

CHAPTER 18

HUMAN DIGNITY AND AUTONOMY IN MODERN CONSTITUTIONAL ORDERS

MATTHIAS MAHLMANN

Zurich

I. Human Dignity: Hopes and Doubt	371
II. Dignity and the Antinomy of Human Rights	373
III. The Quest for Dignity	375
1. The Point and Perils of Historical Reflection	375
2. Dignity in History: Some Tentative Observations	377
IV. The Content of Human Dignity as a Legal Concept	379
1. The Scope of Dignity	379
(a) Elements of Concretization	379
(b) The Cosmopolitan Framework	383
(c) Dignity as a Subjective Right	383
(d) Personal Scope: The Bearer of the Right	384
(e) Objective Element of the Law	384
(f) Horizontal Effect	384
(g) Positive Duties and Rights; Procedural Elements	385
(h) Beginning, Diachronical Continuity, and End	386
2. Interference	387
3. Limitations and Justification	387
4. Relation to Other Fundamental Rights and the Political Order	388
V. Problems and Solutions	389
1. The Scope of Dignity	389
(a) Content and Legitimacy	389
(b) Dignity and Autonomy	390
(c) Dignity: Widely or Narrowly Defined?	390
(d) Subjective Right, Objective Law, Personal Scope	390
(e) Horizontal Effect, Positive Duties and Rights, Procedural Elements	391
(f) Beginning, Diachronical Continuity, and End	391
2. Interference, Limitations, and Justification	392
3. Dignity, Other Fundamental Rights, and the Structure of the Body Politic	392
VI. The Universalist Stance: Yet Another Particularism?	393

I. HUMAN DIGNITY: HOPES AND DOUBT

The concept of human dignity is as difficult and loaded with substantial problems as it is central for the contemporary architecture of human rights. The latter role is evident: human dignity forms a foundational concept for the international legal order of human rights.¹ Many national legal orders incorporate it explicitly, in the post-war era often following the example set by the Universal Declaration of Human Rights.² Supranational international organizations like the European Union have recently done the same³ as have regional systems for the protection of human rights, though sometimes in quite questionable terms.⁴

A further category of norms and instruments relevant for the legal positivation of human dignity are those whose scope is coextensive with central parts of what human dignity is about. Various international instruments, including the international humanitarian and the prospering international criminal law,⁵ are aiming at protecting human dignity, mostly explicitly so through action against genocide,⁶ crimes against humanity, torture,⁷ war crimes, or patterns of discrimination.⁸ On the level of constitutional norms and constitutional instruments, prohibitions on inhuman and degrading treatment, torture, or slavery are evident examples, as are prohibitions of discrimination on the grounds of ascribed race, ethnic origin, sex, religion and belief, disability, and—increasingly so—other characteristics such as sexual orientation.

In legal orders—national or international—without explicit foundation in the positive law, dignity nevertheless plays a sometimes even pivotal role: here it is included in the law through interpretation of other norms, more or less closely related to dignity, by case law.⁹

¹ Cf for some examples: UN Charter, Preamble; Universal Declaration of Human Rights, Preamble and Art 1; International Covenant on Civil and Political Rights, Preamble; and International Covenant on Economic, Social and Cultural Rights, Preamble, acknowledge a foundational role of dignity for human rights.

² Cf for examples from different continents: Finland: s 1; Germany: Art 1; Japan: Art 24; Portugal: Arts 1, 13, 26, 67, 206; Mexico: Art 3(c); South Africa: Art 10; Spain: Art 10; Switzerland: Art 7.

³ Charter of Fundamental Rights of the European Union, Art 1. The European Court of Justice (ECJ) had already acknowledged human dignity as part of the fundamental rights, forming part of the general principles of the then European Community law, cf eg ECJ, Case C-377/98 *Netherlands v European Parliament*, para 70. See Matthias Mahlmann, '1789 Renewed? Prospects of the Protection of Human Rights in Europe' (2003) 11 *Cardozo Journal of International and Comparative Law* 903.

⁴ The American Declaration of the Rights and Duties of Man, 1948: recitals, Preamble, Art XXIII; The American Convention on Human Rights, 1969, Arts 5(2), 6(2), 11; The African (Banjul) Charter on Human and Peoples' Rights, 1981: Preamble, Art 5; The Arab Charter on Human Rights 2004: Preamble, Arts 2.3, 3.3, 17, 20.1, 33.3, 40.1. Arts 2.3 or 3.3 are examples for questionable positivations.

⁵ Rome Statue of the International Criminal Court, Arts 5–8.

⁶ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (without an explicit reference to human dignity).

⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (dignity in preamble).

⁸ International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 (dignity in preamble); Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 (dignity in preamble); Convention on the Rights of Persons with Disabilities, 6 December 2006 (dignity in preamble).

⁹ The European Convention on Human Rights does not contain a reference to human dignity, although such reference is included in additional protocols, cf Protocol 13 noting that 'the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings'. The European Court of Human Rights (ECtHR) assigned dignity a pivotal role in the architecture of the Convention: *Pretty v United Kingdom*, App no 2346/02, para 65. The Court connects human dignity with Art 3 (para 52) and states that human autonomy is protected by Art 8 (para 61).

The central role of human dignity in the global culture of law is by no means self-evident. Human dignity as an ethical and political idea has very powerful history. As a legal concept, it had a rather slow career. It appeared late on the scene of modern constitutional law¹⁰ before its inclusion in the UN Charter and the Universal Declaration of Human Rights sparked off further development.

And there is another point why the central role of human dignity may seem less evident than it sometimes appears: human dignity is not at all a fully trusted lodestar of the international human rights culture and its hard legal normative core in the multi-layered, manifold intertwined, differentiated, and heterogeneous systems of human rights protections through constitutions, sub- and quasi-constitutional human rights bills, supra- and international instruments.¹¹ For some, the light it sheds is not the light of judicial insight and normative progress, but the dubious, phosphorescent, seductive glow of a legal will-o'-the-wisp that leads one astray in the dangerous swamp of hidden ideologies, false essentialism, masked power, and self-righteous cultural and religious parochialism treacherously adorned in the splendid robe of universalism.

And there are reasons for this perspective: the reference to human dignity in legal instruments or court decisions is sometimes not at all in accordance with fundamental values like liberty, equality, and true concern for the worth of individual personality. In any event, it is heterogeneous and full of discord: in important legal matters, the law and courts may refer to human dignity but draw radically different conclusions of what that means for the issue at stake.

Human autonomy is habitually ranked as a central, perhaps even necessary, content of human dignity. This conceptual affiliation, however, nourishes doubts as well as seems to presuppose the idea of a reasonable, self-determining human subject that is for many since its inception profoundly and disdainfully biased by particularistic perspectives such as gender, ethnic background, cultural origin, or social status and rightly deconstructed in contemporary discourse.

On the other hand, is it really imaginable to do away with human dignity in modern law? After all, the quest for grasping the core of human dignity has accompanied human reflection since its beginnings, not necessarily as a term, but as the idea that human beings are invested with a particular worth commanding care and respect, for others and for their own proper selves. And its particular role in the international rights debates is not just a kittenish twist in a contingently unfolding normative narrative of the last century. To the contrary, its rise had to do with epochal shifts—the final dawn of the European empires, decolonization in political, ideological, and theoretical terms, the fall of patriarchies, the critique of dehumanizing ideologies such as racism, democratization, and the economic emancipation of wider parts of societies because powerful social movements claimed their due. And, not to be forgotten, its cruel and unwilling midwife at birth was nothing but the illumination of what its negation practically means provided by the crude light of the gas chambers and other atrocious offspring of a dire epoch.

The controversy around human dignity as a foundational concept for the law in general and constitutionalism in particular is thus no superficial affair. To find a way out of this maze, the

¹⁰ For early references see Art 151 of the Weimar Constitution of Germany (1919) not establishing a subjective right but a principle of economic organization; see further the Preamble of the Constitution of Ireland of 1937. Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 664 lists other examples. Dignity, however, was included in the Constitution of Finland by amendment of 17 July 1995 before the Constitution of 1999 came into force. It was included in the Constitution of Portugal by amendment of 11 June 1951 before the Constitution of 1976 came into force. The Preamble of the Cuban Constitution of 1976 refers to human dignity, but not the Preamble of the Constitution of 1940, Art 20 which includes human dignity in a non-discrimination clause. The Constitution of Mexico of 1917, Art 3, did not contain a reference to dignity, the amendment of Art 3c dates from 1946. § 139 on the prohibition of the death penalty in the *Paulskirchenverfassung*, 28 March 1849 was based on the opinion of the drafters that the human dignity of criminals has to be respected, cf Jörg-Detlef Kühne, *Die Reichsverfassung der Paulskirche* (2nd edn, 1998), 344.

¹¹ Cf Christopher McCrudden (n 10), 655.

following steps will be taken: First, problems of the method and theory of comparative legal perspectives will be discussed and the core issue to which they lead: the antinomy of practical universalism and theoretical relativism of human rights (Section II). Secondly, a few remarks will sketch some relevant aspects of the history of the idea of human dignity (Section III). Thirdly, the discussion will turn to the content of human dignity and its doctrinal unfolding as a legal concept (Sections IV and V). Finally, some tentative remarks will comment on the deeper cultural and political issues at stake (Section VI).

II. DIGNITY AND THE ANTINOMY OF HUMAN RIGHTS

It is an interesting property of contemporary court practice of constitutional and particularly human rights adjudication to incorporate comparative perspectives: a new hermeneutical cross-border curiosity is the jurisprudential mark of the day. The methodological justification of this development is, however, far from clear.¹² One common ground for scholarly work is the interest in understanding the many paths of the law in different legal systems.¹³ However, the concrete impact of such studies is problematic for judicial decision-making. For some, a functional approach seems appropriate that tries to describe and evaluate the answers of different legal systems to the common problems each legal system faces.¹⁴ Others may aim to distil from the heterogeneous legal worlds the normative best, not least by studying unconvincing attempts,¹⁵ perhaps pursuing a universalist stance, in general or limited to human rights with their apparent (though contested) universalist potential.¹⁶ Other alternatives encompass a constructive dialogue of different legal systems¹⁷ or pluralistic perspectives: from the latter point of view, legal concepts are irredeemably embedded in cultural and political contexts and expressions of the particular being or decisions of the community that creates the law.¹⁸ The universalist credentials of a term such as 'dignity' may even be a functionally useful shell to give—contrary to appearance—cultural pluralism its due: the universalistic appearance permits particularistic conceptions to unfold, unrealized, perhaps, by actors like courts. From this perspective, comparative analysis serves to make this transparent and to criticize, deconstruct, and prevent naive uses of a legal concept such as dignity by legal actors.¹⁹

The central question behind these debates is the possibility of normative universalism, a position very much under strain in the contemporary debates. The main problems in this respect are not the variety of interpretations of shared legal concepts or the importance of

¹² Cf Vicki C. Jackson in Chapter 2 of this volume.

¹³ Cf Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, 1996), 3; cf Norman Dorsen, Michel Rosenfeld, András Sajó, and Susanne Baer, *Comparative Constitutionalism* (2nd edn, 2010), 1.

¹⁴ Zweigert and Kötz (n 13), 15ff.

¹⁵ A famous example is the study of the US-American experience with the death penalty by the South African Constitutional Court (SACC), concluding that South Africa 'should not follow this route', *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), para 56 (Chaskalson).

¹⁶ Cf Dorsen et al (n 13), 3. Jürgen Habermas, 'Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte' (2010) 58 *Deutsche Zeitschrift für Philosophie* 343, 347: human dignity imports an egalitarian-universalist morality into law.

¹⁷ Cf Ruti Teitel, 'Book Review: Comparative Constitutional Law in a Global Age' (2004) 117 *Harvard Law Review* 2570, 2586.

¹⁸ These are common approaches; cf the taxonomy of Mark Tushnet, *Weak Courts, Strong Rights* (2009), 5ff, distinguishing functionalism and normative universalism, on the one hand, from contextualism and expressivism, on the other.

¹⁹ This is the central point of McCrudden (n 10), 710.

context for the understanding of legal precepts. There are many different conceptions and understandings of fundamental legal concepts not only between but *within* various legal systems and cultures, as any dissenting court opinion illustrates. Human dignity is of course no exception in this respect. The interesting question is, however, whether all these conceptions are of equal normative plausibility—a question that the observable variety poses, not answers.

In addition, contexts certainly matter for what a legal concept in a particular legal system really means.²⁰ On the other hand, one should avoid the mystification of contexts: there is much to be said about the different contexts, say, of administering the death penalty in the United States or in South Africa.²¹ At the core, however, everywhere a hard normative question is at stake: Can the taking of life for penological purposes be justified? Stressing contexts should not be used to cloud the core of these questions and their often painful normative and political implications.

The real question is thus whether any justification of certain understandings of normative concepts can be normatively relevant for other systems because any such justification is itself *intrinsically dependent* on the cultural, historical, and social background and thus not transferable to other legal orders.

For human rights, this question can be reformulated more precisely as the question of the possibility of a culturally non-relative justification of a *theory of fundamental rights*. Human rights and connected norms, like clauses of limitations are regularly specifically underdetermined by the positive law. Their text is opaque, open-textured, and abstract. A theory of fundamental rights fills the hermeneutical space opened by the abstract structure of human rights norms by providing those normative principles that guide their interpretation: it is an encompassing account of the structure and normative point of an order of fundamental rights and the particular normative positions it creates.²² Such a theory of fundamental rights must be based on the positive law it serves to interpret. A fascist theory of fundamental rights is irreconcilable with the European Convention on Human Rights. Beyond such extreme cases, a theory of fundamental rights can, however, (and with hermeneutical necessity) not be determined in the last instance by positive human rights norms as the opaqueness and openness for different interpretations of these norms formed the reasons to have recourse to theoretical reflection in the first place. The content of a theory of fundamental rights cannot itself be determined by the normative material the content of which it serves to define.

There are now several reasons why it may seem doubtful that a non-relativist theory of fundamental rights is possible. Most importantly, perhaps, a universalist approach faces many challenges of normative epistemology. The critique of metaphysics through analytical non-cognitivism,²³ the element of avowal and decision in value statements in Max Weber's analysis,²⁴ the social and cultural genealogies of Critical Theory,²⁵ structuralism,²⁶ and post-modernity²⁷

²⁰ This is correctly highlighted by Tushnet (n 18), 10ff.

²¹ Cf eg David Garland, *A Peculiar Institution* (2010) on the US-American context.

²² For some background see Matthias Mahlmann, 'Dictatorship of the Obscure? Values and the Secular Adjudication of Fundamental Rights' in András Sajó and Renata Uitz (eds), *Constitutional Topography: Values and Constitutions* (2010), 343ff; Matthias Mahlmann, *Elemente einer ethischen Grundrechtstheorie* (2008).

²³ eg see Rudolf Carnap, 'Überwindung der Metaphysik durch logische Analyse der Sprache' (1931) 2 *Erkenntnis* 219ff on moral concepts as pseudo-concepts or Alfred Jules Ayer, *Language, Truth and Logic* (1936).

²⁴ Cf eg Max Weber, 'Politik als Beruf' in *Max Weber Gesamtausgabe*, Bd 17 (1992), 99ff.

²⁵ Max Horkheimer and Theodor W. Adorno, *Die Dialektik der Aufklärung* (1969).

²⁶ Cf eg Michel Foucault, *Les mots et les choses. Une archéologie des sciences humaines* (1966); Michel Foucault, *L'archéologie du savoir* (1969).

²⁷ Jean-François Lyotard, *La condition postmoderne* (1983).

have rendered it profoundly doubtful that any universalist claim could be epistemologically justified. After all, which foundational argument does not become entangled in the maze of dogmatism, infinite justificatory regress, tautologies, or recourse to contingent traditions? For many, the only intellectually respectable position is therefore one or another form of relativism founding normative arguments in the last instance on cultural traditions, social semantics, discourse formations,²⁸ operations of social systems,²⁹ shifting narratives, or exchangeable final languages.³⁰

There is a political point against universalism, too. Universalism smacks of paternalism, even cultural imperialism that raises serious problems not least in the context of multi-layered systems of human rights, because the universalist stance of one court, say an international court like the European Court of Human Rights, may unduly curtail the self-determination of a political community.

There is, however, a fundamental catch: the very architecture of international human rights law seems to imply the possibility of universalism. This is not just a functional universalism through factual interdependence in multilayered systems of human rights protection. It is an axiological universalism: the various national, supranational, and international human rights codes presuppose through their interconnection that not only irreconcilable norms collide, but that something common is secured and new common ground is gained in the process of adjudication. This was, after all, the core aspiration of the post-Second World War normative recalibration though the political practice of powers continued to remain remote from it. This assumption is the lifeblood as well of fundamental new beginnings of communities that want to re-join the better normative heritage of humanity after years of suppression and injustice—from post-war Germany to South Africa's post-apartheid constitutional resurrection.³¹

The antinomy of international human rights law is thus formulated: there is a practical universalism implied in the very architecture of modern human rights law; this universalism seems, however, theoretically indefensible and politically doubtful. This fundamental problem of all human rights is of particular importance for the idea of human dignity which since its inception has been at the heart of the whole human rights project.

A plausible approach to the solution of this problem cannot be outlined by abstract argument alone but presupposes a reconstruction of the content, the various conceptualizations of the concept human dignity, and some thoughts about their respective legitimacy. Methods and their substantial theoretical underpinnings are sometimes most clearly stated (and to a certain degree legitimized) by the practice of their application. This is what we turn to now, first in a historical perspective.

III. THE QUEST FOR DIGNITY

1. The Point and Perils of Historical Reflection

The reflection about the value status of human beings occupies a central place in the history of normative ideas. This complex and sometimes contradictory history is the background and base for the concrete incorporation of dignity in legal systems. It is therefore rightly not amiss in any

²⁸ Cf eg Foucault, *Les mots et les choses* (n 26); Foucault, *L'archéologie du savoir* (n 26).

²⁹ Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (n 26).

³⁰ Richard Rorty, *Irony, Contingency, and Solidarity* (1989), 73ff.

³¹ Cf on the constitutional aspirations of civilized nations SACC, *Makwanyane*, para 278 (Mahomed); Laurie W.H. Ackermann, 'Equality and the South African Constitution: The Role of Dignity' (2000) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 537, 539.

serious treatment of the matter. Crucially important for gaining a somewhat fuller picture of the content of this history is to look not only at the development of ideas but also at the real history of social practice and struggles. This holds for the contemporary world, too. The most impressive manifestations of human dignity are certainly not found in books (great though some of them are) but in human lives—to be clear, not only or even predominantly so in the lives of the real or imagined heroes and heroines of politics, science, and art, but in the ordinary lives led around the corner that are unnoticed by history books and still embody what this term is about.

Equally significant is to search for manifestations not only where the term dignity and its many synonyms and circumscriptions are used but in other than linguistic forms of human expression as well. There is certainly much to be learned about human dignity from Sophocles' tragedies, Michelangelo's sculptures, or Goya's etchings. Some accounts of the historical development of the concept of human dignity overlook this and conflate recorded theoretical thought with the whole history of this complex normative idea. One detrimental consequence of this stance is that those predominantly non-European, non-Western cultures where such records do not exist (because they were not produced or because they were destroyed by conquerors, empire-building imperialists, and the like) do not even appear on the screen of historical recollections.

A second important point concerns the fallacy of concluding from the absence of a term like 'dignity' in a particular language the absence of the normative substrate in the minds of the people using that language. That this is in fact a fallacy seems to be a rather clear lesson of the contemporary theory of the relation of language and mind.³² Mental representations of any sort (concepts etc) can be realized in a variety of ways without the need for a proper term for what is meant: a native English speaker may lack the word *Gemütlichkeit* without being devoid of the feeling that this term designates and the ability to express this subjective emotional state linguistically. This has some significance for a central issue at stake: one finds, not rarely, the opinion voiced that culture X lacks the idea of human rights in general or of human dignity in particular because language Y used in X lacks a special term for human rights or dignity.³³ This in itself is often not true but even if it were so, it is—given what has been said before about the relation of language and mind—of no interesting consequence for the substantial question at stake.

A third point concerns the distinction between what people think and express about the norms that are applicable to them and the norms that are in fact applicable to them. The fact that a person or a group of persons was or is of the opinion that human dignity is (or is not) a normative status its members enjoy, does not entail that they do (or do not) enjoy it. Thus a culture of fervent dignity-deniers may still possess what they deny.

Finally, it is worth noting that genealogy and justification are distinct things in normative argumentation. A consequence of this distinction is that even if a certain culture has a certain normative tradition, this does not mean that this tradition is justified only for this culture or even justified at all. It may be a good, a bad—or the usual case—a mixed tradition, including better and worse ideas. Historical genealogy of a normative concept thus does not avail one of the tasks for providing a justification for its understanding.³⁴

³² Cf Steven Pinker, *The Language Instinct* (1994), 55ff.

³³ eg former judge of the German Federal Constitutional Court, Paul Kirchhof at the Humboldt-Universität, Berlin in 2009, asserting—in the context of an argument for the Christian origins of human dignity—that the Turkish language is lacking a term for human dignity, cf *Der Tagesspiegel*, 23 April 2009; *Die Welt*, 23 April 2009.

³⁴ Genealogical reconstructions often show exclusionary tendencies. Cf the theses voiced by Ernst von Caemmerer, in Hans-Jürgen Papier and Detlef Merten (eds), *Handbuch der Grundrechte*, Bd VI/1 (2010), § 136, paras 104–112, that human rights are intrinsically connected to the Christian, and less so the Judean, tradition, but are alien to Islam.

2. Dignity in History: Some Tentative Observations

Looking at the history, paying due attention to these methodological parameters, one could make the following observations about the historical trajectory of the idea of dignity:³⁵

The idea of what is today called human dignity concerns the intrinsic value status of human beings as human beings irrespective of other properties. As words in general, human dignity and its synonyms can be used to designate other designata, for example a relative position within a given, contingent social hierarchy.³⁶

This idea is not bound to any particular culture or religion. One finds it in classical antique thought, for example in Greece³⁷ or China,³⁸ in the framework of polytheistic,³⁹ pantheistic,⁴⁰ different monotheistic⁴¹ and secular, agnostic, or atheistic worldviews.⁴² Undoubtedly, violations of human dignity were often defended within these frameworks. The point here is only that the basis for unfolding a concept of dignity is equally present in many cultural and religious contexts, long as the way may be.

The ascription of dignity demands respect and recognition as a creature with particular worth equally shared by every human being. A more precise statement with more clear-cut normative consequences of what this worth means is to regard human beings as *last-order purposes of human intentions and actions*. Human beings are regarded as *Selbstzwecke*, as ends-in-themselves, a term that can be derived from Kant's version of this thought—a *version*, not the *origin*, given other traditions, something to be underlined because the idea is sometimes attributed to Kant alone.⁴³ The normative consequence of this status is the protection of

³⁵ For more detail cf. Mahlmann, *Elemente* (n 22), 97–173.

³⁶ Classic example for this is Cicero, *De inventione rhetorica*, II, 166. The distinction helps to evaluate the thesis that dignity is honour universalized by the Nazis, cf. James Q. Whitman, 'Nazi "Honour" and New European "Dignity"' in Christian Joerges and Navraj S. Ghaleigh (eds), *Darker Legacies of Law in Europe* (2003), 243ff; the point of human dignity proper is that it is a value status intrinsic to any human being, the very point the ideology of racial honour denies—with lethal consequences for those devoid of this 'honour'. The idea of the universalization of the highest rank appears in a different context in Jeremy Waldron, 'Dignity and Rank' (2007) 48 *Archives européennes d'archéologie* 201.

³⁷ Cf. Sophocles, *Antigone* (1997), lines 332ff, where the greatness of human beings is praised.

³⁸ Cf. Mencius on human nature, James Legge (trans), *The Works of Mencius* (2nd edn, 1895), Bk 6, ch 6, 16, 17 on the nobility of human nature; cf. Kwong-loi Shun, *Mencius and Early Chinese Thought* (1997), 136 ff.

³⁹ eg Sophocles (n 37).

⁴⁰ An important source for the reflection of the worth of humans is the Stoa. Cf. the testimony about earlier Stoic thought in Cicero, *De officiis*, 1, 105.

⁴¹ Both for Judaism and Christianity the idea of an image of god (*imago dei*) is of central importance, cf. Gen 1, 26; 27. Similar ideas are found in other religious frameworks, cf. eg for Islam, The Quran, Sure 2, 30 on human beings as 'representatives' or 'successors' of God.

⁴² One of the central elements of Kant's ethics which is foundational for the modern theory of dignity is its principled secularity, cf. Immanuel Kant, *Die Religion innerhalb der Grenzen der bloßen Vernunft*, Akademie Ausgabe, Bd VI, 3. One of the bedrock assumptions of John Rawls's ethics was that humans share an 'aristocracy of all', cf. his reconstruction of this idea in Kant's work, John Rawls, *Lectures on the History of Moral Philosophy* (2000), 213, 306, developed in his later years within a non-religious framework, cf. John Rawls, *On my Religion*, in John Rawls, *A Brief Inquiry into the Meaning of Sin and Faith: With 'On My Religion'* (2009).

⁴³ Cf. Thomas Aquinas, *Summa Theologica*, II-II, q 64: human beings 'propter se ipsum existens'; John Locke, 'The Second Treatise' in *Two Treatises on Government*, ch II: 'Being furnished with like faculties, sharing all in one Community of Nature, there cannot be supposed any such Subordination among us, that may Authorize us to destroy one another, as if we were made for one another's uses' (emphasis in original).

the subject status of human beings, the ability to become authors of their lives and thus of their *autonomy*. The negative counterpart of this is the *prohibition of instrumentalization and objectification*. This denies the status of a subject to human beings by making them the instruments for the realization of ends beyond themselves.⁴⁴

If human dignity is ascribed, its source can be transcendent or immanent. The dignity of religious ethics⁴⁵ and some particular ontologies⁴⁶ are examples of the former. The latter can lead to derivative accounts of human dignity which make the dignity of human beings dependent on some other immanent source, for example Hegel's conditioning human dignity on partaking in the *Sittlichkeit* of the state.⁴⁷ The immanent account for dignity can take a further step and base the ascription of dignity on nothing but the humaneness of humans: this is the path of modern humanism in its various Enlightenment or Post-Enlightenment forms.⁴⁸

It is noteworthy that a strong current of dignity scepticism has accompanied these thoughts. The most radical critique is that there is no shared supreme worth of all human beings, either because all or a portion of humanity is sufficiently wretched and wicked or because worth is not connected to humanity as such but is relative to the performance of certain tasks in society.⁴⁹ Others argue that dignity as a normative concept suffers from severe weaknesses. Schopenhauer's catchphrase of dignity as the 'Shibboleth of all clue- and thoughtless moralists'⁵⁰ has therefore gained considerable popularity.

Given this scepticism, the problem of justification of the predication of dignity to humans gains some importance. The fundamentally different theories outlined about the sources of dignity—transcendent, immanent, derivative, original—entail different theories of justification of dignity. A transcendental conception bases the justification of the ascription to a transcendental legitimacy-conferring cause, prominently an act of grace by a divine force. The immanent derivative theories depend on the justification of the dignity-conferring entity central to such a theory—for example Hegel's theory of the state. The immanent original theories are most commonly based on particular properties of humans that legitimize the predication of dignity to human beings. These properties can be relevant for a transcendent theory as well, for example as the gifts of god. Interestingly, across cultures and times a limited set of properties has been used to legitimize the ascription of dignity. Prominent among them rank the capability to reason and think, moral orientation, self-determination, freedom of will and action and, in consequence, the ability for self-creation through culture.⁵¹

⁴⁴ Cf eg Immanuel Kant, *Grundlegung zur Metaphysik der Sitten*, Akademie Ausgabe, Bd IV, 434 and passim; Immanuel Kant, *Kritik der praktischen Vernunft*, Akademie Ausgabe, Bd V, 87, 131ff; Immanuel Kant, *Kritik der Urteilskraft*, Akademie Ausgabe, Bd V, 435.

⁴⁵ Cf n 41.

⁴⁶ Cf Martin Heidegger, *Über den Humanismus* (1999), 32 where the position of a human being is described as a 'Hirt des Seins' a 'shepherd of being'. This particular 'ontical' position of humans is regarded to be the source of dignity and human worth.

⁴⁷ G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (1986), §258.

⁴⁸ The paradigmatic theory is Kant (n 44).

⁴⁹ For a classic example see Thomas Hobbes, *Leviathan*, ch 10. For a modern variant (human dignity and other human rights functional fiction of an autopoietic social system for the purpose of self-reproduction) see Niklas Luhmann, *Grundrechte als Institution* (1965); Luhmann (n 29), 1075ff.

⁵⁰ Arthur Schopenhauer, *Preisschrift über das Fundament der Moral* (1979), 64: 'Schiboleth aller rath- und gedankenlosen Moralisten'.

⁵¹ Examples for other justifications include Avishai Margalit, *The Decent Society* (1996) (the ability of new beginnings); Ronald Dworkin, *Life's Dominion* (1994), 84 (investments in personal development); Ronald Dworkin, *Justice for Hedgehogs* (2011) (recognition of objective value of life); Jürgen Habermas, *Die Zukunft der menschlichen Natur* (2005), 62ff (reciprocal communicative recognition).

IV. THE CONTENT OF HUMAN DIGNITY AS A LEGAL CONCEPT

Human dignity as a legal concept fulfils various functions in constitutions, constitutional instruments, and international law: It serves as a normative protection of individuals. It constitutes objective law and an important part of the general principles of the law, not least as a guideline for the interpretation of other fundamental rights. It formulates principles for the structure of the state and other political, legally institutionalized, transnational orders. As with any other norms investigated from a comparative perspective, legal guarantees of human dignity differ considerably from each other both on the level of positive texts and judicial interpretation. These differences will first be surveyed in relation to some important systematic points (Section IV), then the normative merits of these different solutions will be considered (Section V).

1. The Scope of Dignity

(a) *Elements of Concretization*

Central elements of concretizations of human dignity prominent in the history of ideas across cultural, religious, and philosophical frontiers can be found in international jurisprudence as well. The preservation of certain *minimum standards of treatment of persons*, the *protection of the subject status of human individuals* implying the *guarantee of their autonomy*, and a *prohibition of their instrumentalization and objectification* rank prominently in various jurisdictions, as explicit arguments or implicit principles. These contents are spelled out in different forms. The two most important strategies, sometimes combined, are, as for other human rights, first abstract and more or less precise intentional delineations of the content of human dignity; secondly, the often only implicit unfolding of the content through case law on violations of dignity.

A rather straightforward abstract definition stems from the German Federal Constitutional Court. This definition is a standard reference point in comparative analysis of dignity jurisprudence, not least because of the prominent role of human dignity in the German Basic Law due to its historical background.⁵² The position of the individual human being as the highest-order purpose of the law is the explicit central element of this jurisprudence, although only after years of jurisprudence on the matter.⁵³ The negative flipside is the prohibition on making a person the object and thus the means of state action, the so-called '*Objektformel*' (object-formula) of the court.⁵⁴

⁵² Cf. Edward J. Eberle, *Dignity and Liberty* (2002); Lorraine E. Weinrib, 'The Charter in the International Context: Human Dignity as a Rights-Protecting Principle' (2004) 17 *National Journal of Constitutional Law* 325; Giovanni Bogner, 'The Concept of Human Dignity in European and US Constitutionalism' in Georg Nolte (ed), *European and US Constitutionalism* (2003), 85.

⁵³ Its first decision on dignity refers to 'Erniedrigung, Brandmarkung, Ächtung' (humiliation, stigmatization, ostracism), BVerfGE 1, 97 (104). In the decision on the prohibition of the right extremist party SRP, the Court referred to the intrinsic worth of human beings irreconcilable with a totalitarian state, BVerfGE 2, 1 (12). In the decision on the ban of the communist party KPD, the Court stated that human dignity is the supreme value of the constitution, respecting a human being as a person that is concretely entitled to be a subject of a the political, democratic process, BVerfGE 5, 85 (204ff). The priority of the person over the order of the state is emphasized in BVerfGE 7, 198 (205). BVerfGE 45, 187 (227) formulated then programmatically: human beings are a '*Zweck an sich selbst*'—a purpose in itself.

⁵⁴ Fully established by BVerfGE 27, 1 (6) and standing case law, despite some sceptical remarks in BVerfGE 30, 1 (25). The 'object-formula' is attributed to Günter Dürig, *Die Menschenauffassung des Grundgesetzes* (1952), 259, stating that the human being as conceptualized under the Basic Law was not the mere object of state power as under Nazi rule; Günter Dürig, 'Der Grundrechtssatz von der Menschenwürde' (1956) 81 *Archiv des Öffentlichen Rechts* 117, 127.

In addition, the duty to protect human beings against violations of the respect they are entitled to beyond cases of instrumentalization has also been underlined.⁵⁵ This formula has been applied—sometimes more, sometimes less convincingly—over the decades in many contexts, on procedural rights,⁵⁶ privacy,⁵⁷ limits of state surveillance,⁵⁸ criminal sanctions,⁵⁹ abortion,⁶⁰ or killing of third parties to protect the lives of others.⁶¹

Other concretizations, although adopting a similar path, stress the open-textured content of human dignity as the expression of an ungraspable essence of human beings, on the basis of respect for the uniqueness and individuality of the person and protection against objectification⁶² or degradation⁶³ or focus more abstractly on the particular equal worth entitling human beings to respect and equal consideration underlining as well the importance of autonomy and self-determination.⁶⁴

The second judicial strategy to get to grips with the content of human dignity is to give the content of dignity contours via cases where a violation of dignity is assumed without an abstract definition of what it is about. This approach is of particular importance for the delineation of the scope of the right even if the first approach is adopted because it helps to concretize this abstract content. Important areas where dignity plays a role revolve, first, around autonomous self-determination, secondly, the preservation of personal (bodily and psychic) integrity, thirdly, the violation and preservation of the equality of status rights, fourthly, the provision of material pre-conditions of human life, fifthly, the social expression of human worth, and sixthly, foundational principles of the structure of the state and of democracy. Prominent examples of the first group are issues of privacy and abortion;⁶⁵ for the second, prohibitions of torture and degrading, cruel, unusual, and inhuman treatment and punishment;⁶⁶ for the third, cases of discrimination;⁶⁷ for the fourth, dignity-based social rights;⁶⁸ for the fifth, matters of individual reputation⁶⁹ or

⁵⁵ BVerfG NJW 1993, 3190: flooding of prison cell with faeces is a violation of dignity. Cf in this context *Brown v Plata*, 563 US __ (2011): 'A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.'

⁵⁶ These were already relevant in early decisions preparing the mature jurisprudence BVerfGE 7, 53; 7, 275; 9, 89; or in criminal law BVerfGE 57, 250.

⁵⁷ BVerfGE 27, 1: as an early decision on data protection.

⁵⁸ BVerfGE 30, 1: declaring a constitutional amendment as reconcilable with dignity that limited access to secret service data to a parliamentary committee, with a sharp (and convincing) dissent, BVerfGE 30, 1 (39).

⁵⁹ BVerfGE 45, 187: life imprisonment only reconcilable with dignity if legally regulated possibility to regain freedom.

⁶⁰ BVerfGE 39, 1; 88, 203.

⁶¹ BVerfGE 115, 118 on a law allowing for shooting down airplanes in the hands of terrorists to save others, declaring it unconstitutional.

⁶² Swiss Federal Court BGE 127 I 6, 14ff. The prohibition of objectivation is underlined in the context of procedural rights, BGE 124 V 180, 181; BGE 127 I 6, 13ff; Hungarian Constitutional Court, Decision 23/1990, 31 October 1990, 3 (Sólyom concurring): humans not to be 'changed into tool or object'.

⁶³ eg SACC, *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT 11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998), para 28.

⁶⁴ Cf eg Supreme Court of Canada, *Law v Canada* [1999] 1 SCR 497, para 53.

⁶⁵ eg *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833, 846 (1992) and below.

⁶⁶ Cf eg *Public Committee Against Torture in Israel v The State of Israel*, 6 September 1999, paras 23–32: shaking, forced crouching on one's toes, cuffing in contorted positions, covering the head with a sack, long-term exposition to loud music, the (contorted) 'Shabach' position on a chair, deprivation of sleep to break a person without further reasoning what exactly makes the concrete acts violations of dignity. Cf Mordechai Kremnitzer and Re'em Segev, 'The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantial Moral Issue?' (2000) 34 *Israel Law Review* 509.

⁶⁷ eg European Commission on Human Rights, Report of 14 December 1973, *East African Asians v United Kingdom*, para 207.

⁶⁸ eg SACC, *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT 11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), para 44 and below.

⁶⁹ eg BVerfGE 30, 173 (194).

collective issues such as pornography,⁷⁰ prostitution,⁷¹ or hate speech;⁷² and for the sixth, decisions on rights-based constraints on the structures of states and democracy.⁷³

An interesting example in this context is the role of dignity in US constitutional law.⁷⁴ It has been observed that dignity played an ambivalent role in US constitutional law: 'In one sense, the entire edifice of U.S. constitutional law is built on a vision of human dignity, as reflected in popular sovereignty, representative government and entrenched individual rights.'⁷⁵ On the other hand, violations of human dignity were legally buttressed or implicitly accepted, including accommodation of unequal voting rights, of slavery and segregation on the base of attributed race, the constitutional framing of US colonialism, or of eugenics.⁷⁶

As far as the jurisprudence of the US Supreme Court is concerned, from the 1940s onwards, references to human dignity have played a significant, if not doctrinally, systematically clarified role.⁷⁷ The concept has been important for matters such as cruel and unusual punishment, the constitutionality of the death penalty, prisoners' rights and conditions of confinement, (body cavity) searches, taking of bodily fluid and other intrusions on bodily integrity, and procedural rights such as the privilege against self-incrimination or personal reputation.⁷⁸ It is noteworthy that constitutional arguments about such high-profile topics as the death penalty,⁷⁹ abortion,⁸⁰ or sexual self-determination⁸¹ were prominently and contentiously in part based on human dignity.

Constitutional jurisprudence on these matters oscillates between more or less wide and precise determinations of which treatment is irreconcilable with human worth. Human dignity can coalesce with general personality rights or can be more narrowly circumscribed to

⁷⁰ eg SACC, *De Reuck v Director of Public Prosecution* (CCT 5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) (15 October 2003), paras 61ff, para 63 referring to degradation and objectification of children through child pornography.

⁷¹ eg *S v Jordan and Others* (CCT 31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002) (O'Regan and Sachs), para 74: no infringement in the dignity of prostitutes by criminalizing their activities because the violation of dignity actually lies in the 'commodification' of the human body.

⁷² eg Supreme Court of Canada, *R v Keegstra* [1990] 3 SCR 697.

⁷³ Cf BVerfGE 2, 1 (SRP); 5, 85 (KPD).

⁷⁴ The federal Constitution does not contain a reference to human dignity. On the level of states, the Montana Constitution of 1972, Art II(4) provides that the 'dignity of the human being is inviolable'. In addition, there are a reference to dignity in the Louisiana Constitution, Art I(3) and the Illinois Constitution, Art 1(20). Only the Montana clause, it appears, had any and partly quite interesting legal effects, cf Vicki C. Jackson, 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse' (2004) 65 *Montana Law Review* 15.

⁷⁵ Gerald L. Neuman, 'Human Dignity in United States Constitutional Law' in Dieter Simon and Manfred Weiss (eds), *Zur Autonomie des Individuums, Liber Amicorum Spiros Simitis* (2000), 249, 251.

⁷⁶ Ibid 249, 252ff.

⁷⁷ As the first reference *In re Yamashita* 327 US 1, 29 (Murphy, dissenting):

If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.

(On the question of punishment for war crimes of a Japanese General.)

⁷⁸ For an overview cf Neuman (n 75), 255ff, and Jordan J. Paust, 'Human Dignity as a Constitutional Right' (1984) 27 *Howard Law Journal* 145; William A. Parent, 'Constitutional Values and Human Dignity' in Michael J. Meyer and William A. Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (1992), 47; Frederick Schauer, 'Speaking of Dignity' in ibid 178; Louis Henkin, 'Human Dignity and Constitutional Rights' in ibid 210; Maxine D. Goodman, 'Human Dignity in Supreme Court Constitutional Jurisprudence' (2006) 84 *Nebraska Law Review* 740ff.

⁷⁹ See below n 84.

⁸⁰ *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833, 846 (1992) and below.

⁸¹ *Lawrence v Texas* 539 US 558, 567 (2003).

particularly qualified acts.⁸² A central common function is to draw a baseline for what is impermissible treatment of individuals under any circumstances. A classical testing case, whether human beings are regarded as a worth at all, is the death penalty.⁸³ Consequently, human dignity plays a prominent role in determining its permissibility in four main aspects: as to the implicit denial of any human worth of the accused by execution,⁸⁴ the modes of execution,⁸⁵ including the death row phenomenon,⁸⁶ the violation of the continuing subject status of the convict,⁸⁷ and the implicit objectification and instrumentalization of the accused for penological purposes.⁸⁸ The death penalty has ceased to be a central political concern in many countries, given the momentum of the international abolitionist movement. Its great human drama serves, however, as a looking-glass to make more visible the critical role dignity can serve in human rights adjudication. It is interesting to observe that with the idea of intrinsic worth, protected status as a subject and purpose of action and the prohibition of instrumentalization and objectification arguments again play a decisive role that belongs to the core tenets associated with human dignity in historical and systematic perspectives. These elements are significant for other cases, too, for example life imprisonment,⁸⁹ legal protection of pre-natal life,⁹⁰ prostitution,⁹¹ or child pornography.⁹² Another testing case that has more recently gained prominence and raises similar concerns is torture, especially for the purpose of protection of third parties.⁹³

The protection of human dignity encompasses not only respect of persons by public authorities and others but is also regarded as aiming to protect the sense of self-worth of an individual—another element already present in the history of ideas.⁹⁴

⁸² An example of a doctrinal path differentiating dignity from other personality rights is the course taken by the German Federal Constitutional Court which created through jurisdiction a general right to protection of the individual personality by reading Art 2(1) (personal liberty) in conjunction with Art 1 (dignity), allowing—unlike dignity—for limitations by all other rights, cf BVerfGE 54, 148 (153).

⁸³ Cf for a comparative overview Paolo Carrozza, 'My Friend Is a Stranger': The Death Penalty and the Global *Ius Commune* of Human Rights' (2003) 81 *Texas Law Review* 1031.

⁸⁴ *Trop v Dulles* 356 US 84, 100 (1958) on the 'dignity of man' as the underlying concept of the 8th amendment:

Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity.... In comparison to all other punishments today, then, the deliberate extinguishment of human life by the state is uniquely degrading to human dignity.

Furman v Georgia 408 US 238, 270ff, 290 (1972) (Brennan J concurring); SACC, *Makwanyane*, para 271 (Mahomed).

⁸⁵ Consequently, graphic descriptions of the realities of executions and the death row phenomenon play a significant role in jurisprudential arguments, cf eg Supreme Court of Canada, *Kindler v Canada* [1991] 2 SCR 779 (Lamer and Cory dissenting); SACC *Makwanyane*, paras 26ff (Chaskalson); 335 (Regan).

⁸⁶ *Furman v Georgia* 408 US 238, 288ff (1972) (Brennan concurring); SACC, *Makwanyane*, para 55 (Chaskalson).

⁸⁷ SACC, *Makwanyane*, para 251 (Madala): no individual beyond reformation.

⁸⁸ Cf SACC, *Makwanyane*, para 144 (Chaskalson); para 166 (Ackerman); paras 313, 316 (Mogkoro); Hungarian Constitutional Court, Decision 23/1990, 31 October 1990, 3. (Sólyom concurring): humans not to be 'changed into tool or object'. Note that the element of contempt for human worth displayed in the mode of execution does not necessarily imply an instrumentalization—the latter is an additional and separate aspect.

⁸⁹ The protection of the subject status was decisive in BVerfGE 45, 187.

⁹⁰ Cf eg Conseil Constitutionnel, Decision 2001-446 DC, 27 June 2001: violation of dignity through 'reification de l'embryon humain'.

⁹¹ eg *S v Jordan and Others* (n 71) (O'Regan and Sachs) para 74.

⁹² SACC, *De Reuck v Director of Public Prosecution* (n 70), paras 61ff, 63.

⁹³ ECtHR, *Gäfgen*, App no 22978/05, 1 June 2010 (Grand Chamber), paras 87, 107.

⁹⁴ Cf SACC, *National Coalition for Gay and Lesbian Equality v Minister of Justice* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999) para 42 on the effect of discrimination of gays and lesbians:

An interesting aspect concerns the relation of individual and community. It has been underlined that respect for the dignity of a person does not imply disregard for importance of membership of a community.⁹⁵

One means employed by courts to avoid an inflation of dignitarian claims is to demand a sufficiently qualified impact on the individual: An act has to touch upon central concerns of human existence to fall within the scope of protection of a right to dignity.⁹⁶

Dignity is often regarded as unalienable. In legal terms, this can mean different things: that the content of the protection is not modified according to the actions of the bearer, that human beings are not only the necessary bearer of this right, but that this status is unforfeitable or that there are specific limits to any system of limitations. What is meant is hardly spelled out in jurisprudence and doctrine.⁹⁷

(b) *The Cosmopolitan Framework*

Human dignity has appealed to many worldviews.⁹⁸ Consequently, courts tend to be reluctant to embark on any in-depth justification of their interpretation of human dignity wedding this concept to judicial authority to any specific approach. A recurrent element, however, is the attempt to embed a concrete interpretation in the international context and its consensual elements and thus to transcend a purely local perspective. It is noteworthy that the ideas of dignity are vindicated by other than the so-called Western cultures—with self-confidence and sometimes in politically central moments, as the example of South Africa shows, where dignity was claimed for the post-apartheid normative re-orientation as an intrinsic part of the African normative tradition and the value of *ubuntu*.⁹⁹

(c) *Dignity as a Subjective Right*

An important question is whether human dignity is taken as a subjective right as in certain systems.¹⁰⁰ As to other conceptions, various alternatives have been formulated, including objective law¹⁰¹

The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and the sense of worth of lesbians and gays.

⁹⁵ BVerfGE 45, 187 (227).

⁹⁶ The German Federal Constitutional Court demands eg that the position of a subject is put into question 'in principle'; BVerfGE 97, 209 (228). An example is the dismissal of the claim that the wrong spelling of a person's name may violate human dignity, German Federal Administrative Court BVerwGE 31, 236 (237). Examples like the spelling case are sometimes taken as illustrations of a dangerous expansion of dignity law. This, however, would only be the case if the claims were not only made but were successful due to structural properties of dignity guarantees.

⁹⁷ See the argument in death penalty cases, that someone who has committed certain crimes, has forfeited his right to dignity, cf the argument of the South African Attorney General in SACC, *Makwanyane*, para 136, taken to be fallacious by the court, *ibid* para 137. The same conclusion was reached by Brennan, in *Furman v Georgia* 408 US 238, 273 (Brennan J concurring): even the vilest criminal remains a human being.

⁹⁸ The drafting history of dignity guarantees is full of pluralistic influences, without clear dominant strands that are sometimes identified from Kant to Jacques Maritain, *The Rights of Man and Natural Law* (1944). Cf Johannes Morsink, *The Universal Declaration of Human Rights* (1999), Mary Ann Glendon, *A World Made New* (2002); Mahlmann, *Elemente* (n 22), 244ff.

⁹⁹ Cf Chaskalson, Langa, Mahomed, and Mogkoro, SACC, *Makwanyane*, paras 131, 223ff, 263, 300ff, at 313 with an explicit connection of the prohibition of instrumentalization with the discussed indigenous African tradition and *ubuntu*; paras 358ff, 374ff (Sachs).

¹⁰⁰ BVerfGE 1, 97 (104). BVerfGE 45, 187; SACC, *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* (CCT 35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000), para 35.

¹⁰¹ Cf Dürig, 'Der Grundrechtssatz von der Menschenwürde' (n 54) 119.

or principles of interpretation.¹⁰² The matter is of practical significance because it may be decisive for the legal standing of individuals. If human dignity is not a subjective right, its invocation may be impossible or conditioned on its relevance for the interpretation of other rights.

(d) *Personal Scope: The Bearer of the Right*

If human dignity is regarded as a subjective right, humans are necessarily the bearers of this right. Constitutional dignity guarantees are commonly conceived as universal rights and not just as the rights of the citizens of the respective state. The same holds for supra- and international instruments. It is not, however, extended to legal persons like corporations as is done for other fundamental rights through transferral norms¹⁰³ or interpretation. Another question of ongoing discussions concerns the question whether dignity is to be extended to animals or even nature in general. Some constitutional law and cases exist in this respect.¹⁰⁴

(e) *Objective Element of the Law*

Dignity can in addition to (or alternative to) its position as a subjective right be part of objective law.¹⁰⁵ Public authorities are in consequence bound by it, though individuals may not have the possibility to base complaints solely on this ground. This is not necessarily completely clarified by doctrine. An interesting example in this respect is the argument that the death penalty violates not only the subjective rights of the convict, but violates the dignity of those that administer and institutionalize it.¹⁰⁶

In this objective respect, human dignity is sometimes interpreted not only as a protected legal interest of individuals but as a norm guaranteeing the integrity of the human species as such. It becomes the legal embodiment of a species ethics.¹⁰⁷ This has gained some practical significance in the framework of biotechnologies that may not violate the rights of any existing human individual but may endanger the given character of the human species.

(f) *Horizontal Effect*

As for any human right, the question arises for human dignity as well, whether at all and if so how it unfolds normative effects not only between the individual and the state but between

¹⁰² For the United States, Neuman (n 75) sums up:

There is no constitutional right to human dignity as such, no objective constitutional norm prohibiting all state action inconsistent with human dignity, and no mandate upon the state to ensure the realization of human dignity. Human dignity informs the interpretation of particular constitutional rights, including the general rights to equality and liberty.

See also sceptical remarks about dignity as subjective rights by David Feldman, 'Human Dignity as a Legal Value-Part I' (1999) *Public Law* 682.

¹⁰³ eg German Basic Law, Art 19(3).

¹⁰⁴ The Swiss Federal Court has applied the 'dignity of the creature' (Swiss Federal Constitution, Art 120(2)) in a leading case on research with primates restricting this research, although not out ruling it in principle. It held that there is a difference between the 'dignity of the creature' of Art 120(2) and human dignity of the Swiss Federal Constitution, Art 7, without clearly stating what this difference is, BGE 135 II 384, 403. In Israel, the Supreme Court has referred ambiguously to the dignity or honour (kavod) of animals (concretely alligators in the context of alligator wrestling) in *Let the Animals Live v Hamat Gader Recreation Enterprise*, LCA 1684/96, cf McCrudden (n 10). The Court did not refer to the Basic Law of Dignity and Freedom, but statutory law on animal protection (thanks to Dr Liat Levanon for clarification on the Hebrew text). In a later case, *'Noah'—The Israel Federation of Animal Protection Organizations v The Attorney General*, HCJ 9232/01, 11 August 2003, the Court did not refer to honour or dignity, but to the suffering of animals.

¹⁰⁵ Cf BVerfGE 39, 1; 88, 203.

¹⁰⁶ SACC, *Makwanyane*, para 314 (Mokgoro).

¹⁰⁷ The German Federal Constitutional Court has referred to the 'Würde des Menschen als Gattungswesen', to 'the dignity of a human being as a species-being', BVerfGE 87, 209 (228).

private parties as well. Some constitutions and legal instruments contain explicit horizontal regulations for the respective fundamental rights catalogue, although it is not always clear whether these general regulations also apply to human dignity.¹⁰⁸ A system—if it allows any horizontal effect—may restrict this to an indirect horizontal effect through the interpretation of other norms in light of fundamental rights.¹⁰⁹ Human dignity, however, is one of the fundamental rights where a direct horizontal effect is more often assumed than in the case of other human rights.¹¹⁰ It is, for example, a widespread assumption that slavery is prohibited by human dignity without need for further positive law which implies such a direct horizontal effect.¹¹¹

(g) *Positive Duties and Rights; Procedural Elements*

Fundamental rights are today often taken as the origin of positive duties. This is true for dignity guarantees as well which can be interpreted as the source of duties to protect the dignity of individuals.¹¹² This raises—apart from the standard questions about positive duties, especially prerogatives of the legislature—an important structural and apparently paradoxical problem: Can human dignity that is so closely associated with autonomy in fact be used to curtail autonomy? Differently put: Can the individual consent to relinquishing the protection of her dignity with legal effects? If this is denied, the conception of dignity at the base of this denial may seem paternalistic. There is some case law on this matter—much discussed are cases such as dwarf throwing,¹¹³ peep shows,¹¹⁴ or laser-dromes.¹¹⁵ Another more fundamental issue already mentioned is slavery. There is little doubt that dignity implies the prohibition to disclaim the fundamental liberty of a person by handing herself over into slavery. This is an interesting observation as it indicates that the question is not so much whether dignity can be protected at all against the will of the person whose dignity is at stake, but under which qualified circumstances it is justified to do so.

Human dignity gives rise in some legal orders not only to negative rights but to positive rights as well. The most important positive right is the right to the provision of a minimal standard of living.¹¹⁶

Guarantees of human dignity have distinct procedural dimensions. The subject status they guarantee is secured through procedural safeguards that give persons the possibility actively and effectively to pursue their rights and interests¹¹⁷ or make them subjects in their working life.¹¹⁸

¹⁰⁸ Cf eg Constitution of South Africa, ss 8(2) and 8(3); Swiss Constitution, Art 35(3). On horizontal effect see Chapter 26.

¹⁰⁹ BVerfGE 7, 198.

¹¹⁰ The Constitution of South Africa, s 9(4), enacts a direct horizontal effect of the prohibition of discrimination, which in turn is governed by human dignity, cf Ackermann (n 31), 538, 550ff. Direct horizontal effect seems to be implied in BVerfGE 24, 119 (144); 115, 118 (153).

¹¹¹ Dignity may not be explicitly mentioned, cf Art 4 ECHR, 13th Amendment of the US Constitution.

¹¹² Cf in the case of abortion BVerfGE 39, 1 (41); 88, 203 with rather wide-ranging conclusions.

¹¹³ Conseil D'Etat, no 136727, 27 October 1995, *Commune de Morsang-sur-Orge v Société Fun Production et M Wackenheim*.

¹¹⁴ German Federal Administrative Court, BVerwGE 64, 274 (278ff).

¹¹⁵ ECJ, C-36/02 *Omega* (14 October 2004).

¹¹⁶ The reference to social rights to human dignity is common, eg Universal Declaration of Human Rights, Art 23(3). For a right to the provision of minimum livelihood cf BVerfGE 45, 187 (228); 82, 60 (85); 125, 175 (222).

¹¹⁷ Cf Swiss Federal Court BGE 124 V 180, 181; BGE 127 I 6, 13 ff; BVerfGE 7, 275 (279).

¹¹⁸ BVerfGE 28, 314 (323).

(h) *Beginning, Diachronical Continuity, and End*

An important question to determine the beginning and end of human dignity is whether the existence of individual human life is a sufficient condition for the ascription of dignity or whether it is conditioned on qualified—for example self-conscious—forms of human life. These questions are connected with the problem, whether personhood is the reason for dignity and when personhood begins—with conception, nidation, sometimes in the pre-natal maturation process (eg sensitivity to pain, viability), at birth, or even later. Another issue concerns diachronically continuous personal identity and its impact for the protection of self-determination, for example as to a person's pre-dementia decisions for post-dementia issues.

Consequently and not surprisingly, given the ethical, political, and religious subtexts of these questions, there is particular variety in jurisprudence and doctrine. Of particular concern is the beginning of human life, either because life and dignity are regarded to be diachronically coextensive or because the existence of human life is at least a precondition for ascribing dignity at all (though it may be not or only ambiguously done in a particular jurisdiction). Courts have regarded conception¹¹⁹ or at least nidation¹²⁰ as the beginning of protection of both life and dignity. Others have followed a different course, giving for example special weight to viability for any legally protected status of the pre-natal life¹²¹ or suspended or deferred the answer as to life and dignity.¹²² There is a further complication from the fact that the beginning of the normative protection through dignity can refer to dignity as a subjective right¹²³ or a tenet of objective law.¹²⁴

A diachronically discontinuous conception of dignity has so far only reached the academic debate. The question when dignity ends, however, has occupied various courts: in some jurisdictions dignity defies death as it is protected post-mortem.¹²⁵

¹¹⁹ This is the tendency of BVerfGE 88, 203 (251) or of the dissent of Rupp-von Brünneck BVerfGE 39, 1 (80). The ECJ, C-34/10, *Brüstle v Greenpeace* (18 October 2011) ruled that any ovum after fertilization, any non-fertilized human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilized human ovum whose division and further development have been stimulated by parthenogenesis constitute a human embryo. This interpretation is derived from the need to protect human dignity, paras 32–34.

¹²⁰ Cf BVerfGE 39, 1(37).

¹²¹ Cf *Roe v Wade* 410 US 113, 163 (1973); *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833, 846 (1992). The rights of the embryo/fetus are not explicitly constructed as related to dignity by the Court, the reasoning uses, however, central notions of what this term is about, cf eg 'the profound respect for the life of the unborn', *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833, 877 (1992). Cf *Stenberg v Carhart* 530 US 914 (2000); *Gonzales v Carhart* 550 US 124 (2007), stating that the Act under review 'expresses respect for the dignity of human life,' without, however clarifying whether this was the constitutional stake for the Court as well.

¹²² Cf ECtHR, *A, B and C v Ireland*, App no 25579, 16 December 2010, paras 233, 237: rights of unborn engaged, states enjoy a margin of appreciation as to the legal definition of the beginning of life. In *Vo v France*, App no 53924/00, 8 July 2004, para 84, the Court, however, stated:

At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person—enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom...—require protection in the name of dignity (emphasis added).

¹²³ This seems to be implied in BVerfGE 88, 203, 210, 283, 306 as in the dissent in BVerfGE 39, 1, 79.

¹²⁴ In ECtHR, *Vo v France*, App no 53924/00, 8 July 2004, para 84, the reference must be to objective law as persons as necessary bearers of subjective rights are assumed not yet to exist. The state's interest in protecting the life of the fetus referred to by the US Supreme Court (n 121) appears also to refer to objective law, as it is the 'state's interest' that is of concern, not the interest of an individual.

¹²⁵ eg Germany, BVerfGE 30, 173, 194; BVerfG NJW 2001, 2957, 2959; Israel, *Frederika Shavit v Rishon Lezion Burial Society*, CA 6024/97, 6 July 1999, paras 4, 16, 20, 26 confirming earlier judgments, in particular *Jerusalem Community Jewish Burial Society v Kestenbaum*, CA 294/91. The case concerned the right to inscribe non-Hebrew letters and to use the Gregorian calendar in a Jewish cemetery. On the background see *ibid* Englard (dissenting), para 18: 'behind this dispute, forces are warring for the character of Judaism and the state of Israel'. The issue can thus be of more than individual concern.

2. Interference

The delineation of an interference is of particular relevance for a conception of human dignity that excludes justified limitations as there is no further step of determining a violation of dignity: interfering with dignity means violating it. Consequently, the discussion of interference can be quite loaded with substantive consideration that doctrinally may belong to another sphere. The scope of the right concerned is an obvious candidate in this respect.

3. Limitations and Justification

One of the practically most important questions concerns the limitations of human dignity. Dignity can be protected absolutely, without allowing any such limitations. This approach can extend to the dignity provision as such,¹²⁶ or to particular elements of what is usually taken to be within its scope.¹²⁷ However, legal provisions on human dignity can also foresee or can be interpreted as containing limitations.¹²⁸ Then it has to be determined which weight human dignity has in relation to other rights and protected legal interests. This weight is regarded as quite considerable—only other values of high order can outweigh dignity concerns, not, for example, the expediency of daily politics.

Those systems that acknowledge limits to dignity can limit the limitations through residual guarantees of a core area, for example by protecting the 'essence' of the right or equivalent jurisprudence.¹²⁹ In any case, any limitation has to undergo (differently framed and named) tests that set limits to encroachments of the right and that deal at their core with matters of proportionality.

The question of limitations is not the least relevant in such contentious areas as abortion.¹³⁰ Here the particular case of conflicts of the dignity of one person with the dignity of another person may arise: if both the embryo and/or the fetus and the women are the bearers of dignity, and if in the case of abortion dignity concerns are taken to be relevant for both sides, such a conflict ensues. As far as pre-natal life is concerned—if it is regarded as the bearer of a subjective right or as an object of protection through dignity as objective law—a violation of this right is based on the ending of the pre-natal life through abortion.¹³¹ As far as pregnant women are concerned, the recognition that the dignity of women and not only other, minor concerns are at stake has been of central legal importance. Crucial for this has been the insight that the fundamental status as subjects of their lives is put into question by certain restrictions on abortion.¹³² The solution of this conflict is not obvious, but tends to be shaped by the kind of time-sensitive model of abortion that has become widely accepted in liberal constitutional states.¹³³ This is important to emphasize to prevent the misperception that ascribing dignity to

¹²⁶ The standard interpretation of the Basic Law, Art 1. Cf Philip Kunig, in V. Münch/Kunig (eds), *Grundgesetz-Kommentar* (5th edn, 2000), Art 1 paras 4ff; Wolfram Höfling in Michael Sachs (ed), *Grundgesetz Kommentar* (6th edn, 2011), Art 1 para 11; Horst Dreier in Horst Dreier (ed), *Grundgesetz Kommentar* (2nd edn, 2004), Art 1, paras 131ff.

¹²⁷ Cf ECtHR, *Gäfgen v Germany*, App no 22978/05, 1 June 2010 (Grand Chamber), paras 87, 107.

¹²⁸ See eg in *Public Committee Against Torture in Israel v The State of Israel*, 6 September 1999, para 23.

¹²⁹ Cf Swiss Constitution, Art 36(4), though it remains to be clarified what limitations are possible under Swiss law.

¹³⁰ See Chapter 51.

¹³¹ Cf BVerfGE 37, 1, 43; 88, 203, 255.

¹³² Cf *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833, 851 (1992); BVerfGE 88, 203, 254, and—clearly pronounced—the dissent BVerfGE 88, 203, 340ff, 348 (Mahrenholz and Sommer dissenting).

¹³³ Cf Federal German Constitutional Court, BVerfGE 39, 1; 88, 203 allowing an abortion for reasons of life and health of the mother, cases such as rape and well-being thus establishing de facto freedom of the ultimate decision of the woman concerned in the first trimester, although with various procedural qualifications, not all convincing.

pre-natal life precludes due concern for the fundamental rights of women. It is noteworthy that the legal recourse to their dignity had for women in the framework of abortion a quite substantial emancipatory effect.¹³⁴

For torture it has been argued but not taken up by the courts that the same constellation of colliding claims arises, especially in the case of torturing a kidnapper to disclose the whereabouts of her victim (or any of the much discussed ticking bomb scenarios).¹³⁵

In any case, dignity as other human rights not only constitutes individual claims but restricts them as well. If dignity is taken to be absolute, the restriction is defined by any act of interference. Any exercise of any other right cannot go as far as to violate the dignity of another person.¹³⁶ If dignity is not taken to be absolute, weighing and balancing exercises including principles of proportionality (and their doctrinal functional equivalents) determine the respective reach of other rights.

4. Relation to Other Fundamental Rights and the Political Order

The delineation of the scope of different fundamental rights is a general problem that takes, in the case of dignity, a particular twist: as human dignity is often regarded as the foundation of all fundamental rights, one could conclude that it is implicitly at stake for any case.¹³⁷ One way to avoid this conclusion is to narrow the scope of the right or demand necessary qualification of an interference. Another solution is subsidiarity—dignity guarantees are only practically considered if no other fundamental right is violated.¹³⁸ A special case is the relation of dignity and equality: dignity is often regarded as fundamental for equality—it serves as a yardstick to calibrate constitutional equality guarantees, sometimes without explicit reference to the term.¹³⁹

Dignity is traditionally regarded as a foundation of democracy and a normative yardstick for the structure of the state.¹⁴⁰

¹³⁴ Cf the summary of the development in *Gonzales v Carhart* 550 US 124 (2007) Ginsburg (dissenting), 171 n 2; 183ff or in BVerfGE 88, 203, 340, 348 (Mahrenholz and Sommer dissenting).

¹³⁵ ECtHR, *Gäfgen*, App no 22978/05, 1 June 2010 (Grand Chamber), paras 87, 107. The argument could run like this: the state has a duty stemming from dignity to protect the victim of a kidnapper against instrumentalization; the kidnapper is turned into a means for the provision of information through torture.

¹³⁶ BVerfG NJW 2001, 2957, 2959.

¹³⁷ The problem is illustrated by the following passage (internal quotations omitted) from *Frederika Shavit v Rishon Lezion Burial Society*, CA 6024/97, 6 July 1999, para 9 (Barak concurring):

From one point of view I assume that the value (or liberty) of freedom of religion is an aspect of human dignity, from the other point of view there is the value (or liberty) of freedom from religion, which is also an aspect of human dignity.... This is not the first time we have weighed different aspects of the same liberty.... Thus we also behaved when the right to one's good name (which is part of human dignity) clashed with the right to freedom of expression (which, in my view, is another aspect of human dignity).

¹³⁸ Cf Swiss Federal Court BGE 127 I 6, 14.

¹³⁹ For an example for the violation of the basic worth of a human being through discrimination *Brown v Board of Education* 347 US 483, 494 (1954).

¹⁴⁰ James Wilson formulated: 'Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator: A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance', *Chisholm, Ex'r v Georgia* 2 US 419, 2 Dall 419, 455 (1793). Cf Supreme Court of Canada, *Kindler v Canada* [1991] 2 SCR 779 (Cory); SACC, *Makwanyane*, para 330 (Regan); BVerfGE 5, 85 (204).

V. PROBLEMS AND SOLUTIONS

The preceding remarks have outlined some aspects of the heterogeneous world of contemporary dignity law. Now the next question arises: What are the merits of the various approaches outlined?

1. The Scope of Dignity

(a) *Content and Legitimacy*

Human dignity as a legal concept aims to protect the inherent, supreme, and inalienable worth of human beings. As was indicated in the historical observations, there is a striking tendency to connect a central normative concern (called dignity, something else, or being present as an implicit premise of an, on the surface, quite different looking argument) with the idea that human beings are ends-in-themselves, highest-order purposes of human motivation and correspondent action who therefore have the right that their status as an autonomous subject of their life is protected. This leads to a prohibition of instrumentalization, objectification, and reification and general demands for respect. These ideas play a crucial role in legal conceptions of human dignity as well, as courts regularly explicitly or implicitly refer to these principles as foundational principles.

This raises the question of the possible justification of these principles. Despite the shortcomings of some argumentations in the history of ideas and of contemporary debates, including Kant's,¹⁴¹ such a justification does not seem impossible. A starting point is the anthropological fact that for human beings—pathological cases aside—the fulfilment of their individual lives is a natural end in itself. This worth of a human life to its possessor is not limited to a particular class of individuals with an elevated content of life.¹⁴² On the contrary, no human life is worth more for its bearer than any other, an observation paving the way to a critique of all social arrangements that deny this worth, for example on the ground of racism, sexism, contempt for the economically and socially unfortunate, and the like. Applying the basic principle of justice to treat equal things equally, respect for the status of any human life as a purpose of equal worth is a universal right. Every human person is the justified last-order purpose of action, because human beings are, through their factual quest for happiness, a purpose in themselves. Universalization as a command of justice demands the ascription of this purpose-status to all.

As Pufendorf nicely formulated, human beings have a particularly fine sense of self-respect.¹⁴³ To protect this human need for respect is certainly justified purely because of a concern for the feelings of human beings. The fact of self-respect does not, however, answer the question, whether this attitude is justified because the self is in fact worthy of respect or whether the self-estimation of human beings is just a (pleasant) subjective illusion. This is an important and difficult question.

Still, if one looks at the existential properties of human life, the *Selbstzweckhaftigkeit* or being-an-end-in-oneself seems to be based on some good reasons. Human beings construct in one way or another a mental explanatory image of the world and have learned to accept its

¹⁴¹ For a detailed review of Kant's theory cf. Mahlmann, *Elemente* (n 22), 152ff.

¹⁴² As Nietzsche thought: see Friedrich Nietzsche, 'Fünf Vorreden zu fünf ungeschriebenen Büchern' in Friedrich Nietzsche, *Kritische Studienausgabe* (1999), Bd I, 776.

¹⁴³ Samuel von Pufendorf, *De Officio Hominis* (1997), VII, §1.

sometimes challenging results as to the rather precarious position of human life in natural history. They appropriate aesthetically human existence with its many, not always pleasant, sides in art. They unfold the emotionally richly textured self of a transient being faced with its own mortality without guarantee that their pursuits will lead to happiness. They live these lives in the mode of self-reflective consciousness and self-determination under moral principles that motivate them sometimes to regard the well-being of others to be of greater importance than their own—an ability to benevolent self-transcendence that is the daily bread of care and affection. All this confers dignity to human life—at least from the (only available) human point of view.

Given these reasons for predicating dignity to human beings, dignity is not only legitimately ascribed to human beings, but rightly taken as unalienable: Because one cannot lose the existential human properties that play a decisive role for its foundation, one cannot lose the dignity that is their consequence.

(b) Dignity and Autonomy

Autonomy is a contested subject in the international discourse about dignity: autonomy is challenged as an antiquated idea because of the modern consciousness of the many influences on human self-determination, for example the subconscious sources of motives, wishes, and desires and their powerful sway over human choice and action or the social and cultural structures that limit the possibilities of action and colour profoundly what is aimed at in the first place. All of this is real enough but no reason to debunk the normative idea of autonomy. It is a misunderstanding of this concept to think it is irreconcilable with these perspectives. The reason is straightforward: it is a concept that does not presuppose that none of these influences exist, but merely that they are not all that counts, that there is an element of residual human self-determination the protection of which is consequently of crucial importance

(c) Dignity: Widely or Narrowly Defined?

Jurisprudential experience seems to teach that there are good reasons to differentiate a protection of human dignity as such from other personality rights, the enjoyment of particular liberties and equality, and thus to circumscribe its scope narrowly. This is best done by limiting the scope of the right to matters that pertain to the subject status of the individual as such and core matters of her worth: to force a woman seriously to compromise her health for giving birth puts the subject status in question, to force someone to drive a victim of an accident to a hospital does not, though both are cases of instrumentalization. To imprison someone in an ugly cell is not a violation of dignity by a display of lack of respect for the aesthetic dimension of her life; to do so in cell regularly flooded by faeces, however, is. This aids avoiding an inflationary use of dignity deprived of any concrete contours and meaning.

(d) Subjective Right, Objective Law, Personal Scope

As human dignity is about the worth of individuals and their autonomy there are not reasons discernible not to understand it as a judicially enforceable subjective right. The limitation of dignity to natural human persons also appears to be quite plausible. Legal persons are not ends-in-themselves but creations for well-defined purposes. That dignity guarantees are of universal scope is well warranted—to limit the protection of this right, for example to the citizens of particular states, fails to grasp the core of its meaning.

Given its origin and mode of legitimation, dignity as a proper legal concept is best reserved for human beings. As practice shows, the expansion of dignitarian concerns leads to fussy legal concepts and carries with it the danger of weakening the protection of humans. As to

animals and nature in general, this by no means indicates a lack of concern as there are other ways effectively to protect non-human organisms or the environment.

Human dignity is in a certain respect the expression of the normative self-confidence of every individual. Human dignity implies in addition the perception that humanity understood as the decisive set of properties shaped by the process of natural history making humans human is something worth protecting, treasuring, and respecting, too. A way to express this perception is to interpret the objective dimension of dignity guarantees as a legal element of species ethics. A concretization of this dimension worth thinking about may be the following: human dignity protects as objective law the set of properties resulting from natural history constitutive of the character of the human species against modification. Dignity is an individual trump of law, but a legal element of the justified self-preservation of the human species as well.

(e) Horizontal Effect, Positive Duties and Rights, Procedural Elements

The tendency to give dignity guarantees effects between private persons is well warranted. Given the constitutive importance and—in a proper doctrinal construction—the clearly circumscribed scope of a dignity guarantee, there is no reason to deny a direct horizontal effect. The not unusual acceptance of a prohibition of slavery directly on the ground of human dignity is an expression of the plausibility of this construction.

As for other human rights, positive duties, including duties to protect and procedural concretizations are to be taken as elements of the scope of a dignity guarantee. This does not necessarily lead to an unwarranted paternalism. Dignity protects autonomy and any protection of dignity against the will of the concerned person consequently needs very good reasons. The case of slavery, as mentioned above, illustrates that in principle there are such reasons: voluntary slavery is not acceptable under a modern human rights conception. To say that there are such duties does not imply that the reach of this duty should be interpreted excessively. Positive duties stemming from dignity guarantees only lead to what is properly called paternalism if they are interpreted paternalistically—which does and may happen (as a freedom may be interpreted quite illiberally) but not necessarily so.

Human dignity is a decisive argument for social rights: if humans are ends-in-themselves they are to be treated as such as to the available necessary material preconditions of a human life.

The procedural aspects of human dignity have been rightly underlined: one way to protect human dignity is to enable human beings to defend their autonomy themselves, in the courtroom and through social and political structures of more than feigned participation.

(f) Beginning, Diachronical Continuity, and End

There seems no plausible reason to dissociate dignity and human life. If there is human life, it has dignity. As to the beginning of human life, there is a good case for taking conception as the crucial moment as at least one genetically individualized human organism comes into existence.¹⁴⁴ It is crucial to rationalize debates to underline, that, as indicated above, this perception does not predetermine the solution of the problem of abortion. For this, competing rights have to be taken into account, most importantly the dignity of the mother. Therefore, ascribing dignity to pre-natal life does not entail the entry of new dark ages of reproductive instrumentalization of women.

¹⁴⁴ On the extensive debates on the matter, not least on the arguments from belonging to the human species, the continuity of human development from conception via birth to adulthood, the potentiality of pre-natal life and the identity of pre-natal life with the post-natal human being, see Mahlmann, *Elemente* (n 22), 293ff.

The legal status of pre-natal life is not only of concern for the question of abortion. It can be of importance for the protection of this phase of the existence of a human being against harm, including life and bodily integrity,¹⁴⁵ of increasing concern in the wake of new biotechnological possibilities.

There is no reason for a diachronically discontinuous conception of human dignity and autonomy. The human substrate of the right is the person in its physical and mental entirety, continuously existing in human life and thus the bearer of an uninterrupted personal right. There is equally no reason for post-mortem protection of human dignity as a subjective right. Such a right presupposes the existence of its bearer which ends with death. Legitimate concerns motivating the post mortem protection of dignity can be dealt with by other legal means, for example entitlements of descendants, relatives, partners, and the like and by the objective dimension of human dignity.

2. Interference, Limitations, and Justification

The possible modes of interference in dignity include beyond final, direct, legal, and sanctioned acts by public authorities other forms that violate the scope of the right, even if unintentional, indirect, factual, and devoid of sanctions. The sufficient gravity of the interfering act is best discussed on the level of the scope of the right.

The problem of the beginning of life and dignity has led already to the question of abortion, which is a core issue of the limitations of the right. Abortion can imply a constellation where claims of dignity collide: the right of the unborn human organism to become a full personality and the right of the mother to stay the subject of her life and not to be instrumentalized for giving birth. The abortion regimes, now common in many constitutional states that allow for abortion under certain conditions (as to danger to life and health of the women, because of the cause of pregnancy, eg in the case of rape or as to the life situation of the mother), taking into account temporal factors of maturation, draw the right conclusion from this insight.

There is no other comparable situation and in this sense dignity is absolute. It is perhaps worthwhile to underscore that torture and, more precisely, torture to save the lives of others in particular is not such a situation, despite arguments to the contrary. There are three central reasons for this: in real life (thought not in theoretical ticking bomb scenarios) it is always unclear whether or not the person tortured has the information she is supposed to disclose, and if so, whether she will disclose it and not lie. Secondly, torture is not only dehumanizing the tortured persons, but the torturer as well. Under the rule of law, torture would need a proper legal, institutional, and personal framework. To legally institutionalize barbarous acts is, however, unthinkable under a constitutional rule of law. Thirdly, given the ubiquitous reality of torture only an absolute ban is a suitable means against its practice.

3. Dignity, Other Fundamental Rights, and the Structure of the Body Politic

Dignity is foundational for human rights, but its scope is not coextensive, but in principle more narrowly circumscribed than rights to liberty and equality. One may accept (odd as it may seem) that someone enjoys certain liberties but deny her equal worth. A historical example of this is the liberty of privileged slaves. Not every violation of a liberty is, on the

¹⁴⁵ An example is ECtHR, *Vo v France*, App no 53924/00, 8 July 2004.

other hand, a violation of human dignity: there are good reasons to think that a prohibition to evaluate the quality of a wine in strong, vulgar terms is a violation of freedom of speech.¹⁴⁶ The permission to critique only without such strong, vulgar terms would, however, not be a violation of human dignity.

The relation of human dignity and equality is no different: the preservation of equality does not suffice to protect human dignity, as the case of a non-arbitrary or unbiased administration of the death penalty illustrates: this punishment, although administered perfectly equal, would still violate the dignity of the convicted. Not every unjustified unequal treatment is, on the other hand, necessarily a violation of human dignity.¹⁴⁷ The preservation of equality is a necessary, not a sufficient, condition of the preservation of dignity, a violation of dignity is a sufficient, not a necessary, condition of a violation of equality. Dignity is, however, for equality guarantees of particular importance: it spells out their substantial concerns. This is a prerequisite of their application as the demand of equality as such does not exclude uniform bad treatment, as the example of the death penalty shows. Only if there is a substantial notion attached to it, equality's point becomes clear.¹⁴⁸ This central notion is the intrinsic worth of human beings.

The idea of human dignity always had a distinct political side. It not only demands and forbids certain actions by the state but is a normative standard for the structure of the political order as such. It demands that human beings are the subjects of political life. The right to structures of participatory democracy with the legal infrastructure that it entails is one of its central consequences. The ethical and political point is clear: if human dignity is to be taken seriously, national and international structures of governance have to give human individuals—as far as possible on this scale and as mediated as it may be unavoidable—some meaningful share in the process of political self-determination.

VI. THE UNIVERSALIST STANCE: YET ANOTHER PARTICULARISM?

These remarks have tried to reconstruct some elements of human dignity as a legal concept from a comparative perspective, embedding the contemporary debates in the history of this idea—as a part of normative theory and as a part of the struggles of real life. The identified core tenets are by no way new and surprising: they are the core tenets of a liberal, egalitarian, and secular humanism. Their origin in secular reflection is important not because of disregard for the impressive contributions of religious beliefs to a culture of dignity, but because only such a justification fits in a methodologically necessarily secular science and can hope to win support across the borders of cultures and religious traditions.

This humanism takes a universalist stance without epistemological embarrassment, as, contrary to the assumptions of some theories mentioned above, there are quite plausible

¹⁴⁶ ECtHR, *Uj v Hungary*, App no 23954/10, 19 July 2011.

¹⁴⁷ Not to take into account periods of employment completed by an employee before reaching the age of 25 in calculating the notice period for dismissal can be regarded with convincing reasons to form discrimination on the ground of age, but hardly as a violation of human dignity, cf ECJ, C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG*, para 57 (19 January 2010). An interpretation of equality and non-discrimination clauses as in *Law v Canada* [1999] 1 SCR 497 paras 52ff which constructs the equality guarantee to demand a violation of human dignity is in danger of interpreting the equality guarantee too narrowly or human dignity too broadly. Cf Supreme Court of Canada, *R v Kapp*, 2008 SCC 41, para 22.

¹⁴⁸ Cf Susanne Baer, 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009) 59 *University of Toronto Law Journal* 455.

reasons for such an orientation. As has been indicated in the remarks on the history of ideas, arguments from the (often wrongly reported) lack of explicit cultural traditions, from language or genealogy do not justify in principle relativist conclusions. Furthermore, it appears to be not very plausible that the elements of justification referred to are relative to one culture. The perception that life is an end in itself and something worth enjoying for people in Calcutta as much as in Cape Town or Anchorage appears rather plausible. That any of the particular properties of human beings that are the base of the ascription of dignity are limited to a certain class of people—say whites or men—has fortunately lost some of its century-proofed appeal, as the idea that the worth of a human being can be forfeited, for example by religious heresy. That the principle of equal treatment of equals is valid in London as in Beijing or Riyadh sounds likewise not very outlandish. In addition, there are quite interesting mentalistic approaches reconstructing the basis of human moral judgment, including precepts of justice or non-instrumentalization by means of the modern theory of the human mind that may offer a promising framework for a fallibilistic, non-foundational but universalist moral and legal epistemology.¹⁴⁹ Relativism is certainly not without theoretical alternative.

These remarks imply an answer to the problem of the antinomy of human rights: they show that the practical universalism of the modern human rights culture is theoretically actually well justified. Comparative analysis consequently has a normative point: it is an effective antidote against judicial parochialism, stirs judicial imaginativeness, and shields against the danger of overlooking convincing normative ideas that have been formulated elsewhere but to solve a similar problem. It can thus supply arguments for doctrinal developments if the positive laws leave room for it. If the respective positive law excludes certain conceptions that seem reasonable they may still be useful for critical assessments of the given legal framework and, finally, these conceptions may be helpful for the shaping of future developments of the law. Comparative research has thus rightly become a constitutive element convincing legal heuristics.

The thus in light of what can be regarded as usual standards of justification of any human rights content, justifiable ascription of dignity has to be fleshed out for concrete cases and new challenges, often with no immediately evident solutions, and no easy matter as for any other fundamental right.

The courts around the world have made some progress in this respect, for example as to discrimination, the death penalty, or personal autonomy. Accomplishments such as these may seem insignificant, but are—with an eye to the short history of human rights as legal instruments and the power of the forces pursuing ends other than the realization of the dignity of individuals—in fact quite considerable.

Human dignity tells a simple story: there are no human lives of greater or lesser worth, whether one of the many, or one of the few that somehow, legitimately or illegitimately, catch the admiring imagination of those to come. Dignity is the value of humans as humans, in this central respect one is like the others irrespective of personal properties and achievements. This idea is consequently the most profound critique of any bifurcation of humanity in guardians and toilers, masters and servants, deserving and undeserving, touchables and

¹⁴⁹ Cf. Muhlmann, *Elemente* (n 22), 512ff; Matthias Muhlmann, *Rationalismus in der praktischen Theorie* (2nd edn, 1999); Matthias Muhlmann, 'Ethics, Law and the Challenge of Cognitive Science' (2007) 8 *German Law Journal* 577, 577; John Mikhail, *Elements of Moral Cognition* (2011); John Mikhail, 'Moral Grammar and Human Rights: Some Reflections on Cognitive Science and Enlightenment Rationalism' in Ryan Goodman, Derek Jinks, and Andrew K. Woods (eds), *Understanding Social Action, Promoting Human Rights* (forthcoming); Erica Roedder and Gilbert Harman, 'Linguistics and Moral Theory' in John Doris (ed), *The Moral Psychology Handbook* (2010), 273.

untouchables, gender that rules and gender that serves which has dominated much of human history and has been transfigured by thought, as in the magnificent beauty of Plato's prose or stripped naked to its unappealing core in the doctrines of racists, sexists, and their like.

Respect for dignity is not costless: dignity demands human solidarity not only in words but in deeds that understand the price to be paid for the enjoyment of humans' common bequest.

There are no grounds for any too magnificent hopes for human civilization, because all rosy fogs of illusion about the human lot have been dispersed by the crisp winds of past horrors and the uneasy hunch that humans will—again and again—have more of this in stock for each other. The taste of dignity is not the mawkish flavour of narcissistic human self-admiration and anthropocentrism, although this appears in the history and present as well, sometimes abundantly. The taste is—in the better and certainly in the great contributions—rather saturated with doubt and the uneasy consciousness of the uncanny depth of what makes up the core of the human self. But it still gives reasons to straighten the neck in an unbent existential pride that is able to look in the eyes of what may come.

To make human dignity a cornerstone of the modern architecture of human rights at the core of constitutionalism is therefore a well-advised move. There is no reason to downgrade it doctrinally, to reduce its importance in legal systems that protect it, or prevent its incorporations in those, where it plays no or only a limited role through interpretation, with due respect to the limits of this enterprise, or through further development of legal instruments.

The law often served and serves power and the interests of a few. A constitutionalism, national and beyond nations' borders, based on the dignity and autonomy of human beings, is part of a different conception of the law. Below the diaphanous folds of legal argument and thought, there is something to be detected that is not wedded to one religious or theoretical creed, but to a fundamental relation to human life: the conviction that care for humans has a point as the being that is at its centre is worth the effort of thought, hope, courage, and sometimes quite profound despair.

BIBLIOGRAPHY

- Laurie W.H. Ackermann, 'Equality and the South African Constitution: The Role of Dignity' (2000) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 537
- Thomas Aquinas, *Summa Theologica* (1933ff)
- Paolo Carroza, "'My Friend Is a Stranger': The Death Penalty and the Global *Ius Commune* of Human Rights' (2003) 81 *Texas Law Review* 1031
- Cicero, *De officiis* (2007)
- Günter Dürig, *Die Menschenauffassung des Grundgesetzes* (1952)
- Ronald Dworkin, *Life's Dominion* (1994)
- Jürgen Habermas, 'Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte' (2010) 58 *Deutsche Zeitschrift für Philosophie* 343
- Jürgen Habermas, *Die Zukunft der menschlichen Natur* (2005)
- Louis Henkin, 'Human Dignity and Constitutional Rights' in Michael J. Meyer and William A. Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (1992)
- Mary Ann Glendon, *A World Made New* (2002)
- Immanuel Kant, *Grundlegung zur Metaphysik der Sitten, Akademie Ausgabe*, Bd IV (1911)
- Immanuel Kant, *Kritik der praktischen Vernunft, Akademie Ausgabe*, Bd V (1913)
- Mordechai Kremnitzer and Re'em Segev, 'The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantial Moral Issue?' (2000) 34 *Israel Law Review* 509

- John Locke, 'The Second Treatise' in *Two Treatises on Government* (1991)
- Matthias Mahlmann, 'Dictatorship of the Obscure? Values and the Secular Adjudication of Fundamental Rights' in András Sajó and Renata Uitz (ed), *Constitutional Topography: Values and Constitutions* (2010)
- Matthias Mahlmann, *Elemente einer ethischen Grundrechtstheorie* (2008)
- Matthias Mahlmann, 'Ethics, Law and the Challenge of Cognitive Science' (2007) 8 *German Law Journal* 577
- Matthias Mahlmann, *Rationalismus in der praktischen Theorie* (2nd edn, 1999)
- Avishai Margalit, *The Decent Society* (1996)
- Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 664
- John Mikhail, *Elements of Moral Cognition* (2011)
- Johannes Morsink, *The Universal Declaration of Human Rights* (1999)
- Gerald L. Neuman, 'Human Dignity in United States Constitutional Law' in Dieter Simon and Manfred Weiss (eds), *Zur Autonomie des Individuums, Liber Amicorum Spiros Simitis* (2000)
- Jeremy Waldron, 'Dignity and Rank' (2007) 48 *Archives européennes d'archéologie* 201
- James Q. Whitman, 'Nazi "Honour" and New European "Dignity"' in Christian Joerges and Navraj S. Ghaleigh (eds), *Darker Legacies of Law in Europe* (2003)