience and freedom of speech.'[414] These were excluded because of the inability to generate a consensus among the parties in the Knesset that they should be included at that time. Notably, several of the religious parties objected to their inclusion. Given that the self-perceived role of the Israeli Supreme Court is to assist in the building of an Israel that is committed to the broad range of human rights, that was unsatisfying. Conceptualizing human dignity as a general value 'has enabled the Court to resort to the concept to create rights in various situations', including in those contexts where the excluded rights would otherwise have been expected to operate.[415] In some cases, the Court has used this method to recognize precisely those rights which were deliberately omitted from the Basic Law because of the lack of political consensus.[416] For example, in the *Hupert* case, the Court asserted that the right to equality could be derived from human dignity and as a consequence merited constitutional protection.[417] Other rights that have been derived from dignity in a similar manner include freedom of religion, the right to strike, the right of minors not to be subject to corporal punishment, and the right to know the identity of one's parents.[418]

A somewhat similar approach can be identified in the UK House of Lords' *Limbuela* decision,[419] in which the claims of three asylum seekers who applied for judicial review of the Nationality, Immigration, and Asylum Act were considered under the Human Rights Act 1998, which effectively incorporated the ECHR into domestic UK law. The challenged legislation had revoked the authority of the Secretary of State to provide support for asylum seekers who did not make a recorded claim for asylum as soon as reasonably practicable after arriving in the UK. Nor were such asylum seekers permitted to work, even where they were destitute. The asylum seekers contended that the regime diminished their human dignity and violated Article 3 of the ECHR, which provided an absolute prohibition on torture, and inhuman or degrading treatment. Dignity was the standard for determining whether treatment rose to the level of inhuman or degrading treatment for the purposes of Article 3. Discussing the types of treatment falling within Article 3, Lord Craighead wrote, 'Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity

[414] Kretzmer, *supra* note 210, at 162.
[415] *Ibid.*, at 172.
[416] *Ibid.*
[417] *Ibid.*
[418] *Ibid.*
[419] *R. v. Secretary of State for the Home Dept., ex parte Limbuela* [2005] UKHL 66 (HL).

or arouses feelings of fear, anguish, … it may be characterized as degrading and also fall within the prohibition of article 3'.[420] The House agreed that the statutory regime violated Article 3 because, by denying the asylum seekers state support at the same time as effectively cutting off self-support measures (applicants could not work without permission, which took a minimum of 12 months to obtain), the state actions resulted in treatment that was severe enough to be considered inhuman or degrading.

E *Reacting to the Institutional Uses of Dignity*

How should we react to these institutional uses of dignity? Some may see the three uses of dignity as merely rhetorical. The courts use the concept of dignity merely to disguise, for example, the absence of a theory on how to resolve conflict between incommensurable values. Instead of making a choice between conflicting rights, they present the conflict as an issue internal to dignity. Some may well consider that this approach obscures the moral issues which give rise to conflicts of rights, pretending that the problem is the absence of a common metric, where the real disagreement is deeper. There may be a similar reaction to the other uses of dignity discussed in this part of the article. If these arguments are accepted, then from a substantive point of view, dignity is a placeholder, but it has taken on a rhetorical function in these three distinct contexts to give judges something to say when they confront the really hard issues. This counts as 'finding the use of dignity', but not in a way that some readers will see as normatively attractive, since it seems merely to provide a smokescreen behind which substantive judgments are being made, but unarticulated as such, and therefore uncontestable. Some, indeed, may consider this as a breach of the Rule of Law which, as conceptualized by Raz, requires decisions to be open, prospective, and clear, such that individuals are able to plan their lives around them.[421] Critics of pluralistic visions of human rights may well argue that the techniques of 'domesticating' human rights discussed above undermine the predictability necessary to create a functioning approach to human rights and in extreme forms allows for total derogation from human rights norms by tolerating all deviations. Others may see the uses of dignity described in this part of the article as anti-democratic. This article is not the place to consider whether these arguments are convincing. My only purpose, I repeat, is to identify what seems to me to *explain* the increasing popularity of the concept of dignity among judges and advocates, not to justify these uses of dignity.

7 Conclusion

Dignity has undoubtedly played a pivotal political role in enabling different cultures with vastly different conceptions of the state, differing views on the basis of human rights, and differing ethical and moral viewpoints to put aside these deep ideological differences and agree instead to focus on the specific practices of human rights abuses

[420] *Ibid.*, at para. 76 (Baroness Hale).

[421] Raz, 'The Rule of Law and its Virtue', 93 *LQR* (1997) 195.

that should be prohibited, as Maritain suggested. Dignity has helped to achieve this by enabling all to agree that human rights are founded on dignity. A basic minimum content of the meaning of human dignity can be discerned: that each human being possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with respect for this intrinsic worth, and that the state exists for the individual not vice versa. The fault lines lie in disagreement on what that intrinsic worth consists in, what forms of treatment are inconsistent with that worth, and what the implications are for the role of the state.[422]

Although a more specific common theory going beyond the minimum core content was not necessary for the political acceptance of the Charter and the Universal Declaration, or for the acceptance of the subsequent human rights texts at the international, regional, and domestic levels, and attempts to generate one might well have been counter-productive, this did not help much when it came to the judicial interpretation of those specific rights that were enacted. When judges read their texts and found that these rights were founded on human dignity, or found that there was a right to dignity as such, it was not surprising that some considered that dignity should be given a more substantive content. It is significant that dignity is so often drawn on where there is some personal security issue at stake (torture, death), where equality is at stake (including as a basis for limiting other rights like freedom of expression), and where some forms of autonomy are at stake (abortion, sexual practices). This might have led (and may still lead) to the development, through discussion among judges nationally and transnationally,[423] of an agreed transnational, transcultural, non-ideological, humanistic, non-positivistic, individualistic-yet-communitarian conception of human dignity which was absent when the Charter and the Declaration were being drafted. I understand Carozza to be arguing that this is what is currently underway. But, although we see judges often speaking in terms of 'common principles for a common humanity', in practice this is often rhetoric, however well intentioned and sincere. We appear to have significant consensus on the common core, but not much else.

I am *not* arguing that there is no more precise conception of human dignity that is possible beyond this minimum content. Nor am I arguing that there is no coherent extra-legal conception of dignity which could form the basis of a common transnational legal approach. The problem is rather the opposite: as the historical examination of the development of dignity indicated, there are several conceptions of dignity that one can choose from, but one cannot coherently hold all of these conceptions at the same time. Dignity appears to become other than impossibly vague only when it is tethered to a coherent community of interpretation.[424] It could be, therefore, that the

[422] See also Feldman, 'Human Dignity as a Legal Value – Part II', [2001] *Public Law* 61, at 75.

[423] See, however, C. Gearty, *Principles of Human Rights Adjudication* (2004), at 88, where he adopts the view that the place where the appropriate conception of human dignity should be resolved 'is ideally the legislative assembly in which the representatives of the people meet to make rules for their society'.

[424] For an interesting attempt to do so in comparing the judicial use of dignity in the US and Germany see E.J. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* (2001).

interpretation of dignity within Catholic social doctrine, or within a social democratic framework, or within an Islamic framework, or within the Jewish tradition, or based on Kant, might fulfil this role. But none of these currently provides a consensus conception of the legal use of dignity, and I am sceptical whether any of these could really provide a secure foundation for its judicial application in the future. When any one of these conceptions is adopted, dignity loses its attractiveness as a basis for generating consensus with those who do not share that tradition.

The central meaning of dignity remains the common minimum core and judicial interpretation has done little, so far, to help us move beyond this. So far, the use of the concept of human dignity has not given rise to a detailed universal interpretation, nor even particularly coherent national interpretations. No one jurisdiction has a coherent judicially interpreted conception of dignity across the range of rights, and no coherent conception of dignity emerges transnationally. But that does not mean that dignity has no role to play in the judicial interpretation of human rights. The absence of a consensus substantive meaning of the concept beyond that minimum core has not, it seems, prevented it from being used to enable a much looser coordination of human rights adjudication to take place, with significant room for disagreement and divergence over specific practical applications. Rather than providing substantive meaning, a significant use is institutional: providing a language in which judges can appear to justify how they deal with issues such as the weight of rights, the domestication and contextualization of rights, and the generation of new or more extensive rights. It is a limited role, and (possibly) a different one from that played in philosophical, religious, and political debate, but it seems to me to go some way towards explaining its current, and I predict future, judicial popularity in human rights adjudication.